Issue: Compliance(consolidation) and Qualification(Compensation/Leave- pay practices)(Discrimination-Race, Sex, Multiple Discrimination); Ruling Date: January 10, 2002; Ruling #2001-040 & 2001-112; Agency: Alcoholic Beverage Control; Outcome: qualified only on misapplication or unfair application of the Salary Administration Plan.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULINGS OF DIRECTOR

In the matters of Department of Alcoholic Beverage Control/ Nos. 2001-040 & 2001-112

January 10, 2002

The grievant has requested rulings on whether her February 22, and April 23, 2001 grievances with the Department of Alcoholic Beverage Control (ABC or the agency) qualify for hearing. The grievant has also asked that her grievances be consolidated.

The February 22, 2001 grievance alleges that: (1) changes in the grievant's duties warranted a pay practice increase; (2) ABC's current Salary Administration Plan (SAP) allows the Compensation Management and Review Committee (CMRC) to make decisions that have a discriminatory effect; and (3) the CMRC's authority should be limited to determining the percentage of pay practice increases, not whether increases are warranted.

The April 23, 2001 grievance asserts that: (1) ABC Board Members (Board) and the Chief Operating Officer (COO) acted in an arbitrary and capricious manner when they granted two white managers a 10% in-band salary adjustment; (2) the Board and COO misapplied the agency SAP by not seeking input from the Human Resources Division (HR) or the CMRC on the matter involving the two white male managers; (3) the Board and COO's granting of the 10% in-band salary adjustments to the two white male managers discriminated against the grievant (a black female); and (4) one of the two white male managers who received an increase is a voting member of the CMRC.

For the reasons discussed below, the grievances are consolidated. However, as discussed further below, only the claim of misapplication or unfair application of the SAP is qualified, in part, for hearing.

FACTS

The grievant is an African American female over forty years of age. Prior to her resignation, she was employed by ABC as a Human Resources Manager. In December 2000, the HR Department's management team proposed that she receive an in-band pay adjustment based on changes in her job duties.[1] To avoid any potential conflict of interest, another HR

[1] Under the Commonwealth's recently revised compensation policy, employees may be awarded pay adjustments (increases) (1) in recognition of a change in duties, (2) in recognition of professional/skill

professional who works for a different state agency reviewed the request for the in-band adjustment.[2] The outside reviewer recommended that she be awarded an in-band increase. The agency's CMRC subsequently informed the grievant that a final decision on her proposed pay increase would be deferred for 6 months so that programs recently assigned to her could be evaluated for workload impact.

In the spring of 2001, the Board and COO granted in-band adjustments to two white male upper level managers. Contrary to the policy in effect at that time, neither the CMRC nor HR was involved with the process. Only after HR inquired as to why it had been omitted from the process was HR asked to review the actions pertaining to the two white males. HR found the in-band adjustment for one of the managers justified, but the second only "marginally supportable."

Approximately six months after the initial submission of HR management's proposal to grant the grievant an in-band pay adjustment, the proposal was resubmitted. The request was also forwarded for review by the state agency charged with developing and interpreting state policy, the Department of Human Resources Management (DHRM). As with the earlier independent review, two compensation specialists with DHRM found the increase to be warranted. The grievant ultimately received a 10% increase effective May 25, 2001, and later resigned from the agency; however, she requested that her grievances continue because she believes she has not received the full relief sought in her grievances such as a reasonable in-band increase retroactive to December 2000.[3]

DISCUSSION

Consolidation

This Department has long held that grievances may be consolidated by mutual agreement of the parties, or absent such an agreement, by this Department whenever the grievances challenge the same action or series of actions or arise out of the same material facts. EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[4] In this case, the events giving rise to the grievances are closely related; for example, both grievances assert that a discriminatory bias tainted the agency's pay practices. Where the issue of discrimination is grieved, and each

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development, (3) to promote employee retention, and (4) to internally align salaries. Department of Human Resources Management (DHRM) Policy 3.05.

[2] The ABC HR Department reviews all requests for in-band adjustments then makes a recommendation to the CMRC on whether the request should be honored. Because the grievant worked within HR, the HR Director concluded that outside review and recommendation would be appropriate.

