Issue: Qualification/grievant claims agency's failure to award upward adjustment to salary was misapplication and/or unfair application of policy; discriminatory, retaliatory; Ruling Date: July 10, 2006; Ruling #2006-1176; Outcome: not qualified

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

## QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2006-1176
July 10, 2006

The grievant has requested a qualification ruling in her July 28, 2005 grievance with the Department of Transportation (VDOT or the agency). In her July 28th grievance, the grievant claims that the agency's failure to award her an upward adjustment to her salary was (1) a misapplication and/or unfair application of policy;[1] (2) discriminatory; and (3) retaliatory. For the reasons discussed below, this grievance does not qualify for hearing.

### FACTS

The grievant is employed as a Bridge Tunnel Patroller (BTP) with VDOT. Several of the grievant's co-workers received an in-band adjustment to their salaries effective August 25, 2005. The grievant did not receive a similar salary adjustment. As such, on July 28, 2005, the grievant initiated a grievance challenging the agency's decision.

### DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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.[3] In this case, the grievant claims that management has misapplied and/or unfairly applied policy and discriminated and retaliated against her by denying her an in-band adjustment to her salary.

*Misapplication of Policy/Unfair Application of Policy*

[1] Although not specifically denoted as such, the grievant's assertion on the Form A that she is deserving of a 10% in-band adjustment because of her "work ethics and VDOT values" can be fairly read as a misapplication or unfair application of policy claim.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual,* § 4.1 (c).

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).[4] A SAP outlines how the agency will implement the Commonwealth's compensation management system, and is "the foundation for ensuring the consistent and equitable application of pay decisions."[5] The agency has complied with this requirement by developing a SAP to address its pay practices.[6]

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.[7] 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.[8] 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.[9]

Under state and agency policy, in-band adjustments may be authorized for the following reasons: (1) change in duties; (2) application of new KSA's, competencies; (3) retention; or (4) internal alignment.[10] In assessing whether to grant an in-band adjustment, the following factors must be considered: (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.[11] With these factors in mind, the agency *may* approve a salary adjustment and has broad discretion as to when it utilizes in-band adjustments.

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[4] *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.
[5] DHRM Policy 3.05, page 1 of 22.
[6] *See* VDOT Salary Administration Plan, effective July 1, 2005.
[7] *See* DHRM Policy 3.05, page 6 of 22.
[8] *See* DHRM Policy 3.05, page 3 of 22 and VDOT Salary Administration Plan, Attachment I, Pay Practice Administration Guidelines for Classified Employees, Revised April 25, 2005, page 3.
[9] *See* DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*.
[10] *See* VDOT Salary Administration Plan, Attachment I, Pay Practice Administration Guidelines for Classified Employees, Revised April 25, 2005, page 3 and DHRM Policy 3.05, page 12 of 22.
[11] *See* VDOT Salary Administration Plan, effective July 1, 2005, page 7.

Here, it does not appear as though the agency misapplied any *mandatory* state or agency policy provision by not providing the grievant with a salary adjustment. Likewise, there appears to be no evidence of an unfair application of policy. In particular, in this case, the district administrator for the district in which the grievant works determined that funding would allow for in-band adjustments to deserving employees and as such, he circulated a quick reference guide outlining how the district would recommend, evaluate and award the in-band adjustments.[12] The reference guide instructs the executive team to consider available funding, market data and average salary for individual roles. The staff level managers are responsible for identifying candidates eligible[13] for an in-band adjustment and evaluating and ranking the identified candidates with a focus on "consistent application between managers and for like roles." Further, in ranking the candidates, the following criteria are to be used: (1) outstanding performance; (2) special assignments; (3) professional development/skill development, including certification, licensure, continuing education and self improvement efforts; (4) retention and in particular, risk of employee turnover, market availability for the designated skill set, skills learned, on the job training or education, whether the employee is a subject matter expert and whether the employee has made a significant contribution to meeting or exceeding objectives and/or performance targets; and (5) internal and external pay equities and pay history. Once ranked, the staff level managers are to submit to the executive team the ranked candidates with a written narrative justifying each request and the percentage increase requested. The executive team then reviews the submissions for "consistency of application," "potential district-wide trends," "ongoing position studies," and "last pay action," as well as verifies budget availability and provides comments to the staff level managers. The appropriate executive team member is responsible for ultimate approval and implementation of the in-band adjustments.

