Issue: Qualification – Management Actions (Recruitment/Selection); Ruling Date: May 9, 2012; Ruling No. 2012-3336; Agency: Department of State Police; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2012-3336
May 9, 2012

The grievant has requested a ruling on whether his March 2, 2012 grievance with the Department of State Police (the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant initiated his March 2, 2012 grievance to challenge a selection process for a Task Force Coordinator position in which the grievant competed unsuccessfully. The grievant argues that the successful candidate was ineligible for consideration based on the application of agency policy. In short, the grievant cites to a provision that states that certain agency employees may request a "lateral transfer to another duty assignment after 12 months."[1] While the successful candidate apparently had been in his/her current grade longer than a year, he/she had been on his/her current assignment for less than a year. Consequently, the grievant argues that the successful candidate was ineligible for the Task Force Coordinator position. The agency disputes the grievant's interpretation of agency policy and maintains that the successful candidate was properly considered. Having failed to resolve the grievance through the management steps, the grievant now requests qualification of his grievance for a hearing.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[2] In this case, the grievant alleges a misapplication and/or unfair application of policy and discrimination.

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

[1] Department of State Police, General Order 6.00, *Assignments and Transfers* [G.O. 6.00], ¶ 2.
[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[3] *See Grievance Procedure Manual* § 4.1(b).

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 it appears the position he sought would have provided a salary increase.

Misapplication of Policy and/or Unfair Application of 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. This Department has reviewed the agency policies at issue to determine whether the agency misapplied or unfairly applied policy in allowing the successful candidate to compete for the position without regard to the alleged 12-month requirement. In this Department's assessment, there is no such misapplication or unfair application of policy such that the grievance should qualify for a hearing.

This Department is persuaded by the distinction between positions that are filled through lateral transfer requests and those that are advertised through a competitive process. The former are specifically referenced with regard to the 12-month requirements of Paragraph 2 of General Order 6.00; whereas that paragraph includes no language about such a restriction for agency employees who apply for an advertised position. This distinction is largely reflected in General Order 6.02. The language cited by the grievant that exempts certain special positions from the tenure requirements in that policy appears primarily in those sections that are filled through requests for lateral transfer. However, the section regarding the Supervisory Special Agent position, the position under which the Task Force Coordinator falls, specifically references application through an advertised process. Therefore, it does not appear that the 12-month restriction in General Order 6.00 would apply to the advertised selection at issue in this case.

The grievant argues that the failure to include language exempting the section on Supervisory Special Agents from the tenure requirements of General Order 6.00 must indicate that those requirements apply. We are not so persuaded. Even if we set aside the distinction being made between positions filled by lateral transfer and advertised competition, the Supervisory Special Agent section includes more specific tenure requirements than those that appear in General Order 6.00.[7] Thus, it would appear that the more specific requirements of

[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] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] For instance, the Supervisory Special Agent must have been a special agent for at least one year in-grade and a sworn employee with the agency for at least four years.

General Order 6.02 would be those that are intended to apply.[8] Indeed, some sections of General Order 6.02 that do not include the exempting language referenced by the grievant include language specifically to make applicable any other eligibility requirements for transfer and/or promotion, e.g., those contained in General Order 6.00. The Supervisory Special Agents section contains no such language making those other eligibility requirements applicable. This Department is left with no other conclusion other than the agency did not intend for Paragraph 2 of General Order 6.00 to apply to selections of Supervisory Special Agents.

An agency's interpretation of its own policies is generally afforded great deference. This Department has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[9] In reviewing the agency policies this Department cannot find that the agency has made an erroneous interpretation. Indeed, we agree with the agency's assessment, which appears to be consistent with the policy language.

In addition, this Department is mindful of the language included in Paragraph 8 of General Order 6.00 that the tenure requirements "shall not apply when a transfer is deemed to be in the best interest of the Department."[10] Given that the policy grants the agency such a sweeping ability to create an exception to these requirements, it would be difficult to show that where the agency has done so there would be a misapplication of policy unless there is disparate treatment. In this case, the agency indicates that it has handled all its recruitments for Supervisory Special Agents without regard to the tenure requirements in General Order 6.00. In sum, after reviewing all these policy provisions and arguments, the grievance fails to raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy. The grievance does not qualify for a hearing.

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 Farr
Director

[8] *See* Broughman v. Carver, 624 F.3d 670, 674 (4th Cir. 2010) (specific terms prevail over general in the same or another statute which might otherwise control).
[9] *See, e.g.*, EDR Ruling No. 2008-1956 and 2008-1959.
[10] G.O. 6.00, ¶ 8.