



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11915

Hearing Date: March 17, 2023

Decision Issued: June 30, 2023

PROCEDURAL HISTORY

The Agency revised its Salary Administration Plan for sworn law enforcement officers resulting in an increase in compensation for Grievant that Grievant believed was inadequate. On August 28, 2022, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 24, 2023, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 17, 2023, a hearing was held by remote conference.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

Whether the Agency misapplied or unfairly applied relevant policies in classifying Grievant at the rank of Special Agent and comparing him with other Special Agents for purposes of compensation adjustment?

BURDEN OF PROOF

The burden of proof is on Grievant to prove by a preponderance of the evidence that the Agency's personnel and/or compensation actions at issue in the grievance were not consistent with policy, as well as the appropriateness of any relief sought. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia State Police employs Grievant as a Law Enforcement Officer III at one of its locations. He typically received extraordinary contributor ratings on his annual performance evaluations. Grievant has been employed by the Agency for over 25 years.

In September 2000, the Commonwealth of Virginia transitioned from compensation based on pay grades to pay bands as part of a crosswalk. Agencies were allowed to have pay sub-bands within pay bands. Some agencies such as the Virginia State Police adopted pay sub-bands and referred to those bands as pay grades.

On May 2, 2001, Grievant received a memorandum from the Agency Head indicating:

Effective May 10, 2001, you will be relieved of your present duties, promoted to the position of Surveillance Agent, (Law Enforcement Officer III)¹

The position was a Pay Grade 14. At that time, Pay Grade 14 included Senior Special Agents, Sergeants, and Special Agent Accountants. Surveillance Agent was Grievant's rank and classification. The position of Surveillance Agent "provides technical support expertise that is necessary to conduct various undercover and surveillance activities for the Department of State Police"² Grievant's duties as a Surveillance Agent were different from and required more specialized skills than the duties of a Special Agent.

¹ Grievant Exhibit p. 19.

² Grievant Exhibit p. 13.

Grievant was given a new position number as a Surveillance Agent and that number has not changed to date.

The position of Surveillance Agent was not eligible for career progression since the salary was already at the Senior Special Agent level.

A Special Agent was a Pay Grade 13. A Senior Trooper and Master Trooper were also Pay Grade 13. A Special Agent – Accountant, Senior Special Agent, and Sergeant were Pay Grade 14.

Grievant's Employee Work Profile effective November 1, 2003, November 1, 2004, November 1, 2005, November 1, 2006, November 1, 2007, November 2, 2008, November 1, 2009, October 25, 2010, November 1, 2011, October 25, 2012, October 25, 2013, October 25, 2014, October 25, 2015, October 25, 2016, October 25, 2017, October 25, 2018, October 25, 2019, October 25, 2020, October 25, 2021, and October 25, 2022 showed his Role, Title and Code as Law Enforcement Officer III, 69073. His Work Title was State Police Surveillance Agent. His position was in Pay Band 5.

Surveillance Agents and Special Agent Accountants were not in career progression meaning they could not be promoted to the position of Senior Special Agent. To obtain career progression, Surveillance Agents had to be placed in the Special Agent classification. If a Surveillance Agent like Grievant were placed in the Special Agent classification, the Surveillance Agent's salary would be reduced by ten percent to place him in the same compensation sub-band as the Special Agent. The ten percent salary reduction would then be added back to the Special Agent's base salary as a "special rate" of pay to account for the employee's special skills. If the Special Agent with the 10 percent special pay were to be promoted, transfer, or otherwise leave the specialty pay position, the employee would lose the ten percent special pay. In other words, the salary of a Surveillance Agent adopting career progression would remain unchanged, but 10 percent of that salary would be considered specialty pay which could be eliminated if the employee's position changed.

