

Issue: Qualification – Benefits (Severance Pay); Ruling Date: July 18, 2012; Ruling No. 2012-3379; Agency: Department of Corrections; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2012-3379  
July 18, 2012

The grievant has requested a ruling on whether her May 18, 2012 grievance with the former Department of Correctional Education, now the Department of Corrections (the agency), qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Due to the closing of the grievant's facility, the grievant was given three options: 1) transfer to a new position, 2) layoff with severance benefits, or 3) enhanced retirement. The grievant selected enhanced retirement and was given permission to extend her retirement date until July 1, 2012, allowing her to access additional benefits. Because disputes arose as to inconsistencies in how employees were being addressed as to the effective dates of their separations, it was ordered that all employees subject to layoff must be separated by May 24, 2012. Consequently, the grievant's separation date was changed and her retirement paperwork updated. She was sent the updated forms to sign, but, at least as of the time of the filing her grievance, had chosen not to sign the papers. As a result of the changed date, the grievant states she is now due significantly less benefits. The grievant states that if she had known when she elected her enhanced retirement option that she would not be able to remain until July 1, 2012, she would have selected a transfer to another position instead of immediate retirement. As such, her May 18, 2012 grievance disputes the agency's action of forcing an update to her separation date.

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, wages, and general benefits "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

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

<sup>2</sup> Va. Code § 2.2-3004(C).

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."<sup>3</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>4</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>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>6</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 benefits and/or compensation.

Though we are sympathetic to the grievant's situation, EDR is unable to find that policy has been misapplied by the agency's adjustments of the separation dates of the grievant and other employees. EDR has found no mandatory policy provision that the agency has violated, and the grievant has cited to none. 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. Rather, it appears that the change in the grievant's separation date was a result of attempting to make the dates of all such affected employees consistent. Therefore, we conclude that the grievant has not presented evidence raising a sufficient question that any policies have been either misapplied and/or unfairly applied to qualify for hearing.<sup>7</sup>

#### CONCLUSION AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.<sup>8</sup> The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt to appeal the qualification determination to the

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

<sup>4</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, EDR substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. See EDR Ruling No. 2007-1538.

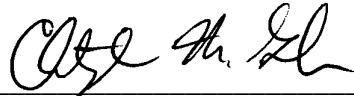
<sup>5</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>7</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.

<sup>8</sup> Va. Code § 2.2-1202.1(5).

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 former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. 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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Christopher M. Grab  
Senior Consultant  
Office of Employment Dispute Resolution