[3] In her February 22nd grievance, the grievant requested: (1) a reasonable retroactive in-band adjustment effective 12/25/00; (2) removal of the Internal Auditor from the CMRC; and (3) a limitation of CMRC's authority to determining the size of pay increases only. The April 23rd grievance seek as relief: (1) fair application of all agency policies including the SAP; (2) rescission of the increases for the two white males; (3) cessation of the discrimination against the grievant, a black female; and (4) no retaliation for initiating her grievance.

[4] *Grievance Procedure Manual* § 8.5, page 22.

grievance challenges a discrete action by management to support this characterization, it is appropriate to consolidate the grievances. Thus, the above-listed grievances are consolidated.

Qualification

1. Misapplication or Unfair Application of Policy

The February 22nd and April 23rd grievances claim, in large part, that the agency has either misapplied and/or unfairly applied policy.[5] For an allegation of misapplication 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.[6] The primary policy implicated in these grievances is Department of Human Resource Management (DHRM) Policy 3.05, which among other things, requires all agencies, pursuant to the Commonwealth's new compensation plan, to develop an agency Salary Administration Plan (SAP).[7] The SAP is the document that outlines how the agency plans to implement the Commonwealth's compensation management system and is "the foundation for ensuring consistent application of pay decisions."[8] ABC has complied with this requirement by developing a SAP, which describes the process by which in-band pay adjustments may be awarded to deserving ABC employees.[9] In this case, the SAP confers to CMRC the authority to determine not only the amount of in-band adjustments but also whether such increases shall be granted with respect to each employee whose manager has proposed granting an increase.

In order for an individual to be considered for an in-band increase, that person's supervisor must recommend the increase. A Pay Action Worksheet (PAW) is completed and then the agency's Human Resources (HR) department reviews the proposal and makes a recommendation. The recommendation and PAW are then forwarded to the CMRC for review. The CMRC evaluation process ess w2(ntiall)-12.8(y)19.4( )-10(consists of a roundtable)-10(re
compensation philosophy and policies; responsibilities and approval processes; recruitment and selection process; performance management; administration of pay practices; program evaluation; appeal process; EEO considerations and te communication plan." DHRM Policy 3.05, page 1 of 13.

[8] DHRM Policy 3.05, page 1 of 13.
[9] DHRM Policy 3.05 describes an In-Band Adjustment (IBA) as a multi-faceted pay practice that allows agency management the flexibility to provide employees potential salary growth and recognizes career progression. An IBA may be awarded (1) in recognition of a change in duties, (2) in recognition of professional/skill development, (3) to promote employee retention, and (4) to internally align salaries.

The claim in the February 22nd grievance that the CMRC should not have the authority to decide who receives a pay practice increase (in-band adjustment) does not qualify for a hearing. The agency's grant of authority to the CMRC to determine not only how much an individual receives, but whether he or she receives a pay increase at all, violates no state policy. Moreover, the grievance procedure cannot be used to challenge the contents of personnel policies.[10]

In addition, none of the issues raised in the April 23rd grievance qualify for hearing. A grievance must pertain "directly and personally to the employee's own employment."[11] Here, the grievance asserts that the Board and COO acted in an arbitrary and capricious manner by granting two white managers in-band adjustments. Moreover, the grievance seeks to rescind the in-band adjustments awarded the two white males.[12] The issue of whether those actions were arbitrary and capricious cannot be qualified because these are not actions that relate directly and personally to the grievant's own employment. For the same reason, any claim of misapplication of the SAP based on (1) the lack of involvement of HR and the CMRC with the pay increases for the two white males; and (2) the voting membership of one of the two white male managers on the CMRC, cannot be qualified.[13]

The only remaining policy issue is the February 22nd claim that based on significant changes in her duties, the grievant should have received an in-band adjustment. While neither this Department nor a hearing officer may determine whether an in-band adjustment is merited for any employee, it appears that the grievant's primary concern here is the process by which the agency decided whether she should be awarded an in-band adjustment and the size of the pay increase as compared to other employees. The grievant asserts, apparently correctly, that agency actions have not always been consistent with the SAP. For instance, the grievant notes that two white male managers were awarded 10% in-band salary adjustments without having their proposed increases reviewed by the CMRC as required by the SAP then in effect. The agency has explained that at the time of the in-band adjustments for the two white male managers, it was in the process of amending the SAP to allow the COO and Board, rather than the CMRC, to review employees (like those managers), who were at the level of director and above.[14] However, while it appears that the two white male managers would have been properly reviewed by the COO and Board under the *revised* version of the SAP, the revised version was not then in effect. Moreover, even if the revised version had been in effect, the pay increase proposal process for the two white male managers still should have included input from HR. Yet, consultation with HR did not occur until HR inquired about its omission from the process. When HR was finally consulted, HR concluded that one

