

Issue: Qualification/grievant claims agency misapplied and/or unfairly applied policy by denying him an upward in-band salary adjustment; Ruling Date: January 4, 2006; Ruling #2006-1122; Agency: Department of State Police; Outcome: not qualified

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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police  
Ruling Number 2006-1122  
January 4, 2006

The grievant has requested a ruling on whether his August 24, 2005 grievance with the Department of State Police (VSP or the agency) qualifies for hearing. The grievant claims that the agency misapplied and/or unfairly applied policy by denying him an upward in-band salary adjustment.<sup>1</sup> For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Human Resource Manager II with VSP and asserts that he has over 16 years of experience in his field. On May 10, 2004, VSP allegedly hired a Human Resource Manager II with only 8 years of state experience, at a starting salary of approximately \$14,000 more than the grievant's. During that same general time frame, the grievant claims that his former supervisor told him he would be given two in-band adjustments to more properly align his salary with other similarly situated employees.

On April 25, 2004, the grievant received the first of the two 10% in-band salary adjustments he was allegedly promised by his former supervisor. On October 5, 2004, the grievant's new supervisor requested a second in-band salary adjustment for the grievant. The request was denied due to the grievant's inclusion in a VSP study of the salaries of its civilian employees (the salary study).<sup>2</sup> The salary study ultimately revealed 323 civilian employees, including the grievant, in need of a salary increase based upon pay inequity. However, on August 22, 2005, the agency notified its civilian employees that "an unanticipated increase in costs throughout the Department" prevented it from implementing the plan to increase the salaries of its civilian employees at that time.

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<sup>1</sup> In his August 24, 2005 grievance, the grievant does not specifically claim that the agency has misapplied policy, but rather asserts that the agency has unfairly applied policy. This Department frequently views an unfair application of policy claim to include a misapplication of policy claim as well and as such, will do so for purposes of this ruling.

<sup>2</sup> The purpose of the salary study was to review the compensation of civilian employees and to develop a plan to increase salaries of employees demonstrating a pay inequity in comparison to all civilian employees with similar years of service.

## DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</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 discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>4</sup> In this case, the grievant asserts that VSP misapplied and/or unfairly applied policy and procedure (1) by hiring an arguably less experienced Human Resource Manager II at a considerably higher starting salary than the grievant's current salary; and (2) by not providing the grievant with the in-band adjustment he was promised (and to which the salary study determined he was entitled) while continually awarding upward salary adjustments to other VSP employees.

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. The primary policy implicated in this grievance 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).<sup>5</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>6</sup> The agency has complied with this requirement by developing a SAP to address its pay practices.

DHRM Policy 3.05 further requires agencies to continuously review agency compensation practices and actions to ensure that similarly situated employees are treated the same.<sup>7</sup> When an agency determines that similarly situated employees are not being comparably compensated, it may increase the salary of the lesser paid employee by up to 10% each fiscal year through an in-band salary adjustment.<sup>8</sup> In-band adjustments and other pay practices are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.<sup>9</sup>

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<sup>3</sup> See Va. Code § 2.2-3004(B).

<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 (c).

<sup>5</sup> 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.

<sup>6</sup> DHRM Policy 3.05, page 1 of 22.

<sup>7</sup> See DHRM Policy 3.05, page 6 of 22.

<sup>8</sup> See DHRM Policy 3.05, page 3 of 22 and Salary Administration Plan, Department of State Police dated October 10, 2004, page IV-1.

<sup>9</sup> See DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*.

Under DHRM Policy 3.05 and VSP's SAP, in-band salary adjustments may be authorized for internal alignment purposes.<sup>10</sup> However, in assessing whether to grant an in-band adjustment, an agency must consider, for each proposed adjustment, each of the following thirteen pay factors: (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>11</sup> Some of these factors relate to employee-related issues, and some to agency-related business and fiscal issues, but the agency has the duty and the broad discretion to weigh each factor for every pay practice decision it makes.

To summarize, both state and agency policies appear to reflect an intent that similarly situated employees be comparably compensated. At the same time, however, both policies also reflect the intent to invest in agency management broad discretion and the corresponding accountability for making individual pay decisions in light of each of the 13 enumerated pay factors. Significantly here, those pay factors include not only employee-related considerations (such as current salary, duties, work experience, and education), but also agency-related considerations (such as business need, market availability, long term impact and budget implications). Likewise, the need for internal salary alignment is just one of the 13 different factors an agency must consider in making the difficult determinations of whether, when and to what extent in-band adjustments should be granted in individual cases and throughout the agency.<sup>12</sup>

### Misapplication of Policy

As stated above, in assessing whether to award the grievant an in-band adjustment based on internal alignment, VSP was required to consider the 13 pay factors. Here, the agency appears to have considered those factors, and in weighing them, determined that at least one of those factors (budget implications) prevented it from awarding the grievant an increase in salary at that time.<sup>13</sup> Further, while we understand the grievant's concern that

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<sup>10</sup> See Salary Administration Plan, Department of State Police dated October 10, 2004, page IV-1. As to an in-band adjustment based on internal alignment (as in this case), DHRM 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." DHRM Policy 3.05, page 12 of 22.

