

Issues: Misapplication of Policy (In-Band Salary Adjustment), Retaliation and Discrimination; Hearing Date: 08/27/08; Decision Issued: 02/09/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8895; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: AHO Reconsideration Request received 02/25/09; AHO Reconsideration Decision issued 03/09/09; Outcome: Request Denied – untimely; Administrative Review: EDR Admin Review Request received 03/12/09; EDR Ruling #2009-2252 issued 03/18/09; Outcome: Untimely.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8895

Hearing Date: August 27, 2008
Decision Issued: February 9, 2009

PROCEDURAL HISTORY

On September 25, 2007, Grievant timely filed a grievance to challenge the Agency's denial of his request for an in-band pay adjustment. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 28, 2008, the EDR Director issued Ruling No. 2008 – 1904 qualifying the matter for hearing. On July 7, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 27, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency misapplied and/or unfairly applied state policy by denying Grievant an in-band adjustment to his salary.
2. Whether the Agency retaliated or discriminated against Grievant.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that relief he seeks 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 as a Transportation Operator II at one of its Facilities. He began working for the Agency in September 1987. The purpose of this position is:

To provide a combination of skills, labor, equipment operation and on-site instruction and leadership to other Transportation Operator II's to maintain, repair and construct overhead signs, bridges and other structures.¹

Grievant has over 20 years of experience with the Agency performing various job functions, including Acting Crew Leader and Bridge Inspector within regional transportation specialty crews. He has performed emergency bridge repairs and snow removal of interstate and subdivision roadways. He has experience supervising employees and contractor work performance.

Grievant has received numerous certifications and training. These include, for example:

- Erosion and Sediment Control
- RLD Environmental Certification
- Medical Examiner Certificate
- Flagging Certification
- Basic First Aid
- CPR
- ASHI Certification
- Forklift Certification

¹ Grievant Exhibit D.

National Safety Council/FLI Learning Systems Course
 Class A Commercial cabdrivers License with Tank, Passenger and School Bus
 Endorsements
 Inspector Qualification and Certification
 HCC Field Certification
 VDOT Leave Policy Training

Grievant received several awards as follows:

YEAR	AWARD
2007	Outstanding Employees for true excellence & Exemplary service
2007	Interstate Maintenance Valuable Contributors
2006	Safety Award for over 19 years of driving with no preventable vehicle/equipment accidents
2003	Outstanding Performance Peer Recognition
2002	Outstanding Team Peer Recognition
2000	Outstanding Performance Award for the [Bridge Replacement]
1998	Appreciation of Outstanding Performance and Commitment
1997	AASHTO Team Prize

Grievant suffered an injury qualifying him to receive workers' compensation benefits. He was absent from work and received workers' compensation leave and short term disability. Grievant returned to work full time on April 25, 2006

Grievant has been requesting an in-band pay adjustment every year since October 2004. On July 12, 2007, the Agency suspended giving in-band pay adjustments absent exceptional circumstances. From July 26, 2007 to January 28, 2008, the Agency gave in-band pay adjustments to 31 employees. At least three of those employees held positions similar to Grievant's position.

On August 23, 2007, submitted a request for an in-band pay adjustment. On September 18, 2007, the Bridge Superintendents sent Grievant a memo stating:

In response to your request dated August 23 regarding an "in-band adjustment", please be advised that on July 12, all VDOT managers were directed by the Chief of Organizational Development not to process any in-band adjustments until further notice. It was indicated that several budget issues associated with in-bands were under consideration by the Commissioner.

Today, we haven't given any approval to proceed so I will hold your request until we get further direction.

Your performance has met and achieved the criteria of the job function throughout the performance cycle and your contributions are appreciated. Keep up the good work.²

Grievant was not satisfied with the Agency's response and filed a grievance on September 21, 2007.

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 use a Pay Practice to set and change an employee's compensation. An in-band adjustment is a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues. Salary changes for in-band adjustments consider Pay Factors and provisions of the Agency's Salary Administration Plan."