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[10] *Grievance Procedure Manual*, § 4.1(c), page 11.
[11] Va. Code § 2.2-3004; *Grievance Procedure Manual*, § 2.4, page 6.
[12] April 23, 2001 grievance attachment (relief section).
[13] While these issues cannot be qualified as separate claims for which relief may be granted, they can be considered as possible background evidence for the grievant's contention she has been discriminated against.
[14] This change appears reasonable. For instance, having CMRC members reviewing proposed pay increases for other CMRC members, as would have been the case here under the former SAP, would certainly result in the appearance of impropriety, if not an outright conflict of interest. (One of the white male managers is a CMRC member).

of the actions was not supportable and the other only “marginally supportable.” Despite HR’s recommendation, both white males received the increases.[15]

On the other hand, the grievant claims that in determining whether an in-band adjustment was warranted in her case the agency did not follow its SAP, and lacked sufficient objective criteria, and indeed, made conflicting determinations using virtually the same data. The Commonwealth’s policy, as articulated in Va. Code § 2.1-110, seeks to “ensure” that “personnel administration [is] based on merit principles and *objective methods* of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of state employment.”[16] Here, the grievant was told that the proposal for her in-band adjustment would be reviewed in six months, but she was not informed how the evaluation would be conducted at that time or what additional information would be required. Furthermore, HR management, which originated the request for the grievant, was apparently not informed as to what kind of additional documentation or information should be submitted for the re-evaluation six months later. Moreover, several of the CMRC members concede that a lack of objective criteria for use during the evaluation process had been an ongoing general concern.[17]

Approximately 6 months after the initial submission of the grievant’s proposal, her proposal was resubmitted. Her proposal was forwarded to DHRM for an independent review. As with the independent review 6 months earlier, two compensation specialists with DHRM found the increase warranted.[18] The COO, *not the CMRC* as required by the SAP, subsequently granted her request, though not retroactive to her original submission.[19] Apparently, no documentation or information on “workload impact” or other matters, with the possible exception of the above-mentioned affirmations from DHRM, accompanied the resubmitted request.[20] Thus, although the accompanying documentation was virtually identical, the first proposal was rejected and the second was accepted.

Given the circumstance described above, this Department concludes that a more thorough examination of the agency’s implementation of DHRM Policy 3.05 and the agency’s

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[15] It should be noted that the CMRC is by no means compelled by the SAP or any other policy to accept HR’s recommendation. One would presume, however, that because the SAP requires HR review, the recommendation of HR would generally be given appropriate weight.

[16] Emphasis added.

[17] One member suggested that because all requests are channeled through HR, HR would be best positioned to provide such objective criteria.

[18] One of the reviewers, who found that an in-band adjustment was “clearly appropriate,” noted that the review “looked okay to me months ago and . . . still do[es].”

[19] The agency asserts that certain actions taken by HR during the interim 6-month period was the reason for the deviation from the process mandated by the SAP.

[20] The few differences between the PAW prepared for the second proposal and the original PAW were extremely minor. For instance, the PAW dated December 25, 2000, read: “The three newly assigned areas are complex and multi-faceted, and there are plans to implement Commonhealth (wellness program) at ABC during the next calendar year.” The same passage in the second PAW, dated May 24, 2001, read: “The three newly assigned areas are complex and multi-faceted, and the incumbent is also charged with developing and implementing Commonhealth (wellness program) at ABC during this calendar year.”

SAP is warranted.[21] Here questions remain as to whether the agency's and CMRC's actions were consistent with ABC's SAP, as well as with the Commonwealth's policy of basing personnel administration "on merit principles and *objective methods* of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of state employment."[22]

At hearing, the grievant must prove by a preponderance of the evidence[23] that the agency misapplied policy by failing to use sufficient objective measures. If the hearing officer finds that the agency misapplied policy, he may only order the agency to reapply the policy at the point at which it became tainted.[24] A hearing officer may not order the agency to (i) grant, deny, or remove any in-band adjustment; (ii) assign or remove any member of the CMRC; or (iii) revise its SAP. Further, a hearing officer is not a "super-personnel officer."[25] Therefore, in resolving the grievance, the hearing officer should give an appropriate level of deference to actions by agency management that are consistent with law and policy, and to management's right to manage the affairs and operations of the agency.[26] Finally, our qualification of the above policy issue in no way indicates that a misapplication of policy occurred. This ruling simply reflects that a further exploration of the facts by a hearing officer is warranted.

