

Issue: Compliance/Compensation; Discrimination/age; Ruling Date: November 1, 2005;
Ruling #2006-1098; Agency: Department of Juvenile Justice; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION
RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Number 2006-1098
November 1, 2005

The grievant has requested a ruling on whether his November 3, 2004 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for a hearing. The grievant alleges that the agency has misapplied and/or unfairly applied compensation policy. The agency denies that it has misapplied policy, and it further asserts that the grievant has previously grieved some of the allegations raised by his November 3rd grievance and may not grieve them again. For the reasons set forth below, we find that although the grievance is in compliance with the grievance procedure, it does not qualify for a hearing.

FACTS

The grievant is employed as a Sergeant at DJJ. On November 3, 2004, he initiated a grievance challenging an alleged misapplication of state and agency compensation policy. The grievance asserts that the agency has violated policy by failing to pay the grievant an "equal and fair salary."¹ Specifically, as set forth in his response to the third-step respondent, the grievant alleges that employees with no experience were receiving higher salaries than long-time employees; employees with less experience and less responsibility were making \$8,000 to \$10,000 more than the grievant with no explanation; J.C.O.'s were beginning in their positions making more than supervisors, without experience or background supporting the salary difference; and younger employees were receiving higher salaries.

After the parties failed to resolve the grievance in the management resolution steps, the grievant requested qualification of his grievance for hearing. In denying the grievant's request, the agency noted that the grievant's challenge was not in compliance with the grievance procedure, as he had previously grieved the alleged disparate pay between newer and more senior employees in a 2002 grievance. The agency also

¹ In addition, the grievant asserted after the third resolution step that younger employees also received better job duties and were promoted more quickly. As these claims do not fall within the scope of the claim of a failure to pay "an equal and fair salary" stated on the Grievance Form A, they will not be considered in this ruling. *See Grievance Procedure Manual* § 2.4 (noting that once a "grievance is initiated, additional claims may not be added").

addressed the grievant's claim of age discrimination, although it noted this claim was not originally part of his grievance.² Concluding that there was no evidence to support the grievant's allegations, the agency head denied the grievant's request for qualification.

DISCUSSION

Compliance

The agency claims that the grievance is not in compliance with the grievance procedure. In 2002, the grievant initiated a grievance alleging, in part, that the agency misapplied the state compensation policy by paying new employees higher salaries than long-term employees. This Department subsequently ruled that the grievant's claim did not qualify for a hearing.

The agency is correct that under the grievance procedure, a grievance may not challenge the same management action challenged by another grievance.³ However, while the present grievance and the earlier 2002 grievance both assert that the agency misapplied policy by paying newer employees more than more long-term employees, the grievances do not challenge the same management action. Whereas the 2002 grievance involved alleged management conduct *prior* to the date of that grievance, the grievant's November 3, 2004 grievance challenges alleged conduct occurring *after* the resolution of the 2002 grievance. Because the 2004 grievance challenges different management actions, it is not barred by the grievant's earlier 2002 grievance, even though both grievances involve the same *type* of alleged management activity.⁴ Accordingly, we conclude that the grievant's November 3rd grievance is in compliance with the grievance procedure.⁵

This Department's rulings on matters of procedural compliance are final and nonappealable.⁶

Qualification

Misapplication of Policy

² Although the agency head's qualification decision acknowledged that the grievant's age discrimination claim encompassed allegations with respect to salary, job duties, and promotion, the decision focused on the grievant's allegations regarding salary.

³ *Grievance Procedure Manual*, § 2.4.

⁴ See generally *Phillips v. Public Serv. Co. of New Mexico*, 2002 U.S. App. LEXIS 7097, at *5-6 (10th Cir. Apr. 17, 2002).

⁵ We caution, however, that while there is no evidence in this case that the grievant initiated his 2004 grievance for an improper purpose, grievants may not initiate repeated grievances of the same type of management conduct in order to harass or otherwise impede the efficient operations of the agency. *Grievance Procedure Manual*, § 2.4.

⁶ Va. Code § 2.2-1001 (5).

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁷ 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.⁸

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.⁹ The primary policies implicated by the grievant's claim of misapplication are Department of Human Resource Management (DHRM) Policy 3.05¹⁰ and the agency's Salary Administration Plan (SAP).¹¹

While we understand the grievant's concern that employees with less service to the agency may be being paid at the same or higher rates of pay as the grievant, neither DHRM Policy 3.05 nor the agency's SAP mandates that new or more junior employees be paid at a rate lower than the rate paid to existing or more senior employees, or that the rate of existing employees be increased to match or exceed that of newer hires. The grievant has not identified, nor are we aware of, any specific policy requirement violated by the agency's existing salary structure. Moreover, there is no evidence that the agency's compensation structure is so unfair as to amount to a disregard of the intent of the applicable policy. To the contrary, Policy 3.05 gives agencies considerable discretion in determining compensation. Accordingly, the grievant's claim of misapplication of policy does not qualify for hearing.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race, age and/or gender.¹² 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

⁷ See Va. Code § 2.2-3004(B).

⁸ Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

⁹ We note that a mere misapplication of policy in itself is insufficient to qualify for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A). For purposes of this analysis, we assume, without deciding, that the salary issue grieved would constitute an adverse employment action.

¹⁰ For purposes of this ruling, we will apply DHRM Policy 3.05 as it existed on November 3, 2004, when the grievance was initiated. (This policy was revised on April 25, 2005.)

¹¹ 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.

¹² See *Grievance Procedure Manual* § 4.1(b).

were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹³

The grievant alleges that several current and former younger employees have received salaries higher than his. While the agency admits that several younger employees have received higher salaries, it denies that the salary differences are related to the grievant's age. Rather, the agency contends, the differences are the result of legitimate, non-discriminatory factors, such as the agency's decision to give higher pay in certain positions for previous military and police experience. Moreover, the agency asserts that several of the employees receiving higher compensation performed different job duties than those performed by the grievant. Although the grievant argues that military and police experience should not result in higher pay and calls the agency's explanations "questionable," he has not presented any evidence which would suggest the agency's stated reasons are in fact a pretext for age discrimination. As the grievant has failed to make this showing, his claim of age discrimination 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 the qualification determination 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 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 he does not wish to proceed.

Claudia T. Farr
Director

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¹³ Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).