

Issue: Qualification/Compensation/Leave/Northern Virginia differential; Ruling Date: June 23, 2003; Ruling #2002-236; Agency: Department of Professional and Occupational Regulation; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Professional and Occupational Regulation
No. 2002-236
June 23, 2003

The grievant has requested a determination on whether her November 7, 2002 grievance with the Department of Professional and Occupational Regulation (DPOR or the agency) qualifies for a hearing. She claims that the agency misapplied or unfairly applied policy when management assigned her to the northern Virginia region and failed to follow established pay practices and pay her comparably to other employees. The grievant also maintains that the agency discriminated against her on the basis of sex. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant was employed as a Fair Housing Investigator with the agency in the role of Compliance/Safety Officer III.¹ Fair Housing Investigators are field investigators and are assigned investigations throughout the state on a rotating basis. The grievant worked out of her home in Chesterfield, and DPOR provided her with office furniture and equipment as well as a state vehicle.

Because of complaints about the delay in DPOR's field investigations, management reorganized the Enforcement Division and transferred some employees. On August 1, 2002, DPOR transferred the grievant to another field investigator position, that of Regulatory Boards Investigator; however, she remained in her previous role of Compliance/Safety Officer III. Although she would continue to work out of her home in Chesterfield, she was assigned cases in the northern Virginia region. DPOR continued to provide a state vehicle for the grievant's business use and to compensate her for travel time from her home to the investigation sites. Significantly, the northern Virginia "region" and the northern Virginia "differential area" are not synonymous; the "region" encompasses many localities outside the differential area.² Additionally, a male Regulatory Boards field investigator who had been assigned the northern Virginia area

¹ Since initiating this grievance, the grievant submitted her resignation and now works for another state agency. This Department has long held that an employee may continue a timely filed grievance even though she may no longer be employed by the agency with which she initiated her grievance.

² The northern Virginia region goes as far west as Winchester continuing down to Harrisonburg and in the east includes the counties of Spotsylvania and King George. The actual northern Virginia differential pay area consists of the counties of Fairfax, Arlington, Prince William and Loudon, and the cities of Alexandria, Falls Church, Manassas and Manassas Park.

was transferred to Fair Housing, while a male Regulatory Boards in-house investigator moved to the position of field investigator.

Upon her transfer, the grievant inquired about receiving the northern Virginia differential. On August 6, 2002, her supervisor informed her she was not eligible for the differential. The grievant claims she was advised that she was not entitled to the differential because she did not live in the northern Virginia differential area. The grievant maintains she then contacted the Department of Human Resource Management (DHRM) and was informed that entitlement to the differential is based upon where the employee works. Subsequently, on August 26, 2002, the grievant met with the agency's Human Resource Director, who agreed to research the matter further. During this meeting, they also discussed the possibility of a 10% in-band adjustment (IBA) based upon her salary in comparison to that of other DPOR investigators.

On September 5, 2002, management was still investigating the differential issue, and the grievant requested a waiver of the 30 calendar day time period for initiating a grievance, and the agency agreed. After reviewing the matter, the agency decided not to grant her request for an in-band adjustment, (IBA) and presented the grievant with three options, none which she found satisfactory. The Human Resource Director states that she has the authority to recommend an IBA, but approval must come from both the Director and the Deputy Director for Administration and Finance. During the time the grievant was discussing her IBA request with management (August-October 2002), the agency did not grant any IBAs because of the uncertainty regarding budget cuts. The grievant initiated her grievance on November 7, 2002.

DISCUSSION

By statute and under the grievance procedure,³ complaints relating solely to the revision of wages, salaries, and position classifications and the transfer and assignment of employees "shall not proceed to a hearing."⁴ Accordingly, challenges to such decisions do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether in compensating her, policy was misapplied, or discrimination, retaliation or discipline improperly influenced the decision.⁵ In this case, the grievant contends that management misapplied or unfairly applied policy by failing to follow established pay practices and to pay her comparably to other employees when the agency transferred her to the northern Virginia area. Additionally, the grievant alleges that DPOR discriminated against her on the basis of sex. These issues are discussed in turn below.

Misapplication and Unfair Application of Policy

³ Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(C).

⁵ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1, pages 10-11.

