

Issue: Qualification – Compensation (Reimbursement/Salary Dispute); Ruling Date: January 10, 2011; Ruling No. 2011-2845; Agency: Virginia Department of Health; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Health  
EDR Ruling No. 2011-2845  
January 10, 2011

The grievant has requested a ruling on whether her October 11, 2010, grievance with the Department of Health (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an Administrative Support Supervisor with the agency. The grievant receives an annual base salary from the state and an additional local salary supplement entirely funded by the County in which she works, pursuant to Va. Code § 15.2-1508.3 and a Personnel Salary Compensation Agreement between the agency and the County. The local salary supplement is given to employees in order to make their pay competitive in the Northern Virginia market. The amount of the supplement is governed solely by County policy and procedures. Each fiscal year, the agency and the County enter into a Local Government Agreement which outlines the total amount of County funds that will be provided to the state to support the cooperative budget. A portion of these funds is allocated for eligible state employee local salary supplements. The County funds are paid to the state in equal quarterly payments. The state is then responsible for disbursing the County's quarterly payments through the state's payroll system to each eligible state employee according to the supplement amount designated by the County for each individual. Each eligible state employee receives a paycheck semi-monthly from the state payroll system which includes their base state salary and their additional local salary supplement as one single payment.

From December 2009 through August 2010, the Department of Health conducted an audit which uncovered incorrect and inconsistent applications of County policies pertaining to the amounts of the local salary supplements. On September 14, 2010, the grievant, along with similarly affected employees, was notified that she received an overpayment in her local county salary supplements from 2007-2010. The grievant was provided seven repayment options at an agency staff meeting on September 14, 2010. The repayment information was provided in-person as well as in writing.

On October 11, 2010, the grievant initiated a grievance, alleging the agency misapplied state policy and procedures by requiring her to repay the overpayment. The October 11<sup>th</sup>

grievance proceeded through the management resolution steps without resolution and was denied qualification by the agency head on November 18, 2010. The grievant now seeks a qualification determination from this Department.

### DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits “shall not proceed to a hearing”<sup>2</sup> unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.<sup>3</sup> In this case, the grievant claims that the agency misapplied or unfairly applied policy by requiring the grievant to repay the overpayment, which, she asserts, was not her fault.

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.”<sup>4</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>5</sup> 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.”<sup>6</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>7</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues with her compensation.

Though we understand the grievant’s assertion that the overpayment was not her fault, the agency’s decision in this instance to recoup the overpayment identified by auditors does not appear to have violated policy. Indeed, both Virginia statutory law<sup>8</sup> and the Department of Accounts’ CAPP Manual<sup>9</sup> appear to authorize (and indeed require in the case of the CAPP

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(C).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(c).

<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> 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.

<sup>6</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>8</sup> See Va. Code § 2.2-804.

<sup>9</sup> 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

Manual) recovery of such overpayments without regard to fault. Furthermore, although the amount of the grievant's local salary supplement is governed by the County's policies and procedures, the disbursement of the County funds by the state to each eligible state employee appears to be governed by state policy, which authorizes recovery of overpayments.

Finally, the agency has been reasonable in providing seven repayment options to the grievant. Under state policy, and in the absence of a full lump sum repayment, an overpayment amount must be collected over a period not to exceed the period during which the overpayment occurred.<sup>10</sup> Thus, based on the totality of the circumstances, the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied and this Department finds this grievance does not qualify for hearing.<sup>11</sup>

#### 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 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.

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Claudia T. Farr  
Director

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the maximum period of repayment is the period of overpayment. *Id.* Thus, the agency may have flexibility to offer the grievant a relatively lengthy period of repayment if that would satisfy both parties' financial concerns.

<sup>10</sup> *Id.*

<sup>11</sup> 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 agency's recovery of the overpayment.