

Issue: Denial of 4-step salary increase; Hearing Date: August 22, 2001; Decision Date: August 27, 2001; Agency: Virginia Department of Transportation; AHO: David J. Latham, Esquire; Case Number: 5264

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION  
DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of Virginia Department of Transportation Case Number 5264

Hearing Date: August 22, 2001

Decision Issued: August 27, 2001

APPEARANCES

Grievant  
Representative for Agency  
Human Resources Representative  
Two witnesses for Agency

ISSUES

Should the grievant have received a four-step salary increase on July 1, 1999? Has the agency complied with all applicable state and agency compensation policies?

FINDINGS OF FACT

Grievant filed a grievance alleging that he should have received a four-step salary increase on July 1, 1999. Following failure to resolve the matter at the third resolution step, the agency head refused to qualify the grievance for a hearing. Subsequently, grievant sought a ruling from the Department of Employment Dispute Resolution (EDR). The Director of EDR ruled that the grievance qualifies for a hearing.<sup>1</sup>

The Department of Transportation (hereinafter referred to as agency) has employed grievant for 25 years. He is currently a Transportation Operations Manager I and has been in this supervisory position for about 18 years. During his five most recent annual performance evaluations, the grievant has achieved an overall rating of "exceeds" expectations.

In 1996, grievant's position was reevaluated and he was reclassified to Transportation Maintenance Supervisor – a salary grade 8 position. Grievant supervises five Highway Sign Fabricators who were in salary grade 5 in 1996. In November 1997, following an audit of the Fabricator job position, the fabricators were reclassified as Engineer Technician II and elevated to salary grade 6. In June 1999, an agency-wide decision resulted in all Engineer Technician

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<sup>1</sup> Exhibit 1. EDR Ruling #2001-100, August 2, 2001.

positions being upgraded by one additional level. Thus, Engineer Technician II employees were upgraded to salary grade 7 and received a four-step salary increase. Grievant's title was changed from Transportation Maintenance Supervisor to Transportation Operations Manager I (TOM I) in conjunction with the Commonwealth's Compensation Reform Program for all state agencies that became effective on September 25, 2000.<sup>2</sup> No employees received a salary increase as a result of Compensation Reform because the program was designed to be salary neutral.

When the Engineering Technician positions were implemented, they were designed to cover positions that required significant technical skills but little or no supervisory skills. Engineer Technician II positions apply technical skills in support of specialized tasks, phases and/or segments of a specialty-engineering project or assignment.<sup>3</sup> Part of the impetus for creating this class of positions and increasing the salary was increasing competition in the labor market for skilled technical employees. Across-the-board salary increases were deemed necessary both to attract employees in this class and to retain skilled technicians already in state employment.

Maintenance Supervisors (now Transportation Operations Manager) have traditionally involved positions that include significant supervision of subordinates but fewer technical skills than Engineering Technicians. The Transportation Operations Manager I includes positions that are responsible for managing the work of multiple crews performing maintenance or construction. These positions may also direct the work of specialty crews and may be responsible for personnel administration (training and evaluating employees) and may be utilized as a working manager.<sup>4</sup> The agency has not experienced significant difficulty in attracting and retaining employees in this occupational family of positions; therefore, an across-the-board salary increase was not granted to supervisory employees in this career group.

Grievant believes his position is comparable to sign crew supervisors located at residencies in his district. While grievant's position involves the supervision of sign fabricators, the primary function of the residency sign crews is identification of residency-wide sign needs and installation of signs. One of the sign crews currently does not have a supervisor. Of the six crews with supervisors, four of the supervisors are classified TOM I (Pay Band 3) while two are Engineer Technician III (Pay Band 4). Each of the TOM I supervisors has two, three or more people on the crew. One of the Engineer Technician III crew leaders has only one crewmember and the second one has no crewmembers.

It has been the practice of the agency that all supervisors are required to annually review the duties of each position they supervise, generally in conjunction with the performance evaluation of employees. Such a review consists of a supervisor weighing the duties and responsibilities listed on the position description against the duties and responsibilities actually performed by the employee. This is not a formal written process, but rather an informal comparative evaluation by the supervisor. If the employee is performing essentially the same major duties and responsibilities listed on his position description, no further action is required.

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<sup>2</sup> Under the Compensation Reform Program instituted September 25, 2000, multiple salary grades were compressed into Pay Bands. The Transportation Operations Manager I positions and Engineer Technician II positions are assigned to Pay Band 3, which includes the previous salary grades 6, 7 & 8.

<sup>3</sup> Exhibit 23, Career Group Description, *Engineering Technician*, Career Group Code 39070.

<sup>4</sup> Exhibit 22, Career Group Description, *Transportation Operations*, Career Group Code 79150.

On the other hand, if the supervisor concludes that the employee's actual duties and responsibilities have significantly changed, the supervisor should notify his superior and human resources. If deemed appropriate, human resources would then institute a full-scale audit of the position to determine whether reclassification of the position is warranted.