On October 22, 2010, all Surveillance Agents and Special Agent Accountants were given the option to enter the career progression program. Surveillance Agents choosing to be eligible for career progression were to sign and acknowledge that:

My official State Police rank/title will remain the same (Special Agent); Surveillance Agent will be my working title/rank. *** I acknowledge that management reserves and has the right to reassign me, at any time, to my permanent title/rank. *** Upon reassignment from the Surveillance Special Agent position to my permanent rank/title and position, this special rate of pay will be terminated.³

On October 22, 2010, Grievant elected the option:

³ Agency Exhibit p. 40.

I wish to remain in my current Surveillance Special Agent classification and realize that by doing so I will not be eligible for promotion in the Career Progression Program.

On July 10, 2022, the Agency implemented a new Salary Administration Plan. The New Salary Administration Plan was part of the Agency's process to eliminate pay compression among sworn employees. The Agency calculated the average pay compression by rank. For Special Agents that percentage was 4.7. For Senior Agents the percentage was zero.

The Agency created a Statewide Pay Area Sworn Pay Step Scale effective for pay actions occurring on or after July 25, 2022. The Agency created a similar pay scale for Northern Virginia. An employee's pay depended on years of service and position. Under this Implementation Chart, a Master Trooper was to be paid approximately 8.5 percent more than a Senior Trooper. A Special Agent was to be paid approximately 1.4 percent more than a Master Trooper. A Senior Special Agent was to be paid approximately 8.5 percent more than a Special Agent. A Sergeant, Supervisory Special Agent, and Trooper Pilot was to be paid approximately 1.4 percent more than a Senior Special Agent.

The Chart eliminated the pay sub-bands in favor of ranks within the pay bands and years of service consistent with the Agency's goals. These included a sworn step pay scale allowing employees to plot their pay throughout their career and maximize compensation for each of the non-supervisory ranks.

Following the Implementation Chart, Grievant remained a Pay Band 5. He received an 11.21% pay raise based on his years of service and rank.

Grievant was placed in the Special Agent pay category. The new Implementation Chart includes the positions of Special Agent and Senior Special Agent. The ranks of Surveillance Agent and Special Agent Accountant no longer appeared.

With the revision of the Salary Administration Plan, Grievant is eligible to be promoted to Senior Special Agent with a ten percent compensation increase based on longevity. On July 20, 2022, Grievant received an email from the Agency advising that he was eligible for career progression to the rank of Senior Special Agent. He had to meet the Agency's weight requirements to be elevated in rank.

On August 18, 2022, Grievant reviewed his personnel file and determined that since 2001 his position number, rank (law enforcement officer III – 69073, and job title (State Police Surveillance Agent) had not changed.

An Occupational Family is a broad grouping of jobs that share similar vocational characteristics. A Career Group is a sub-group of an Occupational Family. A Career Group identifies a specific occupational field common to the labor market. A Role

describes a broad group of occupationally related positions that represent different levels of work or career progression.

DHRM's website shows Law Enforcement is an Occupational Family in Public Safety. Law Enforcement Officer III is a Practitioner Role with the Role Code of 69073 in Pay Band 5. Law Enforcement Officer III includes:

CLASS CODE	CLASS TITLE	GRADE
71114	State Police Senior Trooper	12
73162	DMV Investigator Supervisor	12
76092	ABC Assistant Special Agent In Charge	12
73163	DMV Assistant Investigation Chief	12
82212	Game Warden Supervisor	13
82331	Marine Resources Patrol Supervisor	13
72105	Corrections Investigator Supervisor	13
71115	State Police Trooper Pilot	13
71116	State Police Master Trooper	13
71131	State Police Special Agent	13
76023	Fort Pickett Police Chief	UG
71132	State Police Senior Special Agent	14
23071	State Police Special Agent Accountant	14
71133	State Police Surveillance Agent	14

42261	Medicolegal Death Investigator	14
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4

CONCLUSIONS OF POLICY

The Agency had the discretion to implement a new Salary Administration Plan, but it unfairly applied that discretion to Grievant by treating his position of Surveillance Agent the same as a Special Agent.

DHRM Policy 3.05 governs Compensation. This policy requires agencies to have Salary Administration Plans:

Ensures that the Agency Salary Administration Plan (ASAP) supports Workforce/ Succession Planning initiatives. The ASAP should note pay practices and initiatives to be used to recruit and retain employees having the skill sets needed to fulfill the agency's mission.

