

Issue: Misapplication of Policy (Compensation – In-Band Salary Adjustment); Hearing Date: 05/30/08; Decision Issued: 06/23/08; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8856/8857; Outcome: Partial Relief; **Administrative Review**: EDR Admin Review Request received 06/27/08; EDR Admin Review #2008-2055, 2008-2056 issued 08/05/08; Outcome: Remanded to AHO; Reconsideration Decision issued 08/08/08; Outcome: Original decision affirmed; **Administrative Review**: DHRM Admin Review Request received 06/27/08; Outcome pending.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8856 / 8857**

Hearing Date: May 30, 2008  
Decision Issued: June 23, 2008

**PROCEDURAL HISTORY**

On August 13, 2007, Grievant A and Grievant W filed grievances to compel the Agency to increase their salaries. The outcome of the Third Resolution Step was not satisfactory to the Grievants and they requested hearings. On March 28, 2008, the EDR Director issued Ruling No. 2008-1873 consolidating the two grievances and qualifying them for hearing. On May 5, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 30, 2008, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant A  
Grievant W  
Agency Representative  
Witnesses

**ISSUES**

1. Whether the relief sought by Grievant A and Grievant W should be granted?

## **BURDEN OF PROOF**

The burden of proof is on the Grievants to show by a preponderance of the evidence that the relief they seek should be granted. 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 Virginia Department of Transportation employs Grievant A as a Program Administrative Specialist I at one of its facilities. Her working title is Civil Rights Analyst.<sup>1</sup> She began working for the Agency on March 16, 1990.

On July 26, 2007, Grievant A discovered that her salary was "significantly" lower than the other VDOT Program Administration Specialist I's throughout the State and that these employees had recently received an upward adjustment to their salaries.<sup>2</sup> Grievant A contacted her supervisor, Ms. A, and complained that her salary was out of alignment. Ms. A told Grievant A that in January 2007 she had submitted a pay action worksheet to the Agency's central office seeking an in-band salary adjustment for Grievant A based on an internal salary alignment. The Agency's central office staff either did not receive the pay action worksheet or failed to process it. As a result, Grievant A did not receive an upward adjustment to her salary.

On August 13, 2007, Grievant A filed a grievance challenging the Agency's denial of an in-band pay adjustment for her while awarding such adjustments to her counterparts throughout the State. The Agency denied Grievant A's request for relief because the Agency had frozen all in-band adjustments on July 12, 2007 pursuant to a directive of the Agency's Chief of Organizational Development. On February 29, 2008, the Agency ended the "freeze". On April 28, 2008, the Agency approved a pay action worksheet and raised Grievant A's salary by ten percent.

Grievant W is employed as an Administrative and Office Specialist III at one of the Agency's facilities. Her working title is Civil Rights Technician.<sup>3</sup> On July 26, 2007, Grievant W discovered that her salary was "significantly" lower than the other VDOT

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<sup>1</sup> Grievant A assumed this position in 2005 or 2006.

<sup>2</sup> The other employees had received their in-band salary adjustments in May or June 2007.

<sup>3</sup> Grievant W had been working for the Agency for approximately 20 years.

Administrative and Office Specialist III's throughout the State and that these employees had recently received an upward adjustment to their salaries.<sup>4</sup> Grievant W contacted her supervisor, Ms. A, and complained that her salary was out of alignment. Ms. A told Grievant W that in January 2007 she had submitted a pay action worksheet to the Agency's central office seeking an in-band salary adjustment for Grievant W based on an internal salary alignment. The Agency's central office staff either did not receive the pay action worksheet or failed to process it. As a result, Grievant W did not receive an upward adjustment to her salary.

On August 13, 2007, Grievant W filed a grievance challenging the Agency's denial of an in-band pay adjustment for her while awarding such adjustments to her counterparts throughout the State. The Agency denied Grievant W's request for relief because the Agency had frozen all in-band adjustments on July 12, 2007 pursuant to a directive of the Agency's Chief of Organizational Development. On February 29, 2008, the Agency ended the "freeze". On April 28, 2008, the Agency approved a pay action worksheet and raised Grievant W's salary by ten percent.

### **CONCLUSIONS OF POLICY**

Department of Human Resource Policy 3.05 governs Compensation of State employees. It sets forth an agency's responsibilities to include:

Continuously reviews agency compensation practices and actions to ensure that similarly situated employees are treated the same \*\*\*

If an agency discovers that similarly situated employees are not treated the same, it may attempt to correct the disparity through an in-band pay adjustment. An in-band adjustment is described as:

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

In-Band Adjustments provide employees potential salary growth by recognizing career progression, and provide management with tools to resolve specific salary issues.

An Internal Salary Alignment is:

This is one of thirteen Pay Factors used for pay determinations 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

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<sup>4</sup> The other employees had received their in-band salary adjustments in May or June 2007.

responsibilities; performance, and knowledge, skills, abilities and competencies.

