Issue: Qualification/misapplication or unfair application of policy re: in-band adjustment/salary study; Compliance/respondent steps, 5 day rule; Ruling Date: June 27, 2005; Ruling #'s 2005-947, 2005-1007; Agency: Department of Social Services; Outcome: not qualified, grievant waived rights to claim of non-compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2005-947 and 2005-1007
June 27, 2005

The grievant has requested a ruling on whether his October 19, 2004 (Grievance #1) and December 7, 2004 (Grievance #2) grievances with the Department of Social Services (DSS or the agency) qualify for a hearing. In Grievance #1, the grievant asserts that management misapplied state and agency policy and acted in a discriminatory[1] and arbitrary manner by denying him an in-band adjustment. In addition, Grievance #1 challenges a February 2004 Quality Assurance salary study by the DSS Division of Human Resource Management (DSSDHRM) (the salary study) as contrary to policy.

In Grievance #2, the grievant asserts that (1) the agency misapplied policy by failing to upgrade his classification and salary when his work duties were changed; and (2) the February 2004 Quality Assurance Study done by DSSDHRM to determine whether salary adjustments were necessary for Quality Assurance employees was arbitrary and contrary to policy. Additionally, in Grievance #2, the grievant asserts that the agency has failed to comply with the grievance procedure. For the reasons stated below, these grievances do not qualify for a hearing.

FACTS

The grievant is employed as a Quality Assurance (QA) Analyst with DSS. In 2003, the QA Operations Director convened a workgroup of QA employees and others to review the Employee Work Profile (EWP) of the QA Reviewer position. The goal of the workgroup was to propose revisions to the QA Reviewer EWP so that the language used to describe the current responsibilities of the position was clear. In addition to revising the EWP, the workgroup recommended changing the working title of the QA Reviewer position to QA Analyst. With the input of this same workgroup, a protocol standardizing performance expectations for QA Analysts across the state was also developed. In January 2004, the revised EWP was presented to all QA Analysts for review and comment. The final version of the EWP was presented to all QA Analysts on February

[1] The grievance as initiated does not allege discrimination, but rather after receiving the first step response, the grievant, on Form A, requests to bypass the second step-respondent citing discrimination as the basis for his request.

24, 2004. The new protocol standardizing performance expectations for QA Analysts took effect in March 2004.

In February 2004, the DSSDHRM initiated a classification and compensation study (the salary study) of all QA positions within the grievant's division at DSS. DSSDHRM used the revised QA Analyst EWP and the March 2004 performance expectations protocol when conducting its study of QA Analyst positions. Based on its review of these documents and other relevant factors, DSS DHRM concluded that QA Analysts are properly classified as Program Administration Specialists I and recommended no classification change to the QA Analyst position.

With regard to salary increases, DSSDHRM concluded that awarding salary increases to the less senior employees to bring them up to the same salary level as the more senior employees would not be prudent. Accordingly, DSSDHRM determined that to best assess whether salary adjustments are appropriate, the employees would need to be grouped by their role and years of total relevant experience. The study separated QA Analysts into four groups: (1) those with 9.00 to 15.99 years of relevant experience; (2) those with 16.00 to 20.99 years of relevant experience; (3) those with 21.00 to 25.99 years of relevant experience; and (4) those with 26.00 to 31.00 years of relevant experience. For instance, at the time of the study, the grievant had 26 years of total relevant experience and as such, he was grouped with other QA Analysts with 26.00 to 31.00 years of total relevant experience.

After grouping the employees by role and relevant experience, DSSDHRM averaged the salaries of those employees within each group. Employees whose salary far exceeded the average for their group were deemed "outliers" and were not included in the salary average calculation. For instance, the average salary for the grievant's group is $42,188. All but one of the employees in the grievant's group have salaries just below or just above the calculated average. That one "outlier" in the group has a salary of $49,855, which is $7,197 above the next highest salary of the group (i.e., $42,658). Accordingly, DSSDHRM removed this employee from the average salary calculation. DSSDHRM's ultimate goal, if feasible and appropriate, was to adjust upward the salaries of those employees compensated below the average salary for their group. The grievant did not receive an upward adjustment to his salary because his salary slightly exceeded the average for his group.