One type of In-Band Adjustment is an In-Band Adjustment Internal Alignment. Under this type of in-band adjustment:

An increase of 0-10% may be granted³ 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.

In accordance with DHRM Policy 3.05, the Agency developed a Salary Administration Plan. 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

² Grievant Exhibit D.

³ The HR Manager testified that the Agency considers the necessity of in-band pay adjustments for its employees two or three times per year.

- Knowledge Skills Abilities and Competencies
- Training Certification and License
- Internal Salary Alignment⁴
- Market Availability
- Salary Reference Data
- Total Compensation
- Budget Implications
- Long-Term Impact
- Current Salary

Grievant contends the Agency misapplied or unfairly applied DHRM Policy 3.05. In his August 16, 2007 memorandum to the Transportation Operations Manager III, Grievant outlined the reasons why he believed he is entitled to an in-band pay adjustment:

I have approximately 20 years of experience performing various job functions within the [location] Transportation Specialty Crews, primarily the bridge section.

I also have volunteered and assisted as a Bridge Inspector for approximately 3 months. The duties I performed consisted of drafting, sketching, reading and interpreting bridge plans, inspecting bridges, documenting inspections and maintenance of files.

I was assigned and completed a special fence installation project utilizing my knowledge and skills from employment outside the purview of the Virginia Department of Transportation.

I have received several awards for my exemplary service, valuable contributions, peer and team recognition and have always received average or above average on my performance ratings.

I am certified to operate the following pieces of equipment:

Dump Trucks
 4 by 4 Loaders with Back Hoe
 Booms
 Bob Cats
 Track Loader
 Torches
 Jumping Jacks

⁴ DHRM Policy 3.05 is written in a manner that creates ambiguity. The policy uses the phrase “Internal Alignment” as part of the definition of “In-Band Adjustment.” The policy then defines “Internal Salary Alignment” as one of thirteen pay factors. This raises the question of whether an “Internal Alignment” is the same as an “Internal Salary Alignment.”

Chippers
Spreaders
6 and 10 ton rollers
Tandem Dump Trucks
Boom Trucks
Bucket Truck
Bridge Master
Jack Hammers: 90, 60 and 35 lbs.
Hammer Drills
Water Pumps
Snow Plows
Unimogs

I have obtained and maintain the following certifications:

Erosion and Sediment Control
RLD Environmental Certification
Medical Examiner Certificate
Flagging Certification
Basic First Aid
ASHI Certification
Forklift Certification
National Safety Councils/FLI Learning Systems Course
Class A Commercial Drivers License with Tank, Passenger and School
Bus Endorsements
Inspector Qualification and Certification

Agency managers have discretion to determine which pay factors to consider.⁵ In this case, the Agency chose to apply only⁶ (1) Agency Business Need, (2) Performance, (3) Knowledge, Skills, Abilities and Competencies, and (4) Training, Certification and License. These factors are defined as follows:

Agency Business Need -- the specific activities and organizational, financial, and human resources requirements that are derived from the VDOT's mission.

⁵ Grievant has not established that the Agency's selection of applicable pay factors was incorrect or otherwise inappropriate.

⁶ Although the Second Step Respondent did not specifically identify the pay factors he was using to determine whether Grievant should receive an in-band pay adjustment, his decision-making was consistent with the Agency's four pay factors discussed herein. In addition, his decision-making is consistent with an in-band adjustment which 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.

Performance -- previous and/or current work accomplishments or outcomes and behavioral interactions that are assessed as part of the Performance Management program.

Knowledge, Skills, Abilities and Competencies -- Knowledge refers to acquired principles and practices related to a particular job; Skills refers to acquired psychomotor behaviors; and Abilities are the talents, observational behaviors or acquired dexterity. Competencies are behaviors, knowledge and skills that directly and positively impact the success of the employee.

Training, Certification and License -- training refers to a specialized course of instruction outside the realm of recognized academic degree programs. Certification refers to a specialized course of study resulting in a certificate upon successful completion. Licensure refers to a licensing credential that is required by law to practice one's occupation.

