

Issue: Qualification/issue of in-band upward adjustment; Ruling Date: March 15, 2005;  
Ruling #2005-946; Agency: Department of Mental Health, Mental Retardation and  
Substance Abuse Services; Outcome: not qualified

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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation,  
and Substance Abuse Services  
Ruling Number 2005-946  
March 15, 2005

The grievant has requested a qualification ruling on whether her December 15, 2004 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (the agency), qualifies for hearing. The grievant claims that like all the other Licensed Practical Nurses (LPNs) at the facility where she works, she too should have received an upward in-band adjustment to her pay. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a LPN Case Manager. She is the only person who works in such capacity at the facility where she is employed.

The agency asserts that because of market pressures, it provided in-band pay increases to all LPNs at the facility where the grievant works, except the grievant. According to the agency, the other LPNs were primarily involved with direct care to patients, work described by the agency as “heavy” care. In contrast, the grievant’s primary responsibilities focus on discharge planning rather than direct care. In addition, the agency asserts that the regular days (Monday through Friday) and hours (8:30 a.m. to 5:00 p.m.) of the grievant’s position make it a very desirable position, which the agency would have no trouble filling if vacated. Thus, while agency management asserts that it highly values the grievant’s work, it explained, during the course of the investigation for this ruling, that it simply cannot warrant allocating the scare resource of funds to a position that is not prone to market based salary pressures.

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, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the establishment or revision of compensation generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether

---

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

discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>2</sup>

The grievant has not asserted that her alleged differential treatment is discriminatory, retaliatory or disciplinary. Rather it appears that she believes that it was unfair for management to single her out as the only LPN to not receive an in-band pay increase. Thus, while not specifically stated on her Grievance Form A, a fair reading of the grievance makes out a claim that the grievant's current duties warrant an in-band pay increase under state and agency policy. For a misapplication or unfair application of policy claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy.

#### *Misapplication of Compensation Policy*

The primary policy implicated in this grievance is Department of Human Resource Management (DHRM) Policy 3.05, which, pursuant to the Commonwealth's new compensation plan, requires all agencies, among other things, to develop an agency Salary Administration Plan (SAP).<sup>3</sup> A SAP outlines how the agency will implement the Commonwealth's compensation management system, and is "the foundation for ensuring consistent application of pay decisions."<sup>4</sup> The agency has complied with this requirement by developing a SAP to address its pay practices. The facility where the grievant is employed also has its own SAP. Importantly, the facility's SAP allows for an assessment of each employee's performance and duties and provides the agency with the flexibility to adjust salaries when justified. Specifically, facility personnel rely upon the following factors to determine appropriate pay practices: (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 license; (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>5</sup> These 13 factors mirror those listed under DHRM Policy 3.05 as appropriate for consideration when the agency contemplates a pay practice salary action such as the one at issue here, an in-band pay adjustment. With these factors in mind, the agency *may* approve a salary adjustment on a temporary or permanent basis, including awarding an in-band adjustment to deserving employees. Under Commonwealth and facility policy, management has broad discretion as to when it utilizes in-band adjustments. Among the other reasons that the

---

<sup>2</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c).

<sup>3</sup> See generally, DHRM Policy 3.05 (effective 9/25/00, revised 3/01/01). The SAP "addresses the agency's internal 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 the communication plan." DHRM Policy 3.05, page 1 of 21.

<sup>4</sup> DHRM Policy 3.05, page 1 of 21.

<sup>5</sup> See [Facility] Salary Administration Plan, dated June 25, 2004, page 3.

agency may award an in-band adjustments is “to retain key staff in roles under market pressure.”<sup>6</sup>

Here, it does not appear as though the agency misapplied any *mandatory* state or agency policy provision by not providing the grievant with a salary adjustment. Likewise, there appears to be no evidence of an unfair application of policy in this case. The agency appears to have considered the 13 factors when it made its decisions regarding the granting (and denial) of pay increases to its LPNs. For instance, the decision to award (and withhold) in-band adjustments was based in large part on agency need (factor 1) and market pressures (factor 8). It is undisputed that the agency requires nurses to care for its wards. Furthermore, after reviewing turnover and vacancy rates, the agency concluded that to remain competitive and improve retention rates, it needed to increase the pay for direct care nurses. Thus, it awarded in-band adjustments to its Registered Nurses (RN) 1s and RN 2s but denied in-band adjustments to its RN Manager 1s and Clinical Specialist (RN 3s) because the latter positions were easier to fill than the former. Similarly, it provided increases to direct care LPNs but not to the grievant’s case manager position because, for reasons set forth below, the agency considers her position desirable and one that could be readily filled if vacated.

One of the primary reasons that the agency views the grievant’s position desirable is because her work schedule is more attractive than that of the majority of the direct care providers. The grievant works regular business hours (8:30 a.m. to 5:00 p.m.), Monday through Friday, whereas the vast majority of the direct care LPNs work all shifts (evening and weekends). Given the desirability of the grievant’s daylight, no-weekend schedule, the agency does not consider the grievant’s position subject to the market pressures of the vast majority of the direct care positions.<sup>7</sup>

The agency also considered the job duties of all LPNs (factor 2). It provided the in-band adjustment to those who primarily provided direct care and elected to withhold an increase for the sole employee who works as a case manager, the grievant. The agency describes the work performed by the direct care LPNs at the facility as “heavy” care. In contrast, it notes that the primary duty performed by the grievant is discharge planning. While the agency concedes that the grievant is sometimes called upon to deliver medications to patients, the majority of the work she performs does not entail direct care. The agency also notes that when the grievant is required to provide direct care, she generally does so to individuals who have been released from the facility.

---

<sup>6</sup> See [Facility] Salary Administration Plan, page 6.

<sup>7</sup> The grievant notes that two other LPNs who work as central supply nurses also work regular business hours. The agency concedes that these nurses work the more desirable regular day shift but asserts that they spend more time providing direct care and notes that the grievant is generally providing care to patients who have been released whereas the central supply nurses typically provide care to individuals who have not been released—that is patients who are essentially more ill and therefore can pose a somewhat greater treatment challenge.

Finally, budgetary constraints (factor 11) weighed heavily in the agency's determination not to provide the grievant with an in-band adjustment. The agency appears to value the services provided by the grievant. However, given the budgetary pressures faced by the agency,<sup>8</sup> management made the difficult decision to not award the grievant a pay increase given that it believes her position is not one facing market pressures. Therefore, for all the reasons set forth above, this grievance is not qualified for hearing.

#### 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 the qualification determination to the circuit court, the grievant 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 the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

---

Claudia T. Farr  
Director

---

William G. Anderson, Jr.  
EDR Consultant, Sr.

---

<sup>8</sup> For example, the facility's Human Resources Manager noted that because of budget constraints the human resource office staff had been reduced in numbers in order to free up funds for direct care positions.