

Issue: Qualification – Compensation (promotion); Ruling Date: October 5, 2011;  
Ruling No. 2012-3103; Agency: Department of Corrections; Outcome: Not Qualified.



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

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections  
Ruling Number 2012-3103  
October 5, 2011

The grievant has requested a ruling on whether his July 6, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant, formerly a Corrections Lieutenant, was previously subject to layoff due to the closure of a facility and placed in a Corrections Officer Senior position in another facility. The grievant's salary remained the same in that new position. The grievant later applied for a Lieutenant position and was selected as the successful candidate. Because this selection was for a promotion from his Corrections Officer Senior position to Lieutenant, the grievant expected a customary 10% increase in his salary. The agency did not provide such an increase because the grievant was already being compensated at the level of a Lieutenant due to the fact that his salary remained the same from when he was previously in that rank prior to being subject to layoff. The grievant challenges this refusal to provide a salary increase in his July 6, 2011 grievance.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries "shall not proceed to hearing"<sup>2</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant's claims essentially allege a misapplication and/or unfair application of policy.<sup>3</sup>

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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> The grievant also describes the failure to grant him a pay increase as "discrimination." However, his claim of "discrimination" is not based on any protected status, such as those listed in DHRM Policy 2.30. Because there is no actual claim of discrimination as recognized under the grievance procedure, it will not be discussed further in this ruling.

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 he potentially asserts issues with his salary.

Compensation issues are governed by Department of Human Resource Management (DHRM) Policy 3.05. This policy states that “[s]alary negotiations for promotions consider the Pay Factors and provisions of the Agency’s Salary Administration Plan.”<sup>8</sup> In addition, when an employee is promoted, the promotional increase is negotiable from the minimum of the new salary range up to 15% above the employee’s current salary.<sup>9</sup> Thus, while the policy allows an agency to provide a promoted employee with a salary increase, there is no policy requirement that any increase be provided. This language appears to be consistent with the agency’s Compensation Policy, which requires consideration of the pay factors and does not specify a required salary increase for promotions in cases such as the grievant’s.

These policies invest agency management with broad discretion for making individual pay decisions. However, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency’s assessment of a position’s job duties), qualification is warranted where the grievance raises a sufficient question as to whether the agency’s determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>10</sup>

Though the grievant has shown that he was selected for a promotion, he has not shown that the agency’s refusal to grant a salary increase violated a mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies.

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

<sup>8</sup> DHRM Policy 3.05, *Compensation*.

<sup>9</sup> *Id.* The grievant’s salary exceeds the pay band minimum.

<sup>10</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made “[i]n disregard of the facts or without a reasoned basis”); see also, e.g., EDR Ruling 2008-1879.

Indeed, it would appear that the agency's rationale for not granting the grievant a salary increase is based upon reasonable considerations. The grievant was previously a Lieutenant and compensated as such. The grievant's salary has not changed since he was a Lieutenant. Therefore, the agency considered him to have a Lieutenant's salary already and no adjustment for the promotion was necessary. Based on this analysis, this Department finds no indication that the agency's decision was arbitrary or capricious or otherwise disregarded the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.

The grievant appears to rely on his belief that all agency employees, to his knowledge, who have obtained a promotion, have received a salary increase. Assuming for purposes of this ruling only that this was the agency's past practice, the grievant's situation would be an understandable and reasonable departure from the norm. The grievant had already effectively received a salary consistent with obtaining a Lieutenant position in the past. Consequently, the agency's decision not to provide an additional increase in this situation where a former Lieutenant attains another promotion back to Lieutenant makes sense. Further, this Department has reviewed no information that the grievant's salary is otherwise currently out of alignment with those of other Lieutenants in his region.

In light of the above, the grievance does not qualify for a hearing as the grievant has not raised a sufficient question as to whether the agency misapplied or unfairly applied policy.

#### 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