2. Discrimination

Both grievances allege discrimination. The February 22nd grievance alleges that the agency's SAP allows CMRC to make decisions that have a discriminatory effect. The April 23rd grievance alleges that the Board's and COO's actions discriminated against the grievant (a black female). As indicated previously, the April 23rd grievance cannot be qualified because the claims concerning the 10% pay increases awarded to the two white males do not directly relate to the grievant's own employment. The action that *does* relate to the grievant's own employment, deferral of an in-band increase for at least 6 months, is a subject of the February 22nd grievance. However, for the reasons set forth below, the grievant's claim of discrimination does not qualify for hearing.

The grievant asserts in her February 22nd grievance that the "current Salary Administration Plan allows the Compensation Reform Committee to make decisions that have a discriminatory effect." Federal law and Commonwealth policy prohibit discrimination based on race, color, religion, sex, national origin, age, and disability.[27] The agency's SAP

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[21] This Department's qualification of the issue of misapplication of policy in no way reflects an opinion that CMRC's decision regarding the grievant was incorrect. The CMRC has explained that it felt it was not prudent to award an in-band increase based on a *prospective* assumption of duties, as the CMRC claims was the case here. If this has been CMRC's *consistent* position with *all* proposals, then it would be reasonable to postpone for six-months a decision in the grievant's case.
[22] Va. Code §2.1-110.
[23] *Grievance Procedure Manual,* § 5.8, page 15.
[24] *Rules for Conducting Grievance Hearings*, page 14.
[25] *Rules for Conducting Grievance Hearings*, page 10.
[26] *Id*.
[27] *See* Title VII of the Civil rights Act of 1964 as amended 42 U.S.C.A. 2000e et seq.; Department of Human Resources Management (DHRM) Policy 2.05, (Equal Employment Opportunity Policy).

also expressly prohibits discrimination based on "race, sex, creed, color, religion, national origin, political affiliation or handicapping condition."[28]

Disparate Impact

The grievant's assertion that agency actions caused a "discriminatory effect" is fundamentally a "disparate-impact" allegation. To prevail with a disparate-impact discrimination claim, a grievant need not provide evidence of the employer's *subjective* intent to discriminate on the basis of her membership in a protected class. Instead, a grievant must demonstrate that a policy applied by the employer, although neutral on its face, is discriminatory in its application.[29] To prove a prima-facie case of disparate-impact discrimination, a grievant must (1) identify the specific employment practice being challenged, and then (2) demonstrate that the practice excluded the grievant, as a member of a protected group, from certain benefits of employment.[30] Disparate impact analysis may be applied to subjective or objective employment practices.[31]

As to the first element of a prima-facie claim, the grievant identified CMRC's process for determining whether pay increases should be granted, a process which she claims fails to incorporate sufficient objective measures to guide the deliberations. [32]

As to the second element of a disparate-impact claim, in some instances, statistical evidence, may permit an inference of discrimination.[33] Statistics, however, are probative only to the extent that they reveal a disparity of such a degree as to rule out chance; in other words, "statistical disparities must be sufficiently substantial that they raise . . . an inference of causation."[34]

In this case, as of June 28, 2001, the CMRC had reviewed 19 pay actions. Of the 19 actions, 10 of those submitted were for persons over the age of 40, 9 for those under 40. Thirteen of the actions were approved: 6 for individuals over 40, and 7 under the age of 40. Thus, there does not appear to be any statistically significant disparity regarding age. Likewise, there does not appear to be a disparity based on race. Only one African American, the grievant, was nominated for an increase, which she was denied. However, it is virtually impossible to draw any conclusions through the use of statistics based on a single action.[35]