For a claim of policy misapplication to qualify for a hearing, there must be sufficient evidence of a violation of a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy.

Issue I: Options Offered by Management Concerning Payment of Differential, Commute Time and Mileage

The grievant first alleges that the agency misapplied or unfairly applied compensation policy by offering her the following options after she requested the northern Virginia differential: (1) continue to commute to her cases in the northern Virginia differential area in her state car and on the agency's time, but with no payment of a differential; (2) receive the northern Virginia differential, but house the state car in one of the northern Virginia differential areas, driving her personal car with no mileage reimbursement to get her state car and no credit for commute time to pick up the state car or to return home; or (3) transfer back to her prior position in Fair Housing.

The General Assembly has recognized that the Commonwealth's system of personnel administration, including its classification and compensation system is to be "based on merit principles and objective methods of appointment and other incidents of state employment."⁶ With regard to compensation, the Department of Human Resource Management's (DHRM) compensation procedures allow the payment of market-based differentials and supplements in addition to a base salary.⁷ Differentials are base pay adjustments to make salaries more competitive with the market and may be applied to Roles, Salary Reference (or SOC) Titles, Work Titles, Pay Areas or based on geographic location.⁸ In the case of Pay Areas, northern Virginia is an area where market conditions have consistently required the payment of differentials and are based on the cost of competing for employees to perform specific kinds of work in the northern Virginia area.⁹ Significantly, this differential applies only to those employees in *positions* located in the area defined as northern Virginia.¹⁰

As evidence of her entitlement to the northern Virginia differential, the grievant states management erroneously determined her eligibility for the differential based upon where she resides, rather than where she works. She also notes that several other investigators assigned to the northern Virginia region receive the differential, and additionally receive pay for commute time and mileage. Further, the grievant claims the agency paid the differential to investigators under similar circumstances in the 1980s.

⁶ Va. Code § 2.2-2900.

⁷ See DHRM *Human Resource Management Manual*, Chapter 9, "Differentials and Supplements."

⁸ *Id.* at 1; see also DHRM Policy No. 3.05, page 18 of 21, "Differentials" (effective September 25, 2000; revised March 1, 2001).

⁹ DHRM *Human Resource Management Manual*, Chapter 9, Differentials and Supplements, page 2.

¹⁰ *Id.* (emphasis added).

Based upon state policy, the determinative factor for whether an employee is entitled to the northern Virginia differential is the location of the *position*, not where the employee resides or works.¹¹ The location assignment of the grievant's *position* was Richmond. While some statements by DPOR suggest there may be some confusion regarding how entitlement to the northern Virginia differential is determined,¹² the agency's decision to deny the grievant's request for differential pay was correct based upon state policy. Additionally, notwithstanding statements by other agency personnel, DPOR's Director (the third-step respondent) did state that the grievant was not eligible to receive the differential because the location assignment of the grievant's *position* was Richmond.¹³ Likewise, all the investigators currently receiving the northern Virginia differential are in *positions* assigned to the northern Virginia region.

Additionally, no state or agency policy provision addresses how management should determine where a position is to be located; thus, such a decision is at the discretion of the agency and is valid as long as it has a rational basis. In this case, the agency appears to have a reasonable basis for locating the grievant's position in Richmond -- efficiency. Because of the distinction between the northern Virginia "region" and the northern Virginia differential area,¹⁴ an investigator's assignment to the northern Virginia region does not mean the investigator will be covering cases only (or even primarily) located in the differential area. At the time of the grievant's transfer, DPOR was attempting to maximize the cost efficiency of the agency (investigators are paid for mileage and commute time to and from cases) and to make the most effective use of personnel. DPOR planned to first assign the Richmond investigators cases in the northern Virginia region, but outside the differential area, as the other two northern Virginia field investigators lived within the differential areas of Manassas Park and Fairfax and, thus, would log less travel time if assigned cases in closer proximity to their residences.¹⁵ When the division workload shifts, however, investigators are assigned cases in any region in order to carry out the agency's mission. For example, investigators assigned to the northern Virginia region were recently reassigned to cover cases in

¹¹ See DHRM *Human Resource Management Manual*, Chapter 9, Differentials and Supplements, page 2.