Agency Salary Administration Plan is defined as:

This document outlines how agencies will implement the Compensation Management System and is the foundation for ensuring the consistent and equitable application of pay decisions. The Agency Salary Administration Plan addresses the agency's internal compensation philosophy and policies; responsibilities and approval processes; recruitment and selection process; performance management; administration of pay practices; program evaluation; appeal process; EEO considerations and the employee communication plan. Agencies should review the plan periodically to ensure its continued conformance to state policy and applicability to the agency's mission and organizational needs.

Sub-Bands are defined as:

A portion of an existing Pay Band that has a defined minimum and maximum salary within that Pay Band. A Sub-Band is a tool used to manage employees' salaries within Pay Bands based on agency need. Sub-Bands may be established at agency discretion in accordance with the agency's Salary Administration Plan. (See Salary Range.)

Salary Range is defined as:

4

<https://web1.dhrm.virginia.gov/itech/DHRMWebAssets/careergroups/pubsafe/LawEnforcement69070.htm>

The pay range assigned to a position for purposes of recruitment, Pay Practices, and compensation administration. A salary range may be the Pay Band; an Alternate Band; a Sub-Band; a Northern Virginia (FP) Expanded Range; or, for competitive recruitment actions, a hiring range, as determined by the agency.

The Agency did not have authority to demote Grievant to the position of Special Agent. Demotion is defined as:

Voluntary: Employee initiated movement to a different position in a lower Pay Band. This move may result from a competitive (recruitment) or non-competitive (employee request) process.

Performance or disciplinary: Management initiated assignment of an employee to the same or a different position in the same or lower Pay Band with less job responsibilities that results in a minimum of a 5% reduction in base salary.

In 2010, Grievant rejected a voluntary demotion. In 2022, the Agency did not offer Grievant the opportunity for voluntary demotion. It had no basis for a performance or disciplinary demotion. The Agency elected to treat Grievant the same as a Special Agent even though he was not a Special Agent and had not been formally demoted.

The Agency implemented a new Salary Administration Plan in July 2022. The New Salary Administration Plan did not include the rank of Surveillance Agent. The Agency had to choose how it would treat Grievant's rank within the Salary Administration Plan Chart. The Agency chose to treat Grievant as a Special Agent and not as a Senior Special Agent. The Agency's decision was an unfair application of policy for several reasons.

First, Grievant's duties did not change before or after July 2022. His position number remained the same. At the time of the hearing, Grievant believed his title remained Surveillance Agent.

It appears that the Agency eliminated Grievant's rank but did not take any action to inform him of the change. Grievant continued to believe he is a Surveillance Agent. Grievant's October 2022 EWP showed his title as Surveillance Agent. The DHRM website continues to list pay sub-bands for Law Enforcement Officer III.

Second, the Agency's practice was to compensate Surveillance Agents at the same level of Senior Special Agents, not Special Agents. The positions of Special Agent and Senior Special Agent survived the imposition of the new Salary Administration Plan. The duties of a Special Agent did not materially change from prior to July 2022 and after July 2022. The duties of a Senior Special Agent did not materially change from prior to July 2022 and after July 2022.

The Agency could have followed the past practice of compensating Grievant at the level of a Senior Special Agent but chose instead to compensate him at the level of a Special Agent. The Agency has not presented sufficient reason to alter its prior practice.

Third, Grievant opted out of career progression in 2010. Had he selected to become a Special Agent with career progression in 2010, his compensation prior in July 2022 would likely have been different from his actual compensation as a Surveillance Agent. By designating Grievant as a Special Agent in July 2022, the Agency effectively reversed his 2010 decision to opt out.

