

Issue: Qualification – Compensation (In-Band Adjustment) and Retaliation (Grievance Activity Participation); Ruling Date: January 14, 2008; Ruling #2007-1651; Agency: Department of Game and Inland Fisheries; Outcome: All issues qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Virginia Department of Game and Inland Fisheries  
Ruling Number 2007-1651  
January 14, 2008

The grievant has requested a ruling on whether his February 2, 2007 grievance with the Virginia Department of Game and Inland Fisheries (DGIF or the agency) qualifies for a hearing. For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant works for the agency as a Regional Manager. In 2006, the agency developed a "comprehensive internal salary alignment evaluation and correction process." The agency states that as part of this process, it identified employees "who were mathematically identified as deviating negatively from an indexed average salary." The employees so identified were then evaluated on the basis of their work histories to determine if the deviation from the average salary was justified. As part of this individual evaluation, the agency considered employees' job duties, education, training, "KSA's" [knowledge, skills, and abilities], disciplinary history, past performance evaluations, work history, and special awards and achievements.

The agency states that the grievant's salary was mathematically identified as 9.7% below the salary of other Scientist Managers<sup>1</sup> after considering the length of his management experience. Upon reviewing his work history, however, the agency determined that his job performance and overall work history were not comparable to other Scientist Managers with comparable experience. As a result, he received an internal alignment raise of 4.85%, or 50% of the 9.7% deviation.

On February 2, 2007, the grievant initiated a grievance challenging the agency's decision to award him only 50% of the salary deviation. He argues that his work history and background are at least equal to that of two other Scientist Managers, both of whom

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<sup>1</sup> While the grievant's position was "Regional Manager," the term "Scientist Manager" was used by the agency to describe the grievant and the other employees with whom he was compared for alignment purposes.

received 100% of the salary deviation available<sup>2</sup>. After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of his grievance for hearing. The agency head denied the grievant's request and he has appealed to this Department.

### 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 claims that management has misapplied and/or unfairly applied policy and procedure by awarding him only 50% of the available adjustment. In addition, he asserts that the agency's actions were in retaliation for his 1998 grievance activity. Each of these issues will be addressed below.

#### *Misapplication or Unfair Application of Policy*

For a misapplication of policy or unfair application 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.<sup>5</sup> The primary policy implicated by the grievant's claim regarding the in-band adjustment is Department of Human Resource Management (DHRM) Policy 3.05.

DHRM Policy 3.05 requires agencies to review agency compensation practices and actions to ensure that similarly situated employees are treated the same.<sup>6</sup> However, in-band adjustments and other pay practices are intended to emphasize merit rather than entitlements, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.<sup>7</sup>

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<sup>2</sup> One of these two employees, Mr. K, was also a Regional Manager; the other, Mr. L, was an Assistant Director.

<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> 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). Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment. *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)). The issue grieved here would constitute an adverse employment action, as it involves an arguable denial of a pay increase.

<sup>6</sup> See DHRM Policy 3.05, Agency Responsibilities.

<sup>7</sup> See DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*.

Under DHRM Policy 3.05, 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 licensure; (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>8</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.

Thus, while the applicable policy appears to reflect an intent that similarly situated employees be comparably compensated, it also reflects 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, 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). In this case, the agency's actions were apparently governed by an "Internal Alignment Model" adopted on October 30, 2006. Among the variables considered by the agency in applying this mathematical model were geographic differentials, increases based on competency or job level, role/class experience, starting pay, employee work profiles, performance evaluations, education and training, and knowledge, skills, and abilities.

However, even though agencies are afforded great flexibility in making pay decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.<sup>9</sup>

Here, the grievant has met this burden. In particular, he has presented evidence that he and the two Scientist Managers receiving 100% of the available adjustment all had masters' degrees, but that he and one of the Scientist Managers, Mr. K. (another

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<sup>8</sup> See DHRM Policy 3.05, Pay Practices.

<sup>9</sup> See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also EDR Ruling 2008-1845 (applying arbitrary or capricious standard to reorganization resulting in change of job duties); EDR Ruling No. 2008-1760 (applying arbitrary or capricious standard to agency's assessment of applicants during a selection process); EDR Ruling No. 2008-1736 (same); EDR Ruling No. 2007-1721 (same); EDR Ruling No. 2007-1541 (applying arbitrary or capricious standard to classification of grievant's job duties and salary determination); EDR Ruling No. 2005-947 and 2005-1007 (applying arbitrary or capricious standard to agency's assessment of a position's job duties); EDR Ruling No. 2003-007 (applying arbitrary or capricious standard to agency's denial of upward role change).

Regional Manager), were rated as “typical” in “Education,”<sup>10</sup> while a third, Mr. L (an Assistant Director), was rated as “greater.” When questioned during this Department’s investigation about its rationale for this distinction, the agency responded,

While it is unlikely than an individual could become a regional manager with out [sic] a Masters Degree it would be even less likely for an Assistant Director. Continuing education in the areas of administration and management are necessary for senior managers (Mr. L). It is important to keep in mind that this broad band (alignment group) includes Regional Field Managers, Assistant Division Directors and Division Directors.

This response could arguably be read as suggesting that Mr. L’s education was that expected for his work title (Assistant Director), and that the educational level achieved by the grievant and Mr. K (both Regional Managers) was less expected for theirs. As previously noted, the work history evaluation form used by the agency explained that an individual’s education should be rated as being either typical, greater or lesser for the job title. It seems somewhat anomalous that Mr. L’s education was rated as “greater,” when a master’s degree was apparently “typical” (if not required) for his job title, while Mr. K and the grievant were rated as “typical.” Further, to the extent the agency’s response reflects a reliance on Mr. L’s continuing education, we note that “Training”<sup>11</sup> was assessed on the Work History Evaluation form as a separate criterion from “Education.”

In light of these issues, we find that the grievant has raised a sufficient question as to whether the agency has a reasoned basis for at least this portion of its assessment. Accordingly, this grievance is qualified for hearing. We note, however, that qualification of this grievance in no way determines that the agency’s decision to grant only 50% of the grievant’s salary deviation in fact was arbitrary or capricious so as to violate compensation policy, only that further exploration by a hearing officer is appropriate.

#### *Alternative Theories and Claims*

The grievant also asserts that that the agency’s decision-making process was influenced by retaliation for his 1998 grievance activity. Because the grievant’s claim of misapplication qualifies for hearing, this Department deems it appropriate to send all alternative theories and claims raised by the grievance for adjudication by a hearing officer to help assure a full exploration of what may be interrelated evidence and facts. Again, qualification in no way determines that the agency’s actions were retaliatory, only that further development of the facts is warranted.

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<sup>10</sup> The work history evaluation form used by the agency defines the “Education” criterion to consider whether the employee’s education is typical for the work title, or greater or lesser in some aspect.

<sup>11</sup> The work history evaluation form defined the “Training” criterion to consider whether the employee’s “O-T-J training and self-initiated training” was typical for the job title, or greater or lesser in some aspect.

CONCLUSION

For the reasons set forth above, this grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

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Claudia T. Farr  
Director