

Issue: Compliance – Grievance Procedure (Other Issue – actions previously grieved), and Qualification – Compensation (In-Band Adjustment), and Discrimination (Age); Ruling Date: February 4, 2008; Ruling #2008-1799; Agency: Department of Corrections; Outcome: Grievant In Compliance (in part), Grievant Not In Compliance (in part); Not Qualified.



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

**COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR**

In the matter of Virginia Department of Corrections  
Ruling Number 2008-1799  
February 4, 2008

The grievant has requested a ruling on whether his July 6, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. In addition, the agency asserts that some of the issues raised in the July 6, 2007 grievance were the subject of a previous grievance filed by the grievant and as such, the grievant is out of compliance with the grievance process. For the reasons set forth below, this Department concludes that the grievant's July 6, 2007 grievance is in compliance with regard to his claim that he was wrongly denied an in-band adjustment on June 5, 2007. However, for the reasons below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Chief Probation and Parole Officer with DOC. On May 25, 2007, several employees within the Probation and Parole department of DOC received in-band adjustments based on internal salary alignment. The grievant was notified by letter dated June 5, 2007 that he had not received an adjustment to his salary. The grievant subsequently challenged his failure to receive an in-band adjustment by initiating a grievance on July 6, 2007. The July 6<sup>th</sup> grievance advanced through all the management resolution steps and to the agency head for qualification. The agency head denied qualification and as such, the grievant seeks a qualification determination from this Department.

DISCUSSION

*Compliance*

The agency claims that some of the issues contained in the grievant's July 6, 2007 grievance were the subject of the grievant's earlier April 10, 2007 grievance<sup>1</sup> and as such, the grievant is out of compliance with the grievance process. According to the grievance procedure, an employee's grievance must not duplicate another grievance challenging the

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<sup>1</sup> The grievant concluded his April 10, 2007 grievance on June 15, 2007.

same action or arising out of the same facts.<sup>2</sup> When an employee initiates a grievance that duplicates another grievance challenging the same facts, the grievance may be administratively closed due to noncompliance.<sup>3</sup>

In his April 10, 2007 grievance, the grievant challenged the general effect and substance of the agency's new pay practices policy and the application of the pay practices policy to an employee under the grievant's supervision (Employee). More specifically, the grievant initiated his April 10, 2007 grievance to challenge the events surrounding the submission of a Determining Rate of Pay (DROP) Form. The grievant was requesting that Employee be given a ten percent promotional pay increase. The grievant alleges that agency policy required that DROP Forms be addressed within ten days. The request was not acted upon until March 23, 2007. In the meantime, the agency issued a new policy on such salary adjustments. The result was that the Employee was given only a 5% permanent salary adjustment and a one-time 5% bonus under the new policy. The grievant then initiated his April 10, 2007 grievance to challenge the agency's delay in acting on the DROP Form. He further alleged in his April 10<sup>th</sup> grievance that the actions of the agency, and the policy itself, resulted in age discrimination against the Employee.

In his July 6, 2007 grievance, the grievant mentions the implementation of the new pay practices policy as well as the discriminatory effect of this policy on Employee. As such, it appears that the grievant is challenging the content of the agency's new pay practices policy and the application of that policy to Employee in his July 6, 2007 grievance. As stated above, these issues were previously raised in the grievant's April 10, 2007 grievance. The grievance procedure does not allow an employee to initiate more than one grievance challenging the same action or arising out of the same facts. Accordingly, to the extent the July 6, 2007 grievance challenges the content of the agency's new pay practices policy and the application of that policy to Employee, the grievant is out of compliance with the grievance process and these issue will not be addressed in this qualification determination. This Department's rulings on matters of procedural compliance are final and nonappealable.<sup>4</sup>

However, this Department concludes that the grievant has appropriately challenged the agency's June 5, 2007 denial of an in-band adjustment to himself (a new management action since the filing of his April 10, 2007 grievance) as a misapplication of policy and discriminatory. Accordingly, as discussed below, this Department will issue a qualification determination on whether the denial of an in-band adjustment to the grievant was a misapplication and/or unfair application of policy and/or discriminatory.

### *Qualification*

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<sup>2</sup> See *Grievance Procedure Manual* § 2.4.

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

<sup>4</sup> Va. Code § 2.2-1001 (5).

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>5</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>6</sup>

In this case, the grievant claims that management has misapplied and/or unfairly applied policy and procedure and discriminated against him on the basis of age<sup>7</sup> by not providing him with a salary adjustment like that received by other Chief Probation Officers. Each of these issues will be addressed below.

#### Misapplication and/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>8</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 continuously review agency compensation practices and actions to ensure that similarly situated employees are treated the same.<sup>9</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>10</sup>

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>11</sup> 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

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<sup>5</sup> See Va. Code § 2.2-3004(B).

<sup>6</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

<sup>7</sup> At the time of the in-band adjustments, the grievant was 60 years of age.

<sup>8</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>9</sup> See DHRM Policy 3.05, *Agency Responsibilities*.

<sup>10</sup> See DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*.

<sup>11</sup> See DHRM Policy 3.05, *Pay Practices*.