From 2002 to 2007 Grievant was one of approximately 13 employees with similar Employee Work Profiles⁷ in his Region. Grievant contends his salary is between 7.8 and 10 percent below the average salary of other employees holding a similar position. The annual salaries of the 13 Assistant Crew Leaders and Crewmembers⁸ including Grievant are as follows:

\$43,679
\$40,825
\$44,126
\$44,345
\$43,963
\$44,233
\$43,070
\$45,336
\$46,193
\$46,087
\$46,653
\$47,529
\$46,568

⁷ These employees consisted of Assistant Crew Leaders and Crewmen. It is not appropriate to compare Grievant to the position of Crew Leader because Crew Leader is a supervisory position. Grievant sometimes acted as an Acting Crew Leader. When Grievant worked as an Acting Crew Leader, his duties more closely resembled those of an Assistant Crew Leader and not a Crew Leader.

⁸ Agency Exhibit 6.

When Grievant's salary is removed from these 13 salaries and compared with the average of the remaining 12 salaries, Grievant salary is approximately 4.4 percent below the average.⁹

An approximately 4.4 percent disparity between an employee's salary and the average employee working in a similar position does not, in itself, reveal unfairness or a misapplication of policy. A disparity between an employee's salary and other employees can arise because of many factors. For example, an employee who transfers between State agencies may receive a salary increase as a result of that transfer. An employee joining a State agency from the private sector may receive a State salary based on a higher private sector salary plus an additional amount because of the change of jobs. Only when factors other than simply salary averages are considered can one determine whether an employee is unfairly or inadequately compensated.

Agency Business Need. One of the Agency's business needs is to have employees report to work and provide services to the Agency. The Agency maintains a database in which it distinguishes between productive and non-productive time. Productive time would include time at work performing employee duties. Non-productive time includes time other than productive time such as annual leave, sick leave, military leave, etc.¹⁰ The Agency compared Grievant's productive time with his peers for the period 2002 through July 24, 2007.¹¹ For each time period, Grievant's productive time was lower than that of his peers.¹²

⁹ Grievant presented evidence of other employees working as Transportation Operator IIs who had received in-band adjustments. See Grievant Exhibit 6. On the Pay Action Worksheet, pay factors of "Duties & responsibilities, "Work experience/education, Knowledge, skills abilities & competencies, and Internal salary alignment" were checked. The Agency has discretion to select appropriate pay factors. Once the Agency selects pay factors for one employee, the Agency is not obligated to only consider those factors for all subsequent requests for in-band adjustment. As long as the Agency's selection is not motivated by an improper purpose or generated as an attempt to single out an applicant, different Agency managers may consider different pay factors depending on the Agency's needs at a particular point in time. As part of the written justification, the Agency compared the salary of the employee with the average of employees performing the same duties and responsibilities. The disparity for those employees was 13.2%, 19.3%, 17%, and 10%. The pay action worksheets signed by Agency managers also discuss unique accomplishments of the employee applicants. If the Hearing Officer only considers the disparity between Grievant's salary and the average of his peers, a 4.4 percent disparity is not sufficient to justify an in-band adjustment based on the Agency's prior actions.

¹⁰ Grievant argued that annual leave, etc. should be considered by the Agency because annual leave is a benefit he accrued and was entitled to take. This argument is untenable. Annual leave, routine sick leave, etc. are not protected activities. The Agency may choose to distinguish between employees who take all of their available leave and employees who do not. For example, employees who accrue annual leave but do not take that leave spend more hours performing duties for the Agency than do employees who take all of their leave balances.

¹¹ The Agency included calculation of overtime worked by employees.

¹² The range was from 2 percent to 12 percent below his peers.

Performance. The Agency reviewed Grievant's past five performance evaluations and those of his peers. The Agency counted the number of times an employee was rated as "Extraordinary Contributor" for Core Responsibilities. In 2002 and 2006, Grievant was equal to his peers. In 2003, 2004, and 2005, Grievant was below his peers. On average, Grievant's work performance was rated slightly below his peers.