Subsequently, on September 10, 2004, the grievant requested an in-band salary adjustment citing (1) internal salary alignment; (2) change in responsibilities and requirements; and (3) new training expertise and duties as the basis for deserving an in-band adjustment. In support of his request, the grievant offered the following: (1) his current salary is 38.4% below the top rate of pay in his pay band; (2) the change in his duties and job description in 2004 warrant an in-band adjustment based on a change in responsibilities; and (3) his performance in testing and training staff on the new automated system at his field office and subsequent Acknowledgment of Extraordinary

Contribution on August 30, 2004 for his performance in this capacity entitle him to an in-band adjustment based on new training expertise and duties.

The agency denied the grievant's request for an in-band adjustment for the following reasons: (1) the DSSDHRM salary study determined that the grievant's salary is properly aligned with other QA Analysts with similar years of experience; (2) the new job duties that took effect in March 2004 apply to all QA Analysts, not just the grievant; and (3) each field office has a designated lead on the new automated system thus negating any justification for an in-band salary adjustment based on new training expertise and duties. In addition, the agency claims that the job description revisions in March 2004 simply "updated wording and provided a more clear description of the work that Analysts were already doing" and the grievant's work on the new automated system was a special assignment that was not at a level of work above his current pay band.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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 discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[3]

Grievance #1

In Grievance #1, the grievant asserts that management misapplied state and agency policy and acted in a discriminatory and arbitrary manner by denying him an in-band adjustment.

Misapplication of Policy/Arbitrary and Capricious

For a misapplication of policy claim 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. The primary policy implicated in both Grievance #1 and Grievance #2 is Department of Human Resource Management Policy 3.05, which, pursuant to the Commonwealth's compensation plan, requires all agencies, among other things, to develop an agency Salary Administration Plan (SAP).[4] An SAP

[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c).
[4] *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.

outlines how the agency will implement the Commonwealth's compensation management system, and is "the foundation for ensuring consistent application of pay decisions."[5] The agency has complied with this requirement by developing an agency SAP, which describes the process by which in-band pay adjustments may be awarded to deserving employees.

Under DSS's SAP, in-band adjustments must be initiated by an employee's supervisor/manager and may be authorized for the following reasons: (1) permanent change in level of duties; (2) application of new KSA's, competencies; (3) retention; or (4) internal alignment.[6] The in-band adjustment must not exceed 10% per fiscal year and requires the approval of the DSS Commissioner.[7] In assessing whether to grant an in-band adjustment, the following factors must be considered: (1) current salary; (2) duties and responsibilities; (3) training, certification, license, etc.; (4) salary reference data; (5) long term impact; (6) work experience and education; (7) knowledge, skills, abilities and competencies; (8) market availability; (9) total compensation; (10) agency business needs; (11) internal salary alignment; (12) performance; (13) budget implications; and (14) reference checks if applicable.[8] With the exception of factor #14, the remaining 13 factors mirror those listed under Department of Human Resource Management 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 agency policy, management has broad discretion as to when it utilizes in-band adjustments and this Department has long held that a hearing officer may not simply substitute his or her judgment for that of management regarding such decisions.

In Grievance #1, 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. Specifically, the grievant claims that the DSSDHRM salary study relied upon by the agency in denying the grievant's September 10th request was contrary to policy in that DSS failed to consider all the required factors in assessing which employees would be granted an in-band salary adjustment. In addition to current salary, experience, and proximity of one's salary compared to others similarly situated, it appears that DSSDHRM's salary study considered the following factors in making its in-band salary adjustment recommendations: (1) the employees' knowledge, skills, abilities and competencies;[9] (2) duties and responsibilities of the employee;[10] (3) employee

[5] DHRM Policy 3.05, page 1 of 21.
[6] *See* Virginia Department of Social Services Salary Administration Plan, Effective September 25, 2000.
[7] *Id.*
[8] *Id.*
[9] *See* VDSS Quality Assurance Study, June 30, 2004, page 13.
[10] *Id. See also* VDSS Quality Assurance Study, June 30, 2004, page 15-16.

performance;[11] (4) employee training and education;[12] (5) agency budget implications;[13] (6) market availability;[14] (7) salary reference data;[15] (8) long-term impact;[16] and (9) agency business need.[17] Accordingly, the agency appears to have considered the 13 factors when it made its decision regarding the granting (and denial) of pay increases to QA employees. Likewise, by relying upon the salary study,[18] as well as considering other individual factors specific to the grievant (i.e., the Acknowledgment of Extraordinary Contribution), the agency appears to have adequately considered the required enumerated factors in determining whether to grant the grievant's September 10th request for an in-band adjustment.