If an agency concludes that an internal alignment is appropriate:

An increase of 0-10% 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.

Grievant A and Grievant W contend that their salaries were out of alignment with similarly situated employees and when those other employees received in-band salary adjustments, they also should have been included as employees receiving the salary increases. The Agency contends it was not obligated to increase the Grievants' salaries at the time the salaries of other employees were changed and during the period the Agency enacted a freeze on in-band pay adjustments.

Grievant A and Grievant W have established that they were entitled to in-band pay adjustments at the same time the Agency concluded in-band pay adjustments were appropriate for other comparable employees. On April 25, 2008, the Agency increased the salaries of Grievant A and Grievant W by ten percent pursuant to an internal alignment. The Agency's action on April 25, 2008 serves as an admission by the Agency that the Grievants' salaries were not consistent with similarly situated employees.

The gap between the salaries paid to the Grievants on April 25, 2008 when compared to the salaries paid to similarly situated employees also existed at the time the Grievants filed their respective grievances on August 13, 2007. The Hearing Officer's authority to grant relief extends to 30 days prior to the filing of a grievance. This is because under Section 2.4 of the Grievance Procedure Manual, grievances must be filed within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance. Grievant A and Grievant W filed their grievances on August 13, 2007. The Agency must make the ten percent pay increases they received on April 25, 2008 effective 30 days prior to August 13, 2007. The Agency should recalculate for the two Grievants, the cost of living increase given to all State employees in the Fall of 2007 with the assumption that Grievants' salaries were increased by ten percent 30 days prior to August 13, 2007 instead of increased on April 25, 2008.

Grievant A and Grievant W ask the Hearing Officer to order the Agency to continue with annual pay increases of 10 percent until such time as their salaries are in full alignment with other comparable employees. Nothing in the Grievance Procedure Manual or the Rules for Conducting Grievance Hearings authorizes the Hearing Officer to enter a prospective order of relief of the type requested by the Grievants. Ten

percent is the maximum in-band pay adjustment that can be awarded at one time under DHRM Policy 3.05 as the result of an internal alignment.

## DECISION

For the reasons stated herein, the Agency is ordered to change the effective date of the ten percent salary increase given to Grievant A from April 25, 2008 to 30 calendar days prior to August 13, 2007. In addition, the Agency is ordered to change the effective date of the ten percent salary increase given to Grievant W from April 25, 2008 to 30 calendar days prior to August 13, 2007.

## 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 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>5</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>5</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case No: 8856 / 8857-R**

Reconsideration Decision Issued: August 8, 2008

**RECONSIDERATION DECISION**

Grievant A and Grievant W filed grievances alleging certain issues in dispute with the Agency. The Agency denied qualification of these grievances. In Rulings 2008-1873 and 2008-1874, the EDR Director qualified the grievances for hearing and described the issue as follows:

Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to **whether the agency's determination was plainly inconsistent with other similar decisions within the agency** or otherwise arbitrary or capricious. (Emphasis added).

The Hearing Decision answers this question as follows:

The Agency's action on April 25, 2008 serves as an admission by the Agency that the Grievants' salaries were not consistent with similarly situated employees.

In EDR Ruling 2008-2055 and 2008-2056, the EDR Director seeks additional clarification as follows:

Accordingly, the hearing officer is ordered to reconsider and clarify the grounds for his decision and how those grounds impact the decisions themselves. The hearing officer must expressly address whether the agency misapplied or unfairly applied policy and he must describe the



basis for his findings. Further, the reconsidered decision must clarify the rationale for its determinations on whether and when the grievants were entitled to the in-band adjustments, and the grounds or theories for those determinations.

The Agency presented testimony from the HR Analyst who described the Agency's Salary Administration Plan.<sup>6</sup> The Plan provides that when initiating pay actions, VDOT managers must take the applicable pay factors into consideration. These 13 pay factors include:

- Agency Business Need
- Duties and Responsibilities
- Performance
- Work Experience and Education
- Knowledge Skills Abilities and Competencies
- Training Certification and License
- Internal Salary Alignment
- Market Availability
- Salary Reference Data
- Total Compensation
- Budget Implications
- Long-Term Impact
- Current Salary

On April 25, 2008, the Agency considered its Salary Administration Plan, selected the applicable pay factors and concluded that the Grievants were entitled to a ten percent in-band pay adjustment. The Salary Administration Plan authorizes VDOT managers to consider only "applicable pay factors". The Pay Action Worksheet for Grievant A shows nine of 13 pay factors were marked as applicable by the Agency. The Pay Action Worksheet for Grievant W shows only eight of 13 pay factors were marked as applicable by the Agency.