Knowledge, Skills, Abilities and Competencies. Grievant possesses skills at a level consistent with his peers. Although the Agency does not maintain a database comparing skills of employees, based on the testimony of Grievant's supervisors, the Agency concluded that his overall skills are, in general, equal to his peers.

*Training, Certification and License.*¹³ The Agency keeps transcripts of training received by its employees at "VDOT University." The Agency compared Grievant's training records from October 2002 to October 2007 to the records of his peers. In 2002, 2003, and 2005, Grievant attended fewer training classes than the average of his peers. In 2004 and 2006, he attended more training classes than the average of his peers. Overall, Grievant's training is on par with his peers.

When the four pay factors are considered, Grievant's circumstances are not such that it would be an unfair or misapplication of policy for the Agency to avoid increasing Grievant's annual salary. Grievant has not established that the Agency's decision to deny him an in-band pay adjustment was plainly inconsistent with other similar decisions within the Agency or otherwise arbitrary or capricious.

From July 26, 2007 to January 28, 2008, the Agency gave in-band pay adjustments to 31 employees. At least three of those employees held positions similar to Grievant's position. Insufficient evidence was presented to enable the Hearing Officer to determine whether Grievant was treated inconsistently with those three employees receiving in-band adjustments. Grievant's request for relief regarding this issue must be denied.

State employees may not be discriminated against based on disability. A State agency may not discriminate against an employee who has been absent from work due to an injury relating to workers' compensation and/or due to short-term disability. Accordingly, the Agency may not deny an in-band pay adjustment to an employee who has been absent from work because of a workers' compensation injury or short-term disability. As part of the Agency's initial consideration of the merits of Grievant's request for an in-band adjustment, the Agency considered Grievant's absences due to workers' compensation and short-term disability leave. This action was improper. Grievant brought the error to the Agency's attention. During the grievance Step process, the Agency corrected this mistake. For example, the Second Step Respondent calculated Grievant's productive time to include the time he was absent

¹³ The Agency appears to have included course work resulting in a certification as part of the meaning of training. Grievant's position does not require professional licensure.

due to workers' compensation or short-term disability. In other words, the Second Step Respondent treated Grievant's workers' compensation and short-term disability absences as if Grievant were working. The Hearing Officer finds that there is no basis to grant relief to Grievant because he took protected leave.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁴ (2) suffered a materially adverse action¹⁵; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹⁶

Grievant engaged in protected activity. For example, he filed grievances in 1998 and 1999. Grievant has suffered a materially adverse action because his request for an in-band pay adjustment was denied. Grievant has not established a connection between his protected activity and the materially adverse action he suffered. No credible evidence was presented to show that Agency decision-makers knew of Grievant's prior protected activity and considered that protected activity as part of the decision to deny Grievant an in-band pay adjustment. The Agency did not retaliate against Grievant.

Grievant contends that the Agency retaliated against him by considering his workers' compensation and short-term disability leave as unproductive time. Since the Agency corrected that mistake in the grievance Second Step, there is no basis to conclude at the time of the hearing that the Agency was retaliating against Grievant.

In conclusion, Grievant has demonstrated he is a dedicated, competent, and valuable employee to the Agency and Commonwealth of Virginia. What he has not demonstrated are the existence of sufficient reasons to increase his salary to close the gap between his salary and those of his peers.

¹⁴ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁵ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹⁶ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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 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
600 East Main St. STE 301
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.¹⁷

[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

¹⁷ 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: 8895-R

Reconsideration Denial Issued: March 9, 2009

RECONSIDERATION DENIAL

Grievance Procedure Manual § 7.2 requires all requests for review to be made in writing and received by the Hearing Officer within 15 calendar days of the date of the original hearing decision. The original hearing decision was issued on February 9, 2009. Grievant's request was dated February 22, 2009, postmarked February 24, 2009 but received February 25, 2009. The request is not timely received and, thus, the Hearing Officer no longer has jurisdiction to address the request.

For this reason, the request for reconsideration is **denied**.

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