In accordance with the above guidelines, the acting facility manager (Manager A) in this case determined that in-band adjustments would be recommended based upon internal salary alignment and additional knowledge, skills and abilities and cross training. Nine employees occupying the same role and working the same shift as the grievant received an in-band adjustment. Of these nine employees, five received an in-band adjustment based upon internal salary alignment, while the other four received an in-band adjustment based upon retention. The employees that received an in-band adjustment based upon internal alignment were below the district average salary for BTP's ($20,952) and the internal alignment brought each of them up to, or slightly surpassing, the average. The grievant's salary at the time of the 2005 in-band adjustment review was $26,916, well above the district average salary for BTP's. Moreover, the four employees that received an in-band adjustment based upon retention had been either cross-trained as a facility trainer or were qualified to serve as a bridge tunnel patrol supervisor (BTPS). The grievant admits that she has not been similarly cross-trained. Finally, there were at

[12] This quick reference guide was allegedly created in order to "provide a more consistent application of the in-band program."

[13] To be eligible the employee must be out of her probationary period, have no active group notices and be at least a contributor. However, satisfying these requirements does not automatically entitle the employee to an in-band adjustment as the grievant has alleged.

least three employees occupying the same role and working the same shift as the grievant that did not receive an in-band adjustment.

With regard to the grievant's contention that there were five employees that received an in-band adjustment but had not been cross-trained, this Department finds that these employees were not similarly situated to the grievant. Those five employees received an in-band adjustment because, unlike the grievant, their salaries fell below the district average salary for their particular role; as stated above, in-band adjustments were awarded for internal salary alignment as well as cross-training. Also, those employees work a different shift than the grievant (i.e., 2:00 p.m. to 10:00 p.m.).

Based on the foregoing, it appears that the agency considered the required 13 pay factors and appropriately utilized its broad discretion in assessing which employees would receive an upward salary adjustment. Accordingly, the grievant's misapplication and/or unfair application of policy claim does not qualify for a hearing.

*Retaliation*

The grievant claims that a member of management (Manager B)[14] has engaged in a continuous pattern of retaliation against the grievant and that the denial of an in-band adjustment is the most recent example of Manager B's retaliatory behavior.

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;[15] (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's stated reason was a mere pretext or excuse for retaliation.[16] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[17]

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[14] According to the agency, Manager B is not the grievant's immediate supervisor and there are three levels of management between the grievant and Manager B.

[15] *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.

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

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

Failure to recommend the grievant for an in-band adjustment constitutes an adverse employment action.[18] Further, assuming without deciding that the grievant is relying upon a previously-filed grievance as evidence that she engaged in a protected activity,[19] this Department finds that the grievant has failed to present sufficient evidence that management denied the grievant an in-band adjustment in retaliation for her prior grievance activity. In particular, it appears that Manager A, not Manager B, was responsible for determining who would be recommended for an in-band adjustment. Further, the grievant has failed to present any evidence that Manager A was influenced by Manager B in determining whether to recommend the grievant for an in-band adjustment.[20] Accordingly, the issue of retaliation does not qualify for a hearing.

*Discrimination*

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race, age and/or gender.[21] 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 were the result of prohibited discrimination based on a protected status, in other words, that because of the grievant's race, age and/or gender she was treated differently than other "similarly-situated" employees. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[22]

In her grievance, the grievant alleges that she was told by Manager A that she did not get an in-band adjustment because she is "a white girl or a blond." Manager A denies making this statement and claims that it was the grievant who told him, and not vice versa, that she believed she did not get an in-band adjustment because she is "a white girl or a blond." The grievant has failed to present any other evidence to suggest that she did not get the in-band adjustment because of her race and/or gender. Moreover, during this Department's investigation she stated that she did not believe her failure to get an in-band adjustment was based upon race, but rather claimed that she was denied an in-band adjustment because Manager B does not like her.

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[18] *See* Farrell v. Butler University, 421 F.3d 609, 614 (7th Cir. 2005).

[19] During this Department's investigation, the grievant stated that Manager B's retaliatory behavior was precipitated by the cessation of a friendship between the grievant and another employee (Employee A). Upon the cessation of the friendship between Employee A and the grievant, Employee A allegedly became good friends with Manager B. From that point on, the grievant claims that Manager B and Employee A have vowed to "get her." While the cessation of the friendship does not constitute a protected activity, the grievant further stated during this Department's investigation that she filed a grievance against Manager B four or five years ago.

[20] According to Manager A, the only involvement by Manager B in the recommendation process was notifying Manager A that the grievant was not BTPS qualified.

[21] *See* Grievance Procedure Manual § 4.1(b).

[22] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

As such, the grievant has failed to raise a sufficient question that the denial of an in-band adjustment was because of her membership in a protected class. Moreover, the agency has presented a legitimate, nondiscriminatory reason for not upwardly adjusting the grievant's salary (i.e., the grievant's salary was above the district average for her role and she did not possess additional knowledge, skills, abilities or cross training). As the grievant has failed to present any evidence that would raise a sufficient question that the agency's stated business reason is a pretext for discrimination, the grievant's discrimination claim 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