In further support of his claim, the grievant asserts that the denial of his request for an in-band adjustment contradicts the Acknowledgement of Extraordinary Contribution he received for "exceeding the expectations of his core responsibilities" and for the "difficult" work he performed in the development and testing phases of the new automated system. While an Acknowledgement of Extraordinary Contribution and its contents are factors to consider in determining whether an in-band adjustment is warranted, the receipt of such an acknowledgment does not necessarily entitle an employee to a salary adjustment.

Additionally, the grievant claims that although the change in duties applies to more than one employee, Department of Human Resource Management policy does not preclude him from receiving an in-band adjustment based on a change in duties. He also asserts that his work in the development and testing phase of the new automated system entitle him to an in-band adjustment based on a application of new knowledge, skills and abilities. Policy states that an in-band adjustment for a change in duties may be appropriate when an employee has assumed "new higher level duties and responsibilities that are critical to the operations of the agency."[19] In this case, the agency asserts and has presented evidence that the changes to the QA Analyst position description and EWP were not "new higher level duties and responsibilities," but revisions and clarification to the job already being done by QA Analysts. However, even if this Department were to assume for purposes of this ruling that the changes to the QA Analyst position description constituted "new higher level duties and responsibilities," such changes do not automatically entitle an employee to a salary adjustment. Moreover, to grant a salary adjustment to one employee where several other similarly situated employees experienced a change in duties as well could constitute an unfair application of policy.

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[11] *Id. See also* VDSS Quality Assurance Study, June 30, 2004, page 16.
[12] *See* VDSS Quality Assurance Study, June 30, 2004, page 13 and pages 18-22.
[13] *See* VDSS QA chart of Employees Recommended for In-Band Adjustment.
[14] *See* VDSS Quality Assurance Study, June 30, 2004, page 14-15.
[15] *Id.*
[16] *See* VDSS Quality Assurance Study, June 30, 2004, page 17.
[17] *See* VDSS Quality Assurance Study, June 30, 2004, page 1.
[18] Given the close proximity in time between the June 2004 salary study and the grievant's September 10, 2004 request for an in-band adjustment, it appears appropriate for the agency to rely upon the findings of the salary study in making its determination on the grievant's subsequent salary adjustment request.
[19] *See* DHRM Policy 3.05.

Additionally, it appears that some of the duties relied upon by the grievant to justify an in-band adjustment were temporary, were not higher level responsibilities, and were merely an increase in volume of his existing duties.[20]

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race, age and/or gender.[21] To qualify such a grievance for hearing, 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 a protected status, in other words, that because of the grievant's race, age and/or gender he was treated differently than other "similarly-situated" employees. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, 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.[22]

In Grievance #1, the grievant alleges that he was the only aged, white male that did not receive a raise as part of the DSSDHRM salary study. Assuming without deciding that the grievant's assertion is accurate, the agency has presented a legitimate, nondiscriminatory reason for not adjusting upward the grievant's salary (i.e., the grievant's current salary meets or exceeds the average salary for other similarly-situated employees) and the grievant has failed to present any evidence that would raise a sufficient question that the agency's stated business reason is an excuse for discrimination.

Grievance #2

Qualification

In Grievance #2, the grievant asserts that the agency (1) misapplied policy by failing to upgrade his classification and salary when his work duties were changed; and (2) the February 2004 Quality Assurance Study done by DSSDHRM to determine whether salary adjustments were necessary for Quality Assurance employees was arbitrary and contrary to policy.

Classification

[20] For instance, in support of his claim that he is entitled to a salary increase based on a change in duties, the grievance references the additional case assignment duties he took on as a result of the termination of another QA employee.
[21] *See* Grievance Procedure Manual § 4.1(b).
[22] 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)).

By statute and under the grievance procedure, complaints relating solely to the establishment and revision of position classifications "shall not proceed to hearing"[23] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy. In this case, the grievant claims that his change in duties and title warrant an upgrade in his classification and the agency's failure to do so is a misapplication of policy.

For the grievant's 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. The General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.[24] In addition, the Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."[25]

The above statutes evince a policy that would require state agencies to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. Accordingly, this Department has long held that a hearing officer may not substitute his or her judgment for that of management regarding the correct classification of a position.[26] Thus, a grievance that challenges the substance of an agency's assessment of a position's job duties does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions within the agency or that the assessment was otherwise arbitrary or capricious.[27]

In this case, it does not appear as though the agency has violated any mandatory state or agency policy in failing to upgrade the grievant's classification when his duties and work title changed. Likewise, there appears to be no evidence of an unfair application of policy or that the agency's assessment of the grievant's classification was otherwise arbitrary or capricious. Specifically, in determining whether the QA Analysts were properly classified, DHRM reviewed the duties and associated knowledge, skills and abilities of the QA Analyst position and compared them to other career group descriptions, class specifications, and EWP's.