¹² The grievant states her supervisor advised she was not eligible for the differential because she *resided* in Richmond, rather than northern Virginia. Additionally, during this Department's investigation for this ruling, the agency stated that, since 1994, any investigator hired that *lived* in the northern Virginia differential area was given the differential. This statement by the agency may merely be a matter of semantics as all the Regulatory Board field investigators receiving the differential also live in the northern Virginia differential area and work out of their homes; their *positions* happen to be located where they live. During the investigation, DPOR also stated that there is no need to use the northern Virginia location code on Employee Work Profiles because there is no longer an office in northern Virginia. However, because payment of the northern Virginia differential is predicated upon where the *position* is located, the location assignment of future positions in the differential area should be northern Virginia in order to entitle an employee to differential pay.

¹³ The grievant's Employee Work Profile indicates that the location of her position is 760/Richmond.

¹⁴ See *supra*, note 2.

¹⁵ In fact, DPOR has been so concerned about budgetary constraints and the need to reduce mileage and commute costs that the agency now has a new policy regarding the hiring of investigators. Any openings for field investigators will be filled by an individual who *resides in the specified area*. A Tidewater position containing that restriction was advertised on February 11, 2003.

Tidewater due to a staffing shortage.¹⁶ Likewise, when there was a large volume of cases in northern Virginia, Tidewater investigators were assigned those cases without payment of the differential.

Furthermore, the agency's decision to locate the grievant's position in Richmond does not appear inconsistent with other agency decisions. The grievant was not the only field Regulatory Boards investigator assigned to the northern Virginia region whose *position* was located in Richmond. Simultaneous to the grievant's transfer, a male in-house investigator was also assigned to conduct field investigations in northern Virginia, also without the northern Virginia differential. Additionally, the investigators cited by the grievant as having received the northern Virginia differential in the 1980s do not appear to be similarly-situated to the grievant. These investigators worked out of the agency's satellite office located in the northern Virginia differential area,¹⁷ whereas the grievant's position was located in Richmond, and she worked out of her home office. Moreover, even if the investigators were similarly-situated to the grievant, management's actions with respect to these employees are not sufficiently proximate in time to serve as precedent for the grievant's situation.

In sum, the evidence presented does not indicate that management misapplied or unfairly applied policy by presenting the grievant with the three options listed above. The grievant's position was located in Richmond and such determination by the agency appears to have had a rational basis. Thus, according to state policy, she was not entitled to the northern Virginia differential. Additionally, while the grievant disputed management's offering the option of receiving the differential, but with additional restrictions not placed upon those employees whose positions are located in northern Virginia, DPOR was not required by policy to provide *any* options to the grievant.

Issue II: Management's Denial of Grievant's Request For an In-Band Adjustment (IBA)

The grievant also contends DPOR misapplied or unfairly applied policy when management denied her request for an in-band adjustment (IBA) because her salary was extremely low in comparison to other field investigators.¹⁸ DHRM Policy No. 3.05 defines an IBA as a non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a pay band for (1) a change in duties, (2) professional/skill development, (3) retention and (4) internal

¹⁶ One Tidewater investigator had resigned and another had retired, leaving the area short-staffed.

¹⁷ All satellite offices were closed in 1994, and field investigators began to work from their homes.

¹⁸ Because the grievant did not include a request for an in-band adjustment in the relief section of the Form A, management did not respond to the issue during the management resolution steps. However, while not mentioned in the relief section, the grievant lists as an issue, "Misapplication/Unfair application of policy related to the Northern Virginia differential *and in pay*" (emphasis added). The grievant states that the "*and in pay*" language refers to payment for commute time and mileage, but also to comparable pay and the in-band adjustment. The facts section of the Form A does discuss with specificity her concern that she was not granted an in-band adjustment and is not paid comparably to other agency investigators. Therefore, she provided sufficient notice to the agency that she was raising the issue of management's failure to grant her request for an in-band adjustment.

alignment.¹⁹ With respect to the issue of internal alignment, the policy indicates that “[a]n 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.”²⁰ Additionally, DPOR’s Salary Administration Plan indicates the utilization of a Pay Action Committee (PAC) at the executive team level to suggest IBAs.²¹ Further, the PAC reviews pay actions quarterly, but such actions may only occur if the agency has sufficient funding to cover the increased salary costs.²²

