

Issue: Qualification – Benefits/Leave (Retirement); Ruling Date: September 27, 2011;
Ruling No. 2012-3077; Agency: Department of Social Services; Outcome: Not
Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2012-3077
September 27, 2011

The grievant has requested a ruling on whether her June 3, 2011 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Beginning in August 1989, the agency had treated the grievant as having Virginia Retirement System (VRS) service credit, and thus made contributions to the grievant's VRS account. The grievant is a part-time classified salaried employee. However, such employees were not eligible for VRS service credit until July 1, 1999. The agency recently discovered this error and notified the grievant that the service credit in her VRS account between August 1989 and July 1999 would be removed. The grievant challenged this action in her June 3, 2011 grievance and now seeks qualification for a hearing.

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.

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

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

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

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 she asserts issues with her retirement benefits.

Though we are sympathetic to the grievant’s situation, this Department must conclude that there is no indication that policy has been misapplied. We have found no mandatory policy provision that the agency has violated, and the grievant has cited to none. Indeed, it appears that the agency’s action of providing the grievant the service credit prior to July 1999 was contrary to law. 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 this grievance fails to raise a sufficient question as to whether any policy has been misapplied and/or unfairly applied.⁷

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.

Claudia T. Farr
Director

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 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 regarding the removal of previously granted benefits.