Following grievant's reclassification to Maintenance Supervisor in 1996, his supervisor has not seen any change in grievant's duties and responsibilities that are significant enough to ask for an audit of the position. Grievant's supervisor has not made any changes in grievant's position description since 1996. Grievant agreed in his testimony that there have not been any major changes in his duties and responsibilities and that his position is essentially the same as it was at the time of his 1996 promotion. The grievant has never personally spoken with the human resources department to request a reclassification of his position. Grievant has not alleged discrimination, retaliation or discipline in connection with this grievance.

#### APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In grievances that do not involve disciplinary actions and dismissals for unsatisfactory performance, the grievant must present evidence first and must prove his claim by a preponderance of the evidence.<sup>5</sup>

The Commonwealth's compensation policy addresses the need for continuing review of all positions and states, in pertinent part:

#### D. Continuing Reviews

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<sup>5</sup> § 5.8, Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.

1. Appointing authorities shall conduct continuing reviews of the duties and responsibilities of all included positions in their agencies to ensure that positions are properly classified.
2. All positions should be reviewed at least once every two years.<sup>6</sup>

There is a significant difference between a “review” and an “audit” of a position. The “review” required by Policy 3.05 is an informal assessment by the immediate supervisor. An “audit” is a full-scale investigation, review and determination by the human resources department that is conducted only after a review suggests the need for such an audit. Thus, if annual reviews are made (as they were in this case), there is no requirement that an audit be conducted.

Grievant contends that his position should have been reevaluated, that he should have been made an Engineering Technician III and that he should have received a four-step salary increase. According to the rationale of the agency, those crew leaders whose primary duties and responsibilities are supervisory, not technical, are designated TOM I. Since grievant supervises 5 people, his position of TOM I is consistent with the agency’s rationale. Only two crew leaders have been designated Engineer Technician III. Those two people supervise either one person or no people. Therefore, their jobs are considered to be more technical rather than supervisory, which is also consistent with the agency’s explanation of the difference between the two positions.

It must be concluded therefore, that the agency has not violated any internal policies. The salary increase given to grievant’s subordinates applied statewide to all employees in the engineer technician positions. Because grievant was not in the engineer technician career group, he was not eligible for the four-step increase received by his subordinates in 1999. Similarly, based on the rationale for the distinction between TOM I positions and Engineer Technician positions, grievant was appropriately classified as a TOM I because his responsibilities are significantly more supervisory than technical.

Further, the undisputed evidence establishes that grievant’s supervisor had looked at grievant’s position description every year and has not seen any need to change that description since grievant’s 1996 promotion. Grievant concurs that his position description accurately reflects the primary duties and responsibilities that he currently performs. Therefore, the agency has complied with the requirements of DHRM Policy 3.05 regarding compensation.

Management reserves the exclusive right to manage the affairs and operations of state government.<sup>7</sup> A hearing officer may order an agency to comply with policy;<sup>8</sup> however, he may not establish or revise compensation, classification or benefits.<sup>9</sup> In the instant case, the agency has complied with policy regarding the assignment of job classifications, salary increases and the periodic review of the grievant’s position. The hearing officer does not find a violation of any

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<sup>6</sup> Department of Human Resource Management Policy No. 3.05, *Compensation*, effective September 16, 1993. [The Compensation policy was completely revised on September 25, 2000; however, the 1993 policy was in effect on the date of the instant grievance.]

<sup>7</sup> § 2.1-116.06.B, *Code of Virginia*.

<sup>8</sup> § 5.9(a), Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.

<sup>9</sup> § 5.9(b) *Ibid*.

policy that would justify the four-step salary increase sought by grievant. Even if such an increase appeared to have merit, the hearing officer has no authority to revise compensation.

Due to the upgrade of the Engineer Technician positions in 1999, and the Compensation Reform Program of 2000, the grievant's position is now in the same Pay Band 3 as his five subordinates. Traditionally, supervisors have always been one or more pay grades above their subordinates. Therefore, the compression of salary grades into much broader pay bands has resulted in a situation that appears inequitable. However, because adjacent salary grades have overlapping salary ranges, it has always been possible that the salary of a high-performing, long-term employee might exceed the supervisor's salary. The same situation can also occur within the compressed pay bands.

In the instant case, the grade level of grievant's subordinates was increased from grade 5 to 7 in less than two years, thus significantly narrowing the pay gap between supervisor and subordinates. For the reasons stated above, no relief is available to the grievant for what has occurred between 1997 and 2000. Therefore, the grievant must now address his situation utilizing the tools available under the Compensation Reform Program. Under this program, there are four possible avenues grievant can pursue to increase his salary. One possibility is to seek promotion to a different position in a higher pay band. That route has always been available and of course, depends upon grievant's skills and abilities to fill other positions as well as his ambition to seek higher-level positions.

Grievant can also seek a role change in a higher pay band (for which increases of up to 10% are available) or, an in-band adjustment. In-band adjustments can result in up to 10% salary increases for a change in duties, application of new knowledge, skills or abilities (from education or certification), internal alignment or for retention reasons. Finally, pay increases can be granted to match offers from outside employers. It is suggested that grievant acquaint himself with these possible methods to improve his salary and, if necessary, seek guidance from the human resource professionals in his agency.

### DECISION

The grievant's request for relief is DENIED.

### APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

Section 7/2(d) of the Grievance Procedure Manual provides that a hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq., Hearing Officer