

Issue: Qualification – Compensation (Salary Dispute); Ruling Date: June 11, 2010;
Ruling #2010-2641; Agency: Department of State Police; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling No. 2010-2641
June 11, 2010

The grievant has requested a ruling on whether his March 3, 2010 grievance with the Department of State Police (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

According to the agency, in October 2007, the grievant received a competitive promotion to Sergeant. However, in accepting that competitive promotion and transfer to his new position, the agency granted the grievant an increase in salary beyond that which was authorized by its applicable compensation plan. The agency's plan only allowed such an employee to receive a maximum of 10% increase above the employee's current salary or \$5700, whichever is larger. The grievant, therefore, was entitled to receive a \$5700 increase on accepting the Sergeant position. The grievant received an \$11,700 salary increase instead. Subsequent adjustments since that time additionally compounded the 2007 error by the agency. To correct its error, the agency has apparently reduced the grievant's salary and is seeking to collect the overpayments that occurred. The grievant has initiated the grievance to challenge these actions.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.¹ Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to hearing"² unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”³ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁴ An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

Though we understand the grievant’s assertion that the overpayments were not entirely his responsibility, he has not shown that the agency’s decision to fix its error and recoup the overpayments violated a specific mandatory policy provision. Indeed, both Virginia statutory law⁷ and the Department of Accounts’ CAPP Manual⁸ appear to authorize (and indeed require in the case of the CAPP Manual) recovery of such overpayments without regard to fault. The grievant has also presented no evidence that the agency’s action was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Therefore, this Department concludes that the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.⁹

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ While evidence suggesting that the grievant suffered an “adverse employment action” is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an “adverse employment action.” For example, consistent with recent developments in Title VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁵ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ See Va. Code § 2.2-804.

⁸ See CAPP Manual, No. 50510, *Unpaid Leaves of Absences and Overpayments*, at 5 (stating that agencies “must take appropriate steps to collect” overpayments due to incorrect paperwork). The CAPP Manual also provides that the maximum period of repayment is the period of overpayment. *Id.* Potentially, the agency may have flexibility to offer the grievant a relatively lengthy period of repayment if that would satisfy both parties’ financial concerns and is approved by the Department of Accounts.

⁹ This ruling only determines that under the grievance statutes this grievance does not qualify for a hearing. This ruling does not address whether the grievant may have some other legal or equitable remedy or defense regarding the repayment. Further, this ruling does not address whether any proposed method of repayment and/or offsets from the grievant’s salary to recover past overpayments comply with law and policy. Those issues do not appear to be ripe as the repayments have not proceeded at this point.

determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director