

Issue: Qualification/Compensation/In-band adjustment; management actions/assignment of duties; Ruling Date: October 16, 2006; Ruling #2007-1438; Agency: Department of Transportation; Outcome: not qualified



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Department of Transportation  
Ruling Number 2007-1438  
October 16, 2006

The grievant has requested a ruling on whether his May 23, 2006 grievance with the Virginia Department of Transportation (VDOT or the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant works for the agency as an Area Headquarters Superintendent. On May 23, 2006, the grievant initiated a grievance challenging an in-band adjustment given to another Area Headquarters Superintendent, Mr. H, as well as an alleged reduction of Mr. H's duties with respect to after-hours call-outs. 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.

The grievant alleges, and the agency apparently does not dispute, that Mr. H received a 10% in-band adjustment after the agency determined that Mr. H was not eligible under policy to commute in a state vehicle. The agency states it agreed to provide Mr. H a state vehicle when he transferred to his current position. The agency asserts that when it realized that Mr. H was not eligible to use a state vehicle for commuting, it gave him an in-band adjustment "[i]n consideration of the agency's inability to make good on its earlier commitment." The agency further states that the justification for the in-band adjustment was "listed as retention," as it was concerned that Mr. H's "desire to remain with VDOT might diminish if the agency failed to fulfill a promise that was a condition of his acceptance of the job."

The grievant also alleges that in addition to giving Mr. H the in-band adjustment, the agency also reduced Mr. H's job duties "by 10%" by eliminating his obligation to respond to call-outs. The agency asserts that all superintendents, including the grievant, have the option to delegate the responsibility for responding to call-outs. The agency

states that Mr. H has elected to exercise this authority, in light of the distance from his home to his geographic area of responsibility, and that his compensation was not affected by this choice. The agency further states that the grievant could delegate his responsibility for call-outs if he wished, without any impact on his compensation.

As relief, the grievant asks that he be given a 10% increase to match that given to Mr. H, as well as an additional 10% increase for continuing to respond to call-outs. In the alternative, the grievant asks that the agency give him a 10% pay increase to match that given to Mr. H and remove his responsibility for responding to call-outs.

### DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</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>2</sup> Similarly, complaints relating solely to "work activity accepted by an employee as a condition of employment or which reasonably may be expected to be a part of the content of the job" shall not proceed to a hearing unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.<sup>3</sup>

In this case, the grievant claims that management has misapplied and/or unfairly applied policy and procedure by giving Mr. H a 10% increase and by removing his obligation to respond to call-outs. Each of these issues will be addressed below.

#### *In-Band Adjustment*

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>4</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. This policy, pursuant to the Commonwealth's compensation plan, requires all agencies to develop an agency Salary Administration Plan (SAP).<sup>5</sup> A SAP outlines how the agency will

---

<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

<sup>3</sup> *Id.*

<sup>4</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). For purposes of this analysis, we assume, without deciding, that the issue grieved would constitute an adverse employment action.

<sup>5</sup> See generally DHRM Policy 3.05 (effective 9/25/00, revised 04/25/05). The SAP "addresses the agency's internal compensation philosophy and policies; responsibilities and approval processes; recruitment and

implement the Commonwealth's compensation management system, and is "the foundation for ensuring the consistent and equitable 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> 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>8</sup>

Under DHRM Policy 3.05, in-band salary adjustments may be authorized for retention purposes.<sup>9</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 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>10</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 policies appear to reflect an intent that similarly situated employees be comparably compensated, they 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, 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).

While we understand the grievant's concern over his co-worker's raise, he has not shown that the agency's decision to give Mr. H an in-band adjustment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. Further, although the agency's actions are understandably viewed by the grievant as "unfair" in the broadest sense of the term, they do not amount to a disregard of the intent of the applicable policies, which allow

---

selection process; performance management; administration of pay practices; program evaluation; appeal process; EEO considerations and the employee 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 Human Resource Management Manual, Chapter 8 *Pay Practices*.

<sup>9</sup> DHRM Policy 3.05, page 12 of 22.

<sup>10</sup> See DHRM Policy 3.05, page 4 and 11 of 22; Virginia Department of Transportation Salary Administration Plan, at 6-7; see also VDOT Pay Practice Administration Guidelines for Classified Employees (Revised 4/25/05).

management great flexibility in making individual pay decisions.<sup>11</sup> Accordingly, this Department concludes that the grievant has not presented evidence raising a sufficient question as to whether the relevant compensation policies have been either misapplied and/or unfairly applied.

*Responsibility for Call-Outs*

The grievant also asserts that the agency has unfairly removed Mr. H's obligation to respond to after-hours call-outs, as he alleges he and other area superintendents are required to do. The agency disputes the grievant's allegation that he is required to perform call-outs, explaining that the grievant has the authority to delegate the responsibility without any impact on his compensation, but has elected not to exercise this authority.

Under these circumstances, we conclude that the grievant has not raised a sufficient question as to whether policy was unfairly applied for his claim to qualify for hearing. We note, however, that this ruling does not prevent the grievant from initiating a subsequent grievance should he attempt to delegate the responsibility for call-outs in the future, and either be denied the ability to do so or be penalized for doing so.

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, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify the grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

---

Claudia T. Farr  
Director

---

<sup>11</sup> See DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*; DHRM Policy 3.05 (effective 09/25/00, revised 04/25/05); Department of Transportation Salary Administration Plan.