COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2008-1873
March 28, 2008

The grievant has requested a qualification ruling in her August 13, 2007 grievance with the Department of Transportation (VDOT or the agency). In her August 13th grievance, the grievant challenges the agency's failure to award her an upward adjustment to her salary. For the reasons discussed below, this grievance qualifies for hearing and is consolidated for hearing with the grievance that was the subject of EDR Ruling 2008-1874.

FACTS

The grievant is employed as a Program Administration Specialist I with VDOT. On July 26, 2007, the grievant discovered that her salary was "significantly" lower than other Program Administration Specialist I's throughout the state and that these other employees had recently received an upward adjustment to their salaries.[1] The grievant went to her supervisor, Ms. A., and learned that in January 2007, Ms. A. had allegedly submitted a pay action worksheet (PAW) to the agency's central office seeking an in-band salary adjustment for the grievant based on internal salary alignment. The agency claims that it never received the PAW allegedly submitted by the grievant's supervisor and as such, the grievant was not awarded an upward adjustment to her salary.

On August 13, 2007, the grievant initiated a grievance challenging management's denial of an in-band adjustment for her while awarding such adjustments to her counterparts throughout the state. The agency denied the grievant any relief in the grievance process due to the "freeze" that was placed on all in-band adjustments on July 12, 2007 by VDOT's Chief of Organizational Development.[2] More specifically, in an e-mail dated July 12, 2007 to the executive staff, the Chief of Organizational Development writes: "Please ensure that you and your leaders do not process any in-band adjustments or bonuses from this day, July 12, 2007, forward until you receive a final decision regarding our practice and guidelines for FY08 In-Band Adjustments."

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[1] Six Program Administration Specialist I's, all of whom were already being compensated significantly more than the grievant, received an upward adjustment to their salaries effective in either May or June of 2007.

[2] The agency appears to recognize that the grievant may be entitled to an upward adjustment to her salary and has stated that she will be considered for such an adjustment as soon as the "freeze" is lifted. According to the agency, the "freeze" was lifted on February 29, 2008.

The Chief of Organizational Development sent a subsequent e-mail to the executive staff on August 14, 2007, which sets forth exceptions to the "in-band adjustment/bonus freeze" put in place on July 12, 2007. These exceptions include: obtaining licensures or meeting the Construction Inspector Trainee program requirements.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4] In this case, the grievant claims that management has misapplied and/or unfairly applied policy by denying her an in-band adjustment to her salary.[5]

Misapplication of Policy/Unfair Application of Policy

For an allegation of misapplication of policy or unfair application of policy 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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[7] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] Because a denial of a wage increase may constitute an adverse employment action,[10] we find that the

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[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[5] Although not specifically denoted as such, the grievant's assertion on the Form A that her salary is "significantly" out of alignment when compared to her counterparts and that the agency treated her differently when it failed to provide her with a salary adjustment can be fairly read as a misapplication or unfair application of policy claim.
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[8] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997).
[10] *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).

grievant has raised a sufficient question as to whether the grieved management conduct was an adverse employment action.

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).[11] 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."[12] The agency has complied with this requirement by developing a SAP to address its pay practices.[13]

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.[14] 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.[15] 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.[16]

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.[17]

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[11] *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.

[12] DHRM Policy 3.05.

[13] *See* VDOT Salary Administration Plan, effective July 27, 2006.

[14] *See* DHRM Policy 3.05.

[15] *See* DHRM Policy 3.05 and VDOT Salary Administration Plan, Attachment I, Pay Practice Administration Guidelines for Classified Employees, Revised July 10, 2006, page 3. 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. *Id.*

[16] *See* DHRM Human Resource Management Manual, Chapter 8 *Pay Practices*.

[17] *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).

Here, the grievant has met this burden. In particular, VDOT states that it cannot provide the grievant with an in-band adjustment because all in-band salary adjustments were "frozen" by the Chief of Organizational Development on July 12, 2007 and only those employees with exceptional circumstances, such as those outlined by the Chief of Organizational Development in her August 14, 2007 e-mail, were given in-band adjustments after the July 12th e-mail. During this Department's investigation, VDOT informed the investigating consultant that 31 VDOT employees received in-band adjustments between July 26, 2007 and January 28, 2008. The vast majority of these 31 employees were not similarly-situated to the grievant as these employees received in-band salary adjustments based on the acquisition of new knowledge, skills and/or abilities, a significant change in duties, or for retention purposes.[18] However, three of the 31 employees received in-band salary adjustments on the basis of internal salary alignment. This Department should note that two of these three employees may not be similarly-situated to the grievant even though the agency has classified their adjustment as an internal salary alignment. That is, the agency asserts that one of these three employees received an upward adjustment to his salary because he took on a new role, while it appears that the other may have obtained a license warranting the adjustment. However, even if the agency can prove that these two employees are not similarly-situated to the grievant, there remains one employee that received an in-band adjustment to his salary based on internal alignment and does not appear to have done so as a result of obtaining any sort of degree, licensure, etc. warranting the adjustment. Moreover, there were two employees that were awarded an upward adjustment to their salaries due to a significant change in duties. According to the agency, an exception was requested for these two employees and approved. During this Department's investigation, the agency stated that a similar exception was sought for the grievant in December 2007, but was denied by the Chief of Organizational Development.

In light of the foregoing, this Department concludes that the grievant has raised a sufficient question as to whether the agency has a reasoned basis for awarding some employees in-band adjustments based on internal salary alignment and granting exceptions for others and not the grievant. 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 deny the grievant an in-band salary adjustment in fact was arbitrary or capricious so as to violate compensation policy, only that further exploration by a hearing officer is appropriate.[19]

Consolidation

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[18] Approximately 24 of the 31 were awarded an in-band salary adjustment after July 12th as a result of obtaining a specific license, certification and/or degree or in accordance with the Construction Inspection Trainee Program guidelines. Two employees were awarded an in-band adjustment due to a significant change in duties. There was one employee that was awarded an in-band adjustment so that he would not leave the agency to take a job elsewhere and one employee that received a "change of duties decrease."

[19] In her grievance, the grievant also alleges "discrimination." The grievant however has not stated a legal basis for her discrimination claim. In other words, she has not stated that she feels discriminated against on the basis of her membership in a protected class, e.g, because she is a female, etc. As such, it appears that her claim of discrimination is simply a claim that she has been treated differently than other similarly-situated employees, which has been addressed in the grievant's misapplication and/or unfair application of policy claim and qualified for hearing.

This Department has long held that it may consolidate grievances for hearing with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.[20] EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.[21]

The issue in this case is essentially the same one raised in the August 13, 2007 grievance that was the subject of EDR Ruling 2008-1874. Both grievances involve the same agency and challenge the same agency policy. Given the commonality between this grievance and the grievance addressed in EDR Ruling 2008-1874, this Department finds that consolidation of those grievances appropriate. Accordingly, this grievance is consolidated with the EDR Ruling 2008-1874 grievance, and the two will be heard together by a single hearing officer at a single hearing.

CONCLUSION

For the reasons set forth above, this grievant's August 13, 2007 grievance is qualified for hearing and consolidated with the EDR Ruling 2008-1874 grievance. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

Claudia T. Farr
Director

[20] *Grievance Procedure Manual* § 8.5.
[21] *Id.*