

Issue: Misapplication of policy; Hearing Date: 10/19/06; Decision Issued: 11/14/06;
Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8438; Outcome:
Employee granted full relief



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8438

Hearing Date: October 19, 2006
Decision Issued: November 14, 2006

PROCEDURAL HISTORY

On April 20, 2006, Grievant filed a grievance to challenge the Agency's failure to process a request for an In-band Salary Adjustment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On September 5, 2006, the EDR Director issued Ruling No. 2006-1390 qualifying the matter for hearing. On September 21, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On October 19, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether the denial of an in-band adjustment was adverse and disciplinary.

2. Whether the Agency failed to comply with State policy.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence. Grievance Procedure Manual (“GPM”) § 5.8. 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 Department of Social Services employs Grievant as a Support Enforcement Specialist. The purpose of her position is:

Serve as program agent for assigned child support cases in order to locate non-custodial parents; gather evidence for establishment of paternity, determine child support and medical coverage and execute enforcement actions. Manages cases using administrative process when possible, provides testimony in court proceedings when required.¹

Grievant received an overall rating of “Contributor” for her 2004 performance evaluation.²

When Grievant was hired by the Agency in June 2004, she was informed that her beginning salary was not negotiable because the salaries were “being revamped.”

On August 22, 2005, the District Manager sent the Assistant Director a memorandum requesting a review of Grievant’s position for an in-band pay adjustment. The memorandum states:

Attached for your review are a Personnel Transaction Form and a Compensation Decision Worksheet for [Grievant], Support Enforcement Specialist, in this office. [Grievant] successfully completed her 12-month probationary period on June 25, 2005.

¹ Agency Exhibit 7.

² Agency Exhibit 7.

As shown on the attached documents, [Grievant'] salary is less than that of her cohorts, as reported in the DCSE Field Study Phase II (Pay Band 4). For this reason we request that [Grievant] salary be reviewed for adjustment.³

The Personnel Transaction Form shows a request for an In-band Adjustment for Internal Alignment. The form is signed by the District Manager.

If the Assistant Director had approved the memorandum, she would have signed it and sent it to the Agency's headquarters. Human Resource Staff in the Agency's headquarters would have performed the necessary analysis and, along with Agency Executives, decided whether to adjust Grievant's salary.

In September 2005, the District Manager became concerned about Grievant's work performance because of two telephone calls she received by individuals outside of the Agency. Grievant was not counseled regarding these calls, but the District Manager and Assistant Director decided to delay but not deny the process for Grievant to be considered for an In-band Adjustment.

On November 16, 2005, the District Manager gave Grievant a memorandum outlining their verbal counseling session on November 14, 2005. On November 9, 2005, Grievant used a State envelope and metered stamp to mail a personal document. During the counseling session, the District Manager reviewed the Standards of Conduct with Grievant and told Grievant further inappropriate use of State property could result in further disciplinary actions.⁴

On December 6, 2005, the District Manager gave Grievant a memorandum regarding their verbal counseling session for an incident occurring on November 15, 2005. Grievant was counseled regarding her response to a telephone call from a caller outside of the Agency, breaching confidentiality of the customer by contacting a third party not involved in the case, and Grievant's need to maintain work/community boundaries. Grievant was advised that if she breached confidentiality again, "further disciplinary action may be taken."

Because of Grievant's work performance as documented by the Agency in the written counseling memoranda, the District Manager and Assistant Director decided not to forward the Personnel Transaction Form and Compensation Decision Worksheet regarding Grievant to the Agency Headquarters staff. Because these forms were not sent to the Agency Headquarters staff, Grievant could not be considered for an in-band pay adjustment.

³ Agency Exhibit 2.

⁴ Agency Exhibit 3.

CONCLUSIONS OF POLICY

DHRM Policy 1.60(II)(C) defines disciplinary action as, “[a]n action taken in response to an employee's behavior ...” Agency Managers believed Grievant had engaged in inappropriate behavior in September and November 2005. Because of that behavior, Agency Managers stopped further processing of the District Manager’s August 22, 2005 request for a review of an in-band pay adjustment for Grievant. Agency Managers did not issue a Written Notice. An Agency may not escape review of disciplinary action simply by omitting the issuance of a Written Notice.

“Disciplinary actions may range from the issuance of an official Written Notice only ... to issuance of a Written Notice and termination.”⁵ Nothing in DHRM Policy 1.60 authorizes an agency to take disciplinary action and use as punishment the withholding of further review of a previously submitted request for in-band pay adjustment. Because the Agency’s action was not authorized by DHRM Policy 1.60, it must be reversed. The Agency’s local office must forward the necessary paperwork to the Agency Headquarters staff to enable the Agency’s Headquarters staff to review and consider whether Grievant should receive an in-band pay adjustment. The Hearing Officer cannot order that Grievant receive an in-band pay adjustment because there is no reason to believe the appropriate people within the Agency have fully reviewed and considered the request and determined that such an adjustment would be granted.

The Agency contends its action was authorized by DHRM Policy 3.05, *Compensation*. This policy defines an In-Band Adjustment:

This multi-faceted Pay Practice allows agency management the flexibility to adjust employees’ salaries on the basis of a Change in Duties, Professional/Skill Development, Retention, and Internal Alignment.

An Internal Salary Alignment is defined as:

This is one of thirteen 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. (Emphasis added).

Performance is defined by the policy as:

This is one of the thirteen Pay Factors used for pay determinations purposes. Performance considers previous and/or current work accomplishments or outcomes and behavioral inter-actions that are assessed as part of the Performance Management Program.

⁵ DHRM Policy 1.60(II)(C).

When the Agency determines whether to grant Grievant an Internal Salary Alignment, it may consider Grievant's work performance including the behavior for which she was counseled. The Agency's defense rests on who is the decision-maker for Internal Salary Alignments. The Agency's evidence showed that the decision-makers are not located within the local office, but are located with at the Agency's Headquarters. In this case, the District Manager and Assistant Director preempted the role of the staff at the Agency's Headquarters. No evidence was presented specifically authorizing either the District Manager or the Assistant Director to decide that Grievant should be denied a salary adjustment.⁶

The Agency argues that the request for a salary change must be initiated by Agency managers⁷ and, thus, they are in control of that request and can determine whether it will proceed to the Agency's Headquarters. The Agency's argument fails because the District Manager began the process of seeking a salary adjustment but the District Manager and Assistant Director stopped the process as a form of punishment contrary to DHRM Policy 1.60. When Agency Managers sought to punish Grievant, their control was contrary to DHRM Policy 1.60 and unauthorized.

DECISION

For the reasons stated herein, the Agency is ordered to complete the process for reviewing whether Grievant should receive an In-band Adjustment for Internal Alignment that was begun on August 22, 2005. Appropriate Agency Human Resource staff and Agency Executives at the Agency's Headquarters should review the request and determine in a timely manner whether to grant the request.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management

⁶ Nothing in this decision prohibits the Agency decision-makers from considering Grievant's work performance including the counseling sessions she has received.

⁷ The request was initiated on August 22, 2005 by the District Manager.

to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

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.⁸

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.