With respect to pay factors and other policy considerations, Grievant A's and Grievant W's circumstances were the same in January 2007, July 2007, and on April 25, 2008. In other words, their job duties did not materially change for over a year and three months.<sup>7</sup> If the Grievants satisfied the requirements for an in-band pay adjustment in April 2008, they also met those requirements in January 2007 and thereafter.

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<sup>6</sup> The Salary Administration Plan was developed pursuant to DHRM Policy 3.05.

<sup>7</sup> Grievant A assumed her current role on July 1, 2006. The Agency's Pay Action Worksheet for Grievant A states "[i]t would be difficult, if not impossible to find someone who has had her 18 years of experience performing ... the type of work described." Grievant W held her current position for 2 ½ years. The Agency's Pay Action Worksheet for April 25, 2008 points out that Grievant W "has 18 years of experience in this area."

In January 2007, Ms. A, a supervisor, recognized that both Grievants were entitled to an internal alignment. She had submitted<sup>8</sup> pay action worksheets to the Agency's central office seeking an in-band salary adjustment based on an internal salary alignment for both Grievants. The Agency's central office staff either did not receive the pay action worksheets or failed to process them. As a result, Grievant A and Grievant W did not receive an upward adjustment to their salaries.<sup>9</sup> The Hearing Officer finds that if the Agency had not lost the pay action worksheet submitted in January 2007, Agency managers would likely have granted timely an in-band salary adjustment to Grievant A and Grievant W just as they did in April 2008.

Grievant A and Grievant W were denied in-band salary adjustments in 2007 not because they were ineligible for the increase but rather because the Agency lost certain forms. The only difference between Grievant A and Grievant W and several other employees who earlier received in-band adjustments was a lost pay action worksheet.

The Agency has created two classes of employees. The first class consists of employees who were qualified for in-band pay adjustments in 2007 and whose pay action worksheets were timely processed. The second class consists of Grievant A and Grievant W who were qualified for in-band pay adjustments in 2007 but whose pay action worksheets were lost by the Agency and not processed. The Agency's loss of the pay action worksheet for Grievant A and Grievant W is not a reasoned basis to distinguish between the Grievants and other VDOT employees who received in-band pay adjustments in 2007. Such a distinction is arbitrary and capricious<sup>10</sup> and, thus, a misapplication of DHRM Policy 3.05. It is also an unfair application of DHRM Policy 3.05 because neither Grievant was at fault for the Agency's loss of the pay action worksheets that would otherwise have resulted in their timely pay increases had the worksheets been timely processed.

The Agency's evidence in this case is contradictory. The Agency would have the Hearing Officer believe that in 2007 the Grievants did not qualify for a pay action if their circumstances were evaluated in 2007 using the 13 pay factors even though the Agency took the opportunity to evaluate pay factors in April 2008 and concluded that the Grievants satisfied the criteria for pay actions increasing their salaries. Nothing materially changed from January 2007 to April 2008 with respect to the Grievants' circumstances. If the HR Analysts' testimony and the Agency's arguments are to be believed, it means the Agency misapplied the Salary Administration Plan in April 2008 and granted salary increases to two employees who did not qualify for salary increases. The Agency cannot have it both ways. It cannot apply the same standard (Salary

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<sup>8</sup> The worksheets were sent by interagency mail.

<sup>9</sup> In contrast, 31 VDOT employees received in-band adjustments between July 26, 2007 and January 28, 2008.

<sup>10</sup> GPM § 9 defines "Arbitrary or Capricious" as "In disregard of the facts or without a reasoned basis."

Administration Plan) to the same circumstances (January 2007 versus April 2008) and reach a different result. To do so would be arbitrary and capricious. The Hearing Officer will not adopt the Agency's flawed reasoning.

The Agency argued that compensate actions could only occur if VDOT had sufficient funds or if such funds were appropriated by the General Assembly.<sup>11</sup> This argument is meritless. The amount of money involved in changing the effective date of the Grievants' salary increases is negligible when compared to the amount of money VDOT's pays to employ thousands of employees. Nevertheless, the Agency did not consider the pay factor entitled "Budget implications"<sup>12</sup> for either Grievant in April 2008. If the Agency did not consider budget implications to apply in April 2008 (namely, the availability of funding for salary increases to the Grievants), there is no reason to believe the Agency would have considered budget implications in January or July of 2007 (namely, the absence of available funds). In short, the Agency's argument that it retains management discretion with respect to budgetary decision-making in this case, is simply a pretext to ignore a uniform standard to apply to its employees.

There is no basis to modify the relief granted as part of the original Hearing Decision.

### **APPEAL RIGHTS**

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 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 DHRM, 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.

*S/Carl Wilson Schmidt*  
Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>11</sup> See page 3 of the Salary Administration Plan, Agency Exhibit 3.

<sup>12</sup> DHRM Policy 3.05 defines this term as: "This is one of thirteen Pay Factors used for pay determination purposes. Budget Implications consider the short and long-term financial consequences of pay decisions and how salary dollars are managed by an agency."