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[28] Curiously, the SAP does not expressly prohibit discrimination based on age.
[29] Barnett v Technology International, Inc., 1 F. Supp. 2d 572, 579 (E.D.Va. 1998), citing Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
[30] Barnett at 579, citing Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988).
[31] Watson at 990-91.
[32] In her February 22nd grievance, the grievant states that "no guidelines have been provided in terms of how the evaluation will be conducted, by whom the evaluation will be conducted or information will be required."
[33] Barnett at 579, citing Carter v. Ball, 33 F.3d 450, 456 (4th Cir. 1994).
[34] Barnett at 579, quoting Watson, 487 U.S. at 995.
[35] The fact that only one African-American has been nominated for an in-band increase is not further addressed in this ruling because (1) the grievant has not raised the issue; and (2) as discussed above, the focus of a grievance must be personal. Here, the grievant had been selected for consideration for an adjustment, thus, she has no standing to complain on behalf of those who have not been submitted for consideration by management.

The data regarding the approval rate for females is potentially more problematic. An approval "rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or 80%) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact."[36] Of the 19 employees submitted for in-band adjustments, 8 were males and 11 were females. All 8 males (100%) were approved. Only 5 of the females 45% were approved, much less than 80% of the highest rated male group. Statistical evidence based on such a small sample group must be viewed with great caution.[37]

However, even where the "four-fifths rule" is implicated, differences in the selection rates may not constitute an adverse impact where the sample size is too small to be statistically significant.[38] Here, the sample size of 19 persons is simply too diminutive to be statistically significant.[39] Accordingly, this grievance cannot be qualified on the basis of disparate impact.

Disparate Treatment

The grievant's discrimination claim must also fail under a disparate treatment analysis. Disparate treatment discrimination is the *intentional* discrimination against an individual because of that person's race, color, religion, sex, nation origin, age, or disability. It differs from disparate impact discrimination in that a disparate treatment claim requires proof that the employer intended to discriminate against the employee; a disparate impact claim requires no such showing of an intent to discriminate.

To qualify a disparate treatment claim for hearing, however, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on the grievant's protected status, in other words, that because of her gender the grievant was treated differently than other "similarly-situated" employees. If the agency provides a legitimate, nondiscriminatory business reason for its actions, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[40]

In this case, a disparate treatment claim fails because the grievant has not been able to show sufficient evidence of intentional discrimination based on her gender, race, age or other protected class. The statistical evidence cited above suffers from the small sample group

[36] 29 C.F.R. § 1607.4(D).
[37] Barnett, at 579-80.
[38] *See* 29 C.F.R. § 1607.6(D).
[39] *See* Price v. City of Chicago, 2000 U.S. Dist. LEXIS 12447 (N.D. Ill. 2000), *aff'd* 251 F.3d 656 (7th Cir. 2001), (rejecting as too small a sample group of 22); Sengupta v. Morrison-Knudsen Co., 804 F.2d 1072 (9th Cir. 1986)(rejecting as too small a sample pool of 28 in a disparate treatment case).
[40] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

deficiency, but more importantly, statistical evidence is generally not relevant under an individual disparate treatment analysis.[41] Because the grievant has not been able to produce evidence of intentional discrimination, her grievance cannot be qualified under a disparate treatment theory.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal to the circuit court any claim not qualified by this Department, she must notify the notify the Human Resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify any of the claims at issue in this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer to hear those claims unless the grievant notifies the agency that she does not wish to proceed.

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Neil A.G. McPhie, Esquire
Director

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William G. Anderson, Jr.
Employment Relations Consultant

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[41] *See* Van Slyke v. Northrop Grumman Corp., 115 F. Supp. 2d 587 (Md. Dist. 2000) *aff'd* Van Slyke v. Northrop Grumman Corp., 2001 U.S. App. Lexis 19279 (4th Cir. 2001), (unpublished opinion), ("statistical evidence has little, if any, relevance in an individual disparate treatment action.") Van Slyke 115 F. Supp. 2d at 597. *See also* Bostron v. Apfel, 104 F. Supp. 2d 548 (D. Md. 2000), *aff'd*, Bostron v. Apfel, 243 F.3d 535, 2001 U.S. App. LEXIS 6653(4th Cir. Md. 2001) reported in full, Bostron v. Apfel, 2001 U.S. App. LEXIS 673 (4th Cir. Md. Jan. 18, 2001), (unpublished opinion), cert. denied, Bostron v. Massanari, 2001 U.S. LEXIS 6653 (U.S. Oct. 1, 2001).