Issue: Qualification/compensation/in-band adjustment; Ruling Date: February 28, 2006; Ruling #2006-1226; Agency: Virginia Department of Transportation; Outcome: qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2006-1226
February 28, 2006

The grievant has requested a ruling on whether his September 27, 2005 grievance with the Virginia Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant asserts that the agency improperly denied him an in-band adjustment because he had received a counseling memorandum. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The agency employs the grievant as a Transportation Operator II. On July 21, 2005, the grievant was involved in an excavation project which resulted in a cave-in accident. The agency concluded that the grievant was not the charge person on the project, was following instructions given by his supervisor or the "competent person" on the site, and had never been formally trained on excavation safety. However, the agency issued the grievant a Letter of Counseling for Inadequate/Unsatisfactory Job Performance on August 15, 2005 for having "made the decision to get into the trench…even though at least seven safety guidelines were not being followed" and for failing to "exercise [his] right to say this is not safe and [he is] not going to subject [him]self and others to injury or bodily harm."[1]

The grievant claims that the agency subsequently denied him an in-band adjustment in September 2005 because of the counseling memorandum. He asserts that his supervisor had told him that the memorandum would not have an effect on his ability to receive an in-band adjustment, and that he was unaware of any unsafe conditions. He also alleges that other employees were initially denied in-band adjustments but that their adjustments were reinstated because they were not involved in the July 21, 2005 incident.

[1] On August 11, 2005, the agency issued the grievant a "Due Process Letter" indicating its intention to issue him a Group I Written Notice for Inadequate/Unsatisfactory Job Performance. The agency subsequently issued the grievant the letter of counseling, apparently in lieu of the Group I Written Notice.

On September 27, 2005, the grievant initiated a grievance challenging the denial of the in-band adjustment. The first-step respondent denied the grievant's request for relief, explaining, in part, that the in-band adjustment was not denied because of the counseling memorandum, but rather "was not approved at the time of recommendation due to the fact that the employees were involved in an unsafe incident."

The grievant next advanced the grievance to the second resolution step. The second-step respondent also denied the grievant's request for relief, stating: "I took into consideration that you were involved in the trench incident on July 21, 2005, and have decided to deny the request for an In-Band Adjustment at this time. . . ." The second-step respondent also noted that the grievant would be eligible to be submitted for consideration for an adjustment in December 2005.

The grievant subsequently advanced his grievance to the third resolution step. The third-step respondent also denied the grievant's request for relief. In his response, the third-step respondent noted that under state policy, in-band adjustments must be made only for internal alignment, professional/skill development that is job related, retention, or because of additional duties/responsibilities. He also explained that the District to which the grievant was assigned "has established a practice of not rewarding employees with In Band Adjustments who demonstrate disciplinary or poor performance issues." He then concluded that the grievant had not met one of the four criteria under policy for an in-band adjustment and that the letter of counseling issued to the grievant was appropriate. In addition, he advised the grievant that the letter of counseling would remain in the grievant's file for three months from the date of issuance, and that the grievant would therefore "be eligible for consideration for the next round of in-band adjustments scheduled for the December-January timeframe."

The grievant subsequently asked the agency head to qualify his grievance for hearing. His request for qualification was denied, on the basis that under the grievance procedure, grievances challenging the establishment or revision of wages, and contents of personnel policies, procedures and rules do not qualify for hearing. In the qualification decision, the agency head's designee stated that the grievant had been denied an in-band adjustment because he did not meet any of the four criteria set forth in Department of Human Resource Management (DHRM) Policy 3.05, "Compensation." Moreover, the decision noted, even had the grievant met one of these criteria, he had recently received a counseling memorandum and "performance is one of the pay factors to be considered in determining compensation changes."