Salary Study

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[23] Va. Code § 2.2-3004(C).
[24] Va. Code § 2.2-2900.
[25] Va. Code § 2.2-103(B)(1).
[26] *See* EDR Ruling No. 2001-062 (July 18, 2001).
[27] *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made in disregard of the facts or without a reasoned basis.

In support of his claim that the DSSDHRM salary study is contrary to policy, the grievant asserts: (1) the salary study inappropriately failed to consider salaries of comparable QA positions in surrounding states; (2) the salary study arbitrarily placed employees into groups based on total relevant experience; (3) the salary study failed to consider the required factors in determining who would receive an in-band adjustment thus misapplying the compensation policy; and (4) the salary study arbitrarily excluded "outliers" from the salary averages calculation.

Again, there is no evidence that the agency misapplied or unfairly applied any state or agency policy by relying upon the salary study. Policy does not require or even recommend that an agency consider salaries of those in comparable positions in other states in determining whether to grant an in-band increase to Commonwealth of Virginia employees. On the contrary, state policy expressly declares that salary reference data is to be "extracted from available surveys that indicate market pricing for various jobs in the *Commonwealth*."[28]

Additionally, the agency's method of grouping employees based on total relevant experience and excluding "outliers" from the average salary calculation does not appear to violate any mandatory policy nor amount to an unfair application of policy in this case.[29] Finally, the salary study provides significant evidence that the agency carefully reviewed the facts and had a reasoned basis for its method of determining which employees were entitled to an in-band salary adjustment (i.e., to maintain fairness by not "awarding salary increases to bring the less senior employees to the same salary level as those senior employees with the most tenure and experience"). Accordingly, this Department cannot conclude that the agency's actions were arbitrary or capricious.

Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[30] That process assures that the parties first communicate with each other about the purported noncompliance and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency is out of compliance (as alleged here), written notice of noncompliance must be made to the

[28] *See* Department of Human Resource Management Policy 3.05 (emphasis added).
[29] It should be noted that the grievant's group was not the only group in which "outliers" were removed from the average salary calculation. Specifically, an "outlier" was excluded from the group comprised of employees with 16.00 to 20.99 years of relevant experience. Further, had the agency not grouped employees based on total relevant experience and included the "outliers" in the average salary calculation, the outcome for the grievant would have most likely been the same, as the average salary for all QA Analysts is approximately $38,270, well below the grievant's current salary of $42,658.
[30] *See Grievance Procedure Manual* § 6.

agency head.[31] If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department.[32]

In addition, the grievance procedure requires that all claims of party noncompliance be raised immediately.[33] Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[34] Finally, this Department has long held that it is incumbent upon each employee to know his responsibilities under the grievance procedure. Neither a lack of knowledge about the grievance procedure or its requirements, nor reliance upon general statements made by agency management or human resources will relieve the grievant of the obligation to raise a noncompliance issue immediately, as provided in the grievance procedure, upon becoming aware of a possible procedural violation.

With respect to Grievance #2, the grievant raises the following compliance issues: (1) at the third management resolution step, the agency failed to respond within 5 workdays and intentionally removed supporting documentation from his grievance without verifying that the agency head (who was also the third resolution step-respondent in this case) had the opportunity to view all supporting documentation in making his decision;[35] and (2) the agency failed to respond to his grievance within 5 workdays at the qualification for hearing step.

In this case, although the grievant was aware of the agency's failure to respond within the mandated 5 workdays at the third-step, he continued to advance his grievance to the qualification phase without raising the issue of noncompliance with the agency head or with this Department until after he had received the agency's qualification decision. Likewise, although the grievant did raise the supporting documentation issue with the agency at the third-step, he elected to advance his grievance to the qualification phase prior to receiving a response from th([th)-5(a)7(t)-4

determination and requesting a qualification determination from this Department. As such, the grievant has waived his right to challenge the agency's alleged noncompliance at the qualification for hearing step.

This Department's rulings on matters of procedural compliance are final and nonappealable. [36]

APPEAL RIGHTS AND OTHER INFORMATION

As outlined above, this Department concludes that the grievant's October 19, 2004 and December 7, 2004 grievances do not qualify for hearing. Additionally, the grievant has waived his right to challenge the agency's alleged noncompliance at the third management resolution and qualification for hearing steps.

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 determinations to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify the grievances, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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[36] Va. Code § 2.2-1001 (5).