Issue: Qualification/compensation/in-band adjustment; Ruling Date: September 5, 2006; Ruling #2006-1390; Agency: Department of Social Services; Outcome: qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2006-1390
September 5, 2006

The grievant has requested a ruling on whether her April 21, 2006 grievance with the Department of Social Services (DSS or the agency) qualifies for a hearing. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The agency employs the grievant as a Support Enforcement Specialist. On April 21, 2006, the grievant initiated a grievance challenging her failure to receive a salary adjustment. In her response, the first-step respondent indicated that the grievant had been submitted for an in-band adjustment, but that "management pulled back the request due to [the grievant's] behavior." The first-step respondent noted that that during the period of in-band adjustment consideration, the grievant had received two counseling memos, one for allegedly using a state envelope and metered stamp for personal mail and another for allegedly breaching the confidentiality of a customer.

The grievant advanced the grievance to the second resolution step, where her request for relief was again denied, although she was advised that "resolution" to her request "will be accomplished in the newly undertaken statewide salary study." The grievant subsequently advanced her grievance to the third step, where she was advised by the third-step respondent that "In-Band Adjustments under our pay practice guidelines must be management initiated," and that he therefore was upholding the decision of the second-step respondent.

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify her grievance for hearing. The agency head denied the grievant's request, and she 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.[1] 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.[2]

Informal Discipline

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.[3] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[4] 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 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). [5]

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[6] Because a denial of a wage increase may constitute an adverse employment action,[7] 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 this grievance raises a sufficient question as to whether the agency's primary intent was to correct or punish perceived poor performance and thus qualifies for hearing. In explaining to the grievant why she had not received an

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[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[3] Va. Code § 2.2-2900 *et seq.*
[4] DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93).
[5] *See* EDR Ruling Nos. 2002-227 & 230.
[6] 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)).
[7] *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).

adjustment, the first-step respondent specifically stated that the request for an adjustment was "pulled back" because of the grievant's alleged "behavior," as apparently documented in two counseling memos. Whether the denial was primarily to punish or correct the grievant's behavior or was instead properly based on the considerations set forth in DHRM Policy 3.05 and/or any agency policy 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 nevertheless warranted and appropriate. Should the hearing officer find that the denial was adverse, disciplinary and unwarranted, he or she may rescind the denial, just as he or she may rescind any formal disciplinary action.[8]

Alternative Theory

The grievance, fairly read, also states a claim of misapplication and/or unfair application of DHRM Policy 3.05 as well as any related agency policies on compensation. Because the issue of informal discipline qualifies for hearing, this Department deems it appropriate to qualify the grievant's claim of misapplication and/or unfair application of policy for hearing as well, to help assure a full exploration of what could be related facts and circumstances.

We note, however, that this qualification ruling in no way determines that the agency's actions toward the grievant constituted unwarranted informal discipline, were a misapplication or unfair application of policy, 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 April 21, 2006 grievance is qualified for hearing. 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

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