Documentation provided by the agency indicates that in August 2005, 23 employees working in the Transportation Operator II role title, including the grievant, were recommended to residency management for an in-band adjustment on the basis of internal alignment.[2] Of these 23, all but two employees—the grievant and another

[2] The agency states that the grievant was recommended for an in-band adjustment by his headquarters superintendent, but that the adjustment was subsequently denied by residency management.

employee involved in the trenching incident—received the recommended adjustments. Another three employees working in the Transportation Operator II role were recommended for adjustments on the basis of internal alignment and some other criteria: all three were approved by residency management for in-band adjustments on the basis of internal alignment. In addition, 14 employees in the Transportation Operator II role were recommended for in-band adjustments for retention or in recognition of new knowledge, skills, and abilities. All 14 received the recommended adjustments. Finally, of the 49 employees (of varying positions) recommended to residency management for in-band adjustments in August 2005, only five did not receive the recommended adjustments. All five of these employees had been directly involved in the trenching incident or had been held responsible for the incident as a manager.[3]

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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.[5] Here, the grievance, fairly read, asserts that the denial of the in-band adjustment constituted an unwarranted informal disciplinary action.

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[6] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[7] These safeguards are in place to ensure that disciplinary action is appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is

---

Documentation provided by the agency indicates that the grievant's compensation was approximately $900 less than the district role average.

[3] For two of these employees, the reason apparently stated by residency management for denying the adjustment was that the employees had active written notices. For the remaining three employees, including the grievant, the reason apparently stated was that the employees "[d]id not meet established criteria; counseled for exhibiting poor performance/involved in a work location where safety rules were violated resulting in a personal injury."

[4] *See* Va. Code § 2.2-3004(B).

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

[6] Va. Code § 2.2-2900 *et seq.*

[7] DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93).

required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance). [8]

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[9] In this case, the grievant asserts that he was denied an in-band adjustment as punishment for his involvement in the July 21st cave-in accident. Because a denial of a wage increase may constitute an adverse employment action,[10] we find that the grievant has raised a sufficient question as to whether the grieved management conduct was an adverse employment action.

We also find that the grievant has presented sufficient evidence that the agency's primary intent was to correct or punish perceived poor performance to qualify for hearing. Although the agency has asserted that the grievant was denied the in-band adjustment because he did not meet one of the four criteria for such an adjustment under Policy 3.05, we note that both the first-step and second-step respondents specifically identified, as the sole basis for the denial of the adjustment, the grievant's involvement in the July 21st incident. We also note that 24 employees working within the grievant's role title were apparently approved by the residency management for an in-band adjustment on the basis of internal alignment, and that the grievant's salary appears to have been less than the district role average.

Moreover, there is significant evidence that the agency has treated the counseling memorandum in a manner consistent with disciplinary action. First, the counseling memorandum appears to have been issued in lieu of a Group I Written Notice. Further, the third-step respondent noted that he had directed that the counseling memorandum would remain in the "[grievant's] file" for three months.[11] Finally, the third-step respondent specifically stated that the grievant would be eligible for an in-band adjustment only after the three-month term of the counseling memorandum had expired, thus linking the grievant's eligibility for an in-band adjustment not to any improvement in performance but rather simply to the active life of the counseling memorandum.

As the grievant has presented evidence raising a sufficient question as to whether the agency's denial of his in-band adjustment was an unwarranted informal disciplinary action, the grievance is qualified for hearing. Whether the denial was primarily to punish or correct the grievant's behavior or was instead properly based on the considerations set

---

[8] *See* EDR Ruling Nos. 2002-227 & 230.

[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[10] *See* Farrell v. Butler University, 421 F.3d 609, 614 (7th Cir. 2005); Lovell v. BBNT Solutions, LLC 295 F. Supp. 2d 611, 626 (E.D. Va. 2003).

[11] *See* DHRM Policy 1.60, "Standards of Conduct" (effective 9/16/93), at VI.C, VII.B. Under Policy 1.60, counseling memoranda may not be retained in an employees' personnel files (except as necessary to support subsequent formal discipline); in contrast, Policy 1.60 provides that written notices "shall be kept in employees' personnel files."

forth in DHRM Policy 3.05 and/or any appropriate agency practice is a factual determination that a hearing officer, not this Department, should make.

At the hearing, the grievant will have the burden of proving that the denial of the in-band adjustment was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the action was warranted. Should the hearing officer find that the denial was both disciplinary and unwarranted, he or she may rescind the denial, just as he or she may rescind any formal disciplinary action.[12]

We note that this qualification ruling in no way determines that the agency's actions with respect to the grievant constituted unwarranted informal discipline or were otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's September 27, 2005 is qualified. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

_____
Claudia T. Farr
Director

_____
Gretchen M. White
EDR Consultant

[12] *See* EDR Ruling No. 2002-127.