<sup>11</sup> See DHRM Policy 3.05, page 4 and 11 of 22; Salary Administration Plan, Department of State Police dated October 10, 2004, page II-1 – II-2.

<sup>12</sup> This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. In particular, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination or some other improper motive. Here, the grievant has not alleged that the agency's refusal to adjust his salary was retaliatory, discriminatory or based on some other improper motive; rather, the grievant asserts that providing some employees with an in-band adjustment and not others is not fair.

<sup>13</sup> The fact that the grievant's former supervisor had allegedly promised him a second pay increase, and that his next supervisor had recommended it speaks well of the grievant and his work, but is not binding on the agency. In-band adjustments must be considered through designated VSP channels, with approval by the Superintendent or his designee. See Salary Administration Plan, Department of State Police dated October 10, 2004, pages I-3 and IV-2.

employees with less service to the agency may be being paid at a higher rate 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.

### Unfair Application of Policy

The grievant also claims that regardless of the agency's compliance with specific policy requirements, the agency's actions were nevertheless unfair. To qualify that claim for hearing, however, there must be sufficient evidence that despite its compliance with state and agency compensation policy requirements, VSP's contested actions, in their totality, amounted to a disregard of the intent of those policies.

In support of his claim, the grievant has presented evidence demonstrating that since the grievant's first in-band adjustment in April 2004, the agency has awarded several other VSP employees an upward salary adjustment. As a preliminary matter, however, many of the employees who received these in-band adjustments were either not similarly situated to the grievant and/or were provided an adjustment at a time when the grievant was ineligible for an in-band adjustment.<sup>14</sup> Thus, providing an in-band adjustment to these employees and not the grievant would not appear to amount to a disregard of the intent of those policies.

As to the handful of employees who received in-band adjustments based on internal alignment while the salary study was pending, the grievant has provided no evidence, nor has this Department found evidence tending to show that the agency granted those in-band adjustments for improper reasons or without regard to the thirteen pay factors. Moreover, in light of management's responsibility and broad discretion under state and agency policies to weigh internal salary alignment needs (Pay Factor # 6) with each of the 12 other factors, we cannot conclude that in exercising its discretion in this case, VSP disregarded the policies' underlying intent by limiting in-band adjustments to a small number of the deserving employees due to the unique facts and circumstances presented by the 13 factors as applied to those particular employees. Indeed, while the grievant's disappointment is understandable, he is one of numerous employees identified in the completed salary study as deserving of an upward salary adjustment, but who have not received an adjustment due to a lack of

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<sup>14</sup> More specifically, several of the salary adjustments were awarded to sworn and civilian employees as a result of the promotion, transfer and/or reallocation processes and not as a result of the need to properly align the employee's salary with others. Additionally, several civilian employees received an upward increase in their salary in May 2004, when the grievant was ineligible for a salary increase due to his April 2004 in-band salary adjustment. More specifically, under both state and agency policy an employee may not receive in-band adjustments in excess of 10% in a fiscal year. See DHRM Policy 3.05, page 11 of 22 and Salary Administration Plan, Department of State Police dated October 10, 2004, page IV-1. DHRM defines a fiscal year for in-band adjustment purposes as June 25<sup>th</sup> through June 24<sup>th</sup> of the following year. See DHRM Policy 3.05, page 11 of 22. Accordingly, because the grievant received a 10% salary increase in April 2004, he was ineligible for another such increase until June 25, 2004, the next fiscal year.

funding.<sup>15</sup> As such, it appears that the agency has actually treated the grievant comparably to numerous other VSP civilian employees by refusing, due to budget implications, to provide him an upward salary adjustment at this time despite the acknowledged pay inequity.

Finally, hiring an arguably less-experienced Human Resource Manager II at a considerably higher starting salary than the grievant, though understandably viewed by the grievant as “unfair” in the broadest sense of the term, does not amount to a disregard of the intent of the applicable policies, which allow management flexibility in establishing starting pay to attract highly skilled and competent new employees and rehires to the Commonwealth’s workforce, in light of its consideration of the 13 pay factors.<sup>16</sup>

Based on all the above, this Department concludes that this grievance fails to raise a sufficient question as to whether the relevant compensation policies have been either misapplied and/or unfairly applied and as such, the August 24, 2005 grievance 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, 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.

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Claudia T. Farr  
Director

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<sup>15</sup> According to the agency, no employee implicated in the salary study as deserving of an increase has received an in-band adjustment.

<sup>16</sup> See DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*; DHRM Policy 3.05 page 5 of 22; Salary Administration Plan, Department of State Police, dated October 10, 2004, page I-1.