

Issue: Qualification – Compensation (In-band adjustment); Ruling Date: August 20, 2014; Ruling No. 2015-3949; Agency: Virginia Commonwealth University; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**QUALIFICATION RULING**

In the matter of Virginia Commonwealth University  
Ruling Number 2015-3949  
August 20, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) on whether his May 13, 2014 grievance with Virginia Commonwealth University (the University or the agency) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a driver for the University's RamSafe transportation service. He claims that the University recruited for and hired several new, inexperienced, RamSafe drivers, and the salaries of these individuals surpass his. As relief, the grievant seeks an adjustment to his salary. In response, the agency indicates that all four newly hired RamSafe drivers have more relevant experience than the grievant, and all RamSafe drivers are within a comparable salary range. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing and the grievant now appeals that determination.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to hearing"<sup>2</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. In this case, the grievant claims that management has misapplied and/or unfairly applied policy and procedure by hiring less experienced, less qualified drivers at a higher salary than the grievant and failing to provide the grievant with an adjustment to his salary to correct the disparity.

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(A), (C).

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>3</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>4</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>5</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

The primary policy implicated in this grievance is DHRM Policy 3.05, *Compensation*.<sup>6</sup> This policy provides that agencies may provide an in-band adjustment of up to 10% to an employee on the basis of change in duties, professional or skill development, retention, and internal alignment.<sup>7</sup> In-band adjustments and other pay practices are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.<sup>8</sup> DHRM Policy 3.05 reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of thirteen enumerated pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long term impact; and (13) current salary.<sup>9</sup> Some of these factors relate to employee-related issues, and some to agency-related business and fiscal issues, but the agency has the duty and the broad discretion to weigh each factor for every pay practice decision it makes.

While we understand the grievant’s concern that employees with fewer years of service to the agency may be being paid a higher rates of pay, DHRM Policy 3.05 does not mandate that new or more junior employees be paid at a rate lower than the rate paid to existing or more senior employees, or that the rate of existing employees be increased to match or exceed that of newer hires. The grievant has not identified, nor are we aware of, any specific policy requirement violated by the agency’s existing salary structure. Likewise, compensating arguably less-experienced drivers at a higher salary than the grievant, though understandably viewed by the grievant as unfair, does not amount on its own to a disregard of the intent of the applicable

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<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>5</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>6</sup> The agency’s pay practice guidelines for classified employees mirror DHRM Policy 3.05.

<sup>7</sup> DHRM Policy 3.05, *Compensation*.

<sup>8</sup> See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

<sup>9</sup> See DHRM Policy 3.05, *Compensation*.

policies, which allow management flexibility in making individual pay decisions in light of its consideration of the 13 pay factors.<sup>10</sup> The need for internal salary alignment is just one of the 13 different factors an agency must consider in making the difficult determinations of whether, when and to what extent in-band adjustments should be granted in individual cases and throughout the agency.<sup>11</sup>

Here, the agency indicates that all RamSafe drivers are within a comparable salary range and denies that an in-band adjustment to the grievant's salary is necessary. Agency decision-makers deserve appropriate deference in making these determinations and EDR will not second-guess management's decisions regarding the administration of its procedures, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious. The question in this case is not whether the applicable policy might support an in-band adjustment to the grievant's salary. Indeed, the facts might support such a pay action. The question is whether the applicable policy mandates that the grievant receive a salary increase such that the agency's failure to provide an increase disregards the facts or was otherwise arbitrary or capricious. Although the grievant may disagree with the agency's conclusions, EDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Therefore, the grievant's claim of misapplication and/or unfair application of policy as outlined in his May 13, 2014 grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.<sup>12</sup>



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<sup>10</sup> *See id.*; DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*..

<sup>11</sup> This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. In particular, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination or some other improper motive. Here, the grievant has not alleged that the agency's refusal to adjust her salary was retaliatory, discriminatory or based on some other improper motive.

<sup>12</sup> Va. Code § 2.2-1202.1(5).