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 has provided significant documentation and other information demonstrating that it considered the enumerated pay factors in determining which employees would receive an in-band adjustment. More specifically, according to the agency, it was having problems with turn-over and vacancies within Probation and Parole and as a result, the agency would go through periods where it would have to hire many new people. Some of these new hires were given higher salaries than current employees doing the same work, which undoubtedly created a disparity in pay among employees occupying the same role. Based on this, the agency determined that in order to stabilize the work force (pay factor 12) and to create internal equity (pay factor 8), it had a business need (pay factor 1) in updating the job structure, pay structure and pay practices across all career groups, including Probation and Parole. In order to fulfill its need, the agency looked at the duties and skills (pay factors 2, 3, 4, 5, and 6) of all those in the Probation and Parole career group and created "skill based tiers."<sup>12</sup> The grievant was classified as a Chief Probation Manager, which placed him in tier eight. The agency then created "target" salaries for each tier (pay factor 9).<sup>13</sup> The target salary for the grievant's role and work location was identified as \$56,488. Once the targets were established, employee salaries were considered (pay factors 10 and 13) and internal salary adjustments (pay factor 8) were made for those furthest from the established target. Due to fiscal limitations (pay factor 11), those employees close to the target did not receive an adjustment. Further, those, such as the grievant, whose salary exceeded the target salary for their role did not receive an adjustment (pay factor 13).<sup>14</sup>

As stated above, policy confers broad discretion on management in making the kind of compensation decisions present in this case. As such, absent some evidence that (1) management violated a mandatory policy provision (e.g., failure to consider the pay factors listed in Policy 3.05); or (2) the challenged action was so unfair as to amount to a disregard of the intent of the policy (e.g., treating two identically situated employees differently), this Department cannot qualify a grievance for hearing on the basis of misapplication or unfair application of policy. In this case, the grievant has not shown that the agency's decision to give others in his position an in-band adjustment violated a

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<sup>12</sup> There are 13 tiers. The first three tiers contain the roles of Probation Officers I, II and III. The fourth tier contains Senior Probation Officers. The sixth tier includes the role of Deputy Chief Probation Officer. The eighth tier contains the role of Chief Probation Manager, while the tenth and twelfth tiers contain the roles of Chief Probation Manager Senior and Chief Probation Director respectively. Tiers five, seven, nine eleven and thirteen are "placeholders" in that they are not currently being used but will be used in the future.

<sup>13</sup> The target salaries varied depending on ones work location. There are three main areas identified: SW (statewide), FP (Northern Virginia) and NB (DOC expanded public safety pay range for districts/facilities contiguous to the FP area).

<sup>14</sup> As of May 10, 2007, the grievant's salary was \$59,288.

specific mandatory policy provision or amounted to a disregard of the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.<sup>15</sup> Accordingly, the question as to whether the relevant compensation policies have been either misapplied and/or unfairly applied is not qualified for hearing.

### Age Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of age.<sup>16</sup> In this case, the grievant is challenging the discriminatory effect of the agency's compensation policy. As such, the grievant is claiming that he is the victim of "disparate impact" discrimination (as opposed to "disparate treatment" discrimination). In order to prevail on a disparate impact claim, a grievant need not provide evidence of the employer's *subjective* intent to discriminate on the basis of his membership in a protected class. Instead, a grievant must demonstrate that a policy applied by the employer, although neutral on its face, is discriminatory in its application.<sup>17</sup>

In order to state a disparate-impact discrimination claim under the Age Discrimination in Employment Act (ADEA),<sup>18</sup> "it is not enough to simply allege that there is a disparate impact on workers, or point to a generalized policy that leads to such an impact. Rather, the employee is 'responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities.'"<sup>19</sup> However, even if there are such "statistical disparities," an agency can avoid liability if it can show that the employment practice was based on reasonable factors other than age.<sup>20</sup>

In this case, the May 25, 2007 salary adjustments resulted in 20 Chief Probation Officers, including Chief Probation Managers, Senior Chief Probation Managers and Probation Directors, receiving an internal salary alignment, while 22 did not receive any adjustment to salary. Of the 20 that received a salary adjustment, 17 were over the age of 40, and 3 were under the age of 40. Moreover, of the 17 that received a salary adjustment, two were older than the grievant (i.e., 67 and 61 years of age) and two were

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<sup>15</sup> See DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*; DHRM Policy 3.05.

<sup>16</sup> See Grievance Procedure Manual § 4.1(b).

<sup>17</sup> *Barnett v. Technology International, Inc.*, 1 F. Supp. 2d 572, 579 (E.D.Va. 1998), citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

<sup>18</sup> The ADEA applies to individuals 40 years of age and older and states "[i]t shall be unlawful for an employer--(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or (3) to reduce the wage rate of any employee in order to comply with this Act." 29 U.S.C. § 623.

<sup>19</sup> *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) *quoting* *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989).

<sup>20</sup> *Smith* at 241-243.

one year younger than the grievant (i.e., 59 years of age). More importantly, however and as discussed in detail above, the agency has demonstrated that its compensation decisions in this case were based on reasonable factors other than age. Accordingly, the grievant's age discrimination claim does not qualify for a 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, 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.

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Claudia T. Farr  
Director