To apply policy fairly, the Agency must recalculate Grievant's salary with the assumption that he held the position of a Senior Special Agent prior to July 2022. The Hearing Officer does not have the authority to promote Grievant to the position of Senior Special Agent and if he had such authority, he would not do so. With respect to compensation, however, the Agency has effectively eliminated the position of Surveillance Agent. The position closest to the Surveillance Agent that survived after the imposition of the new Salary Administration Plan is the Senior Special Agent position. This is true because the Surveillance Agent and Senior Special Agent positions were Pay Grade 14 before the Agency revised its Salary Administration Plan. Grievant suffered an adverse employment action because his salary increase was understated.

The Agency argued it had discretion to implement the new Salary Administration Plan. The Agency argued that it could establish and abolish pay sub-bands at its discretion as long as it had a Salary Administration Plan with pay bands. The Agency argued its Implementation Chart complied with that standard. The Agency is correct that it had discretion to implement a new Salary Administration Plan without pay sub-bands. Once it exercised its discretion to implement a new Salary Administration Plan, however, its next step was to apply that plan in a fair manner. The Agency did not do so with respect to Grievant.

The Agency argued it made an internal alignment for Agency employees as a whole. DHRM policies anticipate the application of an internal alignment on an individual case by case basis. DHRM Policy 3.05 defines IN-BAND ADJUSTMENT – INTERNAL ALIGNMENT:

An increase may be granted to align an employee's salary more closely with those of other employees within the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, competencies, and/or knowledge and skills.

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Internal Salary Alignment is defined as:

This is one of the Pay Factors used for pay determination purposes. Internal Salary Alignment is a fairness criterion that takes into consideration the proximity of one employee's salary to the salaries of others who have

comparable levels of training and experience; duties and responsibilities; performance; and knowledge, skills, abilities and competencies.

Role Change is defined as:

This pay practice allows agency management to change a position to a different Role in a higher, (Upward Role Change), lower (Downward Role Change), or same (Lateral Role Change) Pay Band. This action typically reflects a gradual change in duties assigned.

Internal salary alignment is determined by the examination of an employee's salary in relation to salaries of comparable co-workers. The Agency took no action to address whether Grievant's position required internal alignment on an individual basis.

The Agency argued that it described Grievant as a Surveillance Agent, but he was actually a Special Agent. The Agency argued that some of the documents referred to Grievant as a Special Agent and many of the duties of a Special Agent and Surveillance Agent overlapped, thus, Grievant was always a Special Agent. This argument is not persuasive because in 2010 the Agency recognized that Grievant was not a Special Agent and gave him the option of choosing to become a Special Agent with a 10 percent specialty pay. Grievant declined that option. When the Agency mistakenly referred to him as a Special Agent, Grievant corrected the Agency.

In 2010, the Agency gave Grievant the option for a voluntary demotion to Special Agent with a 10 percent specialty pay. In July 2022, the Agency in essence converted Grievant to the position of Special Agent without the opportunity to opt out and without the ability to receive specialty pay. The Agency described this as a change in policy. It is unclear why changing Grievant from a Surveillance Agent to a Special Agent in 2010 would be a voluntary demotion, but in 2022 it was merely a change in policy.

The Agency argued that it took all Special Agents, recognized that they were all specialists and moved them up to the same level. The Agency also opened career progression to Grievant and gave him an 11.2 percent raise to counter salary compression. This argument is not persuasive because the Agency's documentation does not confirm this conclusion. In addition, if the Agency was "moving up" all Special Agents, it would mean the Agency moved all Special Agents up to the compensation Pay Grade levels of Surveillance Agents and Senior Special Agents.

The Agency argued Grievant's rank was Special Agent and his working title was Surveillance Agent. Grievant presented a document most likely prepared by the Agency during an earlier pay inequity study where the Agency created a table with a column for Rank and Special Agent and Surveillance Agent were listed as individual ranks.⁵

⁵ See, Grievant Exhibit p. 40.

DECISION

For the reasons stated herein, the Agency is ordered to recalculate Grievant's revised salary following implementation of the July Salary Administration Plan with the assumption that Grievant should be compensated as if he were a Senior Special Agent.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.^[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

^[1] Agencies must request and receive prior approval from EDR before filing a notice of appeal.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer