Issue: Qualification/Retaliation/Other protected right; compensation-in-band bonus; Ruling Date: September 29, 2005; Ruling #2006-1094; Agency: Virginia Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2006-1094
September 29, 2005

The grievant requests a qualification ruling in her May 9, 2005 grievance with the Department of Transportation (VDOT or the agency). In her May 9th grievance, the grievant claims that the agency's denial of an adjustment to her salary was (1) a misapplication and unfair application of policy;[1] and (2) retaliatory. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Compliance/Safety Officer III with VDOT. Effective September 10, 2004, the grievant received a 10% in-band salary adjustment. In December 2004, the grievant's District Administrator instituted a policy that employees with active written disciplinary notices on file are ineligible for in-band adjustments. On January 5, 2005, the grievant allegedly attended a public meeting regarding the proposed privatization of VDOT tunnel operations in the area. At this meeting, the grievant claims she spoke out against the proposed privatization and made allegations of discrimination in regard to the proposal.

Thereafter, in March 2005, the Acting Civil Rights Manager asked the District Administrator to approve salary adjustments for his staff, including the grievant. The District Administrator allegedly approved a salary increase for the grievant. The District Administrator claims that he later discovered that (1) the information he had relied upon in approving the salary increase for the grievant was based on an inaccurate and flawed salary study;[2] and (2) the grievant had an active written notice in her file.[3]

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[1] Although not specifically denoted as such, the grievant's assertions in an attachment to Form A that her salary is $1,747.00 below the average and that she should be compensated comparably to her peer group can be fairly read as a misapplication or unfair application of policy claim. Likewise, the grievant's assertion in an attachment to her Form A (that an employee was granted an exception to the policy that restricts employees with active written notices from receiving an in-band adjustment) can be fairly read as an unfair application of policy claim.

[2] The initial salary study determined that the grievant's salary was $5,431.00 below the average salary of her peer group. However, this initial salary study was allegedly flawed in that it (1) included only those individuals performing similar duties as the grievant and with higher salaries than the grievant and ignored those with lower salaries than the grievant; (2) relied upon outdated class codes; and (3) included in the

As such, on April 1, 2005, the District Administrator notified the grievant that her salary was $1,747.00 below average when compared to her peer group; but further advised the grievant that she was currently ineligible for an in-band salary adjustment because she has an active written notice on file. The grievant subsequently challenged the denial of the salary adjustment by initiating her May 9th grievance.[4] During the management resolution steps of the grievance process, the agency proposed additional reasons other than those stated in the April 1st letter to the grievant for its salary adjustment denial. Specifically, at the third management resolution step, the District Administrator stated that the grievant was ineligible for an in-band salary adjustment because of the active Group II written notice and because she had already received an in-band adjustment for the maximum amount allowed under policy (i.e., 10%) during the 2005 fiscal year. Moreover, the agency asserts that there is no requirement that the grievant be paid at the average of her peers.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] Thus, claims relating to issues such as 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.[6] In this case, the grievant claims that the agency misapplied and/or unfairly applied policies and procedures and retaliated against her by failing to grant her an in-band adjustment when her salary is $1,747.00 below the average of similarly situated employees. The grievant further claims that the agency has unfairly applied policies and procedures and demonstrated retaliation by granting one employee an exception to VDOT's in-band adjustment policy and not granting the grievant a similar exception.[7]

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analysis salaries for two positions that receive the Northern Virginia differential. A subsequent salary study revealed that the grievant's salary is actually $1,747.00 below the average salary of comparable positions.

[3] The grievant was issued a Group II Written Notice on February 13, 2003. Group II offenses remain active for three years from the date of issuance. *See* DHRM Policy 1.60 (VII)(B)(2)(b). Accordingly, it appears that the grievant's February 13, 2003 Group II Written Notice will expire on February 13, 2006 and the grievant will again be eligible for an in-band salary adjustment at that time.

[4] The grievant asserts that her grievance challenges a denial of a salary disparity adjustment, not an in-band adjustment. However, salary disparities, like the one complained of here, are typically corrected through an in-band salary adjustment. Accordingly, there is really no distinction between the terms "salary disparity adjustment" and "in-band adjustment."

[5] *See* Va. Code § 2.2-3004(B).

[6] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c).

[7] During this Department's investigation, the grievant told the investigating Consultant that like the employee who was granted an exception to the in-band adjustment policy, she too is an African-American female and by not being granted a similar exception to policy, it appears the agency is retaliating against her.

Misapplication of Policy/Unfair Application of Policy

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.

The primary policy implicated in this case is Department of Human Resource Management (DHRM) 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).[8] 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."[9] The agency has complied with this requirement by developing a SAP to address its pay practices.

Both state and agency policy provide the agency with the flexibility to adjust salaries when justified. An employee's salary may be adjusted by granting her an in-band adjustment. Under Commonwealth and agency policy, management has broad discretion as to when it utilizes in-band salary adjustments. However, despite its broad discretion in determining whether an employee is deserving of an in-band adjustment, both state and agency policy prohibit an agency from granting an employee in-band pay adjustments totaling more than 10% of his or her salary during a given fiscal year.[10] Likewise, an employee of the grievant's district is prohibited from receiving an in-band salary adjustment if she has an active written notice on file.[11]

The grievant was granted a 10% in-band adjustment effective September 10, 2004, within the 2005 fiscal year for purposes of in-band adjustments (June 25, 2004 – June 24, 2005). Accordingly, in the absence of an exception to Policy 3.05 from DHRM,[12] the grievant was ineligible to receive another in-band adjustment until the 2006 fiscal year (June 25, 2005- June 24, 2006). Additionally, the grievant has an active

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[8] *See* generally, DHRM Policy 3.05 (effective 9/25/00, revised 4/25/05). 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 22.

[9] DHRM Policy 3.05, page 1 of 22.

[10] DHRM Policy 3.05 defines a fiscal year for in-band adjustment purposes as June 25th through June 24th of the following year. *See* DHRM Policy 3.05, page 11 of 22 and VDOT Salary Administration Plan, Attachment I, *Pay Practice Administration Guidelines for Classified Employees*.

[11] The grievant asserts that the district's policy prohibiting in-band adjustments for employees with active written notices has not been adopted by DHRM. Agencies are free to adopt their own policies and procedures, and in some cases are required to adopt policies and procedures (e.g., a Salary Administration Plan). *See* DHRM Policy 3.05, page 1 of 22. However, such policies cannot conflict with DHRM policies. Requiring an employee to be free of active disciplinary notices before he or she can receive an in-band adjustment does not appear to conflict with DHRM policy.

[12] *See* DHRM Policy 3.05, page 11 of 22.

written notice on file and thus, is prohibited under district policy from receiving an in-band salary adjustment in any amount.[13] And while the agency has granted at least one exception to the written notice provision, the agency's Human Resources Office states that unlike the grievant, the employee that was granted the exception had not received any other in-band adjustments during the 2005 fiscal year.

In light of the above, this grievance fails to raise a sufficient question as to whether the agency's denial of a salary adjustment for the grievant was a misapplication or unfair application of policy. Accordingly, the grievant's misapplication and unfair application of policy claims do not qualify for hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[14] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency' stated reason was a mere pretext or excuse for retaliation.[15] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[16]

For purposes of this ruling, we will assume without deciding that by speaking out against the privatization of tunnel operations in the area, the grievant exercised her constitutionally protected right to free speech and thus, engaged in a protected activity.[17]

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[13] The grievant claims that she should not be penalized because the policy went into effect after the grievant raised concerns regarding her pay. However, at the time the agency made its decision to deny the grievant an in-band salary adjustment, the policy was in effect. Accordingly, this Department concludes that it was not improper for the agency to deny the grievant a salary adjustment because she has an active written notice on file.

[14] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[15] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

[16] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

[17] For speech by a public employee to be protected under the First Amendment, the speech must be "that of a private citizen speaking on a matter of public concern." Kirby v. City of Elizabeth City, 388 F.3d 440, 446 (4th Cir. 2004). "Speech involves a matter of public concern when it involves an issue of social, political or other interest to a community. The public-concern inquiry centers on whether 'the public or the community is likely to be truly concerned with or interested in the particular expression.'" *Id.* (citations omitted).

Further, being denied a salary adjustment is an adverse employment action. However, apart from a fairly close proximity in time between her public speech on January 5, 2005 and the denial of her in-band adjustment on April 1, 2005, the grievant has failed to present any evidence demonstrating a causal link between her public speech and the denial. Further, the agency denied the salary adjustment for what appear to be legitimate nonretaliatory business reasons: the grievant was ineligible under state and agency policy for an in-band adjustment because she had already received a 10% in-band salary adjustment within the 2005 fiscal year and she has an active written notice on file. The grievant has not presented evidence to demonstrate that the agency's stated business reasons are an excuse for retaliation. Accordingly, the grievant's claim of retaliation does not qualify 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 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 the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

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Claudia Farr
Director

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Jennifer S.C. Alger
EDR Consultant