In this case, the grievant has failed to provide sufficient evidence of a violation of a mandatory policy provision to establish a misapplication of policy by DPOR. State policy indicates that an IBA *may be granted* to an employee;²³ thus, such a decision by management is discretionary rather than mandatory. Nor were management’s actions, in their totality, so unfair as to amount to a disregard of the intent of the applicable policy. Before granting an IBA to an employee, DPOR’s internal policy requires the agency to have the necessary funding to pay the increased salary costs. Here, the grievant first requested an IBA in August, but because of the uncertainty regarding budget cuts, DPOR was unable to grant any IBAs from August 2002 - October 2002. Subsequently, on February 25, 2003, when all budget issues were resolved, the four lowest paid Compliance/Safety Officer IIIs were granted IBAs (which would have included the grievant had she not resigned previously).²⁴ Therefore, if the grievant had remained with DPOR, it appears that her request for an IBA would have been considered when funding became available.²⁵

¹⁹ DHRM Policy No. 3.05, Definitions, page 2 of 21 (effective September 25, 2000, revised March 1, 2001).

²⁰ DHRM Policy No. 3.05, In-Band Adjustment, page 11 of 21 (effective September, 25, 2000, revised March 1, 2001.)

²¹ DPOR Salary Administration Plan, Attachment 1, “Salary Administration Philosophy,” page 3.

²² *Id.*

²³ DHRM Policy No. 3.05, In-Band Adjustment, page 11 of 21 (effective September, 25, 2000, revised March 1, 2001)(emphasis added).

²⁴ The grievant’s last day of work at DPOR was December 16, 2002.

²⁵ During the investigation for this ruling, management stated that DPOR will not grant an IBA if a grievance is active in order to avoid the appearance of bribing an employee to withdraw a grievance. This Department understands management’s concern regarding appearances, however, by statute, once a grievant initiates a timely grievance, management shall review the grievance and respond to the merits thereof. Additionally, each level of management review shall have the authority to provide the employee with a remedy. *See* Va. Code § 2.2-3003(D). Thus, the mandatory statutory language (“shall”) requires each level of management review specified under the grievance procedure rules to respond to the merits of the grievance, which *response* in some instances may be the granting of requested relief when warranted. Furthermore, management should note that when granting relief to the grievant, such relief does not have to be premised upon the closure of the grievance.

Sex Discrimination

Grievances that may be qualified for a hearing include those that allege discrimination on the basis of sex.²⁶ As a female, the grievant is a member of a protected class. To qualify her grievance for a hearing, there must be more than a mere allegation of discrimination -- there must be facts that raise a sufficient question as to whether the grievant suffered an adverse employment action as a result of discrimination based on her sex. If the agency provides a nondiscriminatory business reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's professed business reason is a pretext or excuse for discrimination.²⁷

As evidence of discrimination, the grievant cites the agency's alleged failure to compensate her in the same manner as a male investigator. Specifically, she claims a male investigator was paid the northern Virginia differential, compensated for mileage, and paid for his travel time, while management refused to pay her similarly and presented her with options requiring her to choose between the northern Virginia differential and paid travel time and mileage. As discussed above, however, the agency's determination that the grievant was not entitled to receive the northern Virginia differential was in accord with state policy. Unlike the grievant, this male investigator's position was located within the northern Virginia differential area. Additionally, a male field Regulatory Boards investigator assigned to the northern Virginia region whose position was located in Richmond also did not receive the differential.²⁸ Therefore, the disparity in treatment was based upon a legitimate business reason (following the mandates of state policy), rather than the fact that the grievant is female. Furthermore, the grievant has presented no evidence to suggest that the agency's stated reason for not paying her the differential was a mere pretext for discrimination. Nor has this Department's investigation revealed evidence of such.

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 this determination to the circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request

²⁶ Va. Code § 2.2-3004(A)(iii); *Grievance Procedure Manual* § 4.1(b), page 10.

²⁷ *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)).

²⁸ During the investigation for this ruling, the grievant suggested that this employee did not receive the differential because he never requested it or because he did not work Fair Housing cases as did the grievant. However, the apparent basis for his not receiving the differential was because, like the grievant, his position was located in Richmond rather than northern Virginia.

the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

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