Issue: Qualification – Compensation (Other); Ruling Date: June 8, 2012; Ruling No. 2012-3345; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
EDR Ruling Number 2012-3345
June 8, 2012

The grievant has requested a ruling on whether his February 9, 2012 grievance with the Virginia Department of Transportation (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 a Construction Manager for the agency. From August 2004 until July 2010, the grievant worked on a construction project in Northern Virginia. In lieu of commuting approximately 200 miles round trip to the construction site each day, an agency manager offered the grievant a rent-free apartment nearby the construction site on the condition the grievant work ten hours of uncompensated overtime per week. The grievant accepted the offer. The grievant's overtime hours were not documented or compensated, and the grievant's rent-free benefits were not reported as gross income to the grievant.

On January 9, 2012, the grievant was notified of the conclusion of an internal investigation by the agency's Office of the Inspector General regarding the rent-free occupancy of agency apartments by VDOT employees. The Office of the Inspector General determined that the grievant had received a taxable benefit from August 2004 until July 2010 and that the agency had not properly reported this gross income on the grievant's W-2 tax forms. As such, the agency consulted with the Internal Revenue Service (IRS) and learned that although the benefits the grievant received from 2004-2007 were no longer taxable, the benefits of rent-free lodging from 2008 until 2010 were still taxable. Therefore, the agency submitted revised tax forms to restate the taxable income of the grievant. The grievant's 2008, 2009, and 2010 tax return forms were impacted by this action.

The grievant has challenged the agency's action in this case. He states that he earned the use of the rent-free apartment by working many uncompensated overtime hours. The agency states that it is bound to report the taxable benefit by federal law, and it cannot compensate the grievant for any overtime hours because those claimed by the grievant cannot be verified as required by agency policy.

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 contents of statutes, ordinances, personnel policies, procedures, rules, and regulations "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 raised discrimination, retaliation, or discipline in his grievance. As such, this grievance is best analyzed under a theory of misapplication 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 no policy that the agency has misapplied or unfairly applied by submitting revised tax forms to account for the taxable benefit of rent-free lodging. Although it may have been a better practice for agency management to have notified the grievant about the taxable benefit issue upon making the offer, we cannot find that the failure to do so was a violation of policy. Moreover, it is not even clear that those involved would have even known about the taxable benefit issue at that time. Rather than running afoul of any policy, the agency appears to have acted consistently with the requirements of federal tax law and regulation by reporting the income to the IRS.

While the grievant could understandably be upset at the situation, there is no remedy available under the grievance procedure.[3] Rather, it appears the agency has acted consistently with federal law and its own overtime compensation policy, and, as such, a hearing officer would have no authority to provide relief. Consequently, 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 T. Farr
Director

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] Therefore, this ruling does not address whether the grievant may be entitled to other remedies under law.