Issue: Qualification - Compensation (In-Band Adjustment and Position Classification); Ruling Date: January 28, 2008; Ruling #2008-1879; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services
No. 2008-1879
January 28, 2008

The grievant has requested a ruling on whether his September 24, 2007 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (the agency) qualifies for a hearing. The grievant claims that the agency has misapplied or unfairly applied state policy during a compensation study and resulting salary revision. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is a Security Officer III (hereinafter referred to as "Security Officer") at one of the agency's facilities. The agency recently undertook a compensation study, which resulted in raising the salaries for newly hired Security Officers. The agency then reviewed the salaries of current Security Officers and awarded individually determined adjustments or bonuses to address the higher salaries for new employees and to recognize certain Security Officers' experience and status as sworn deputies. The grievant received a 5% increase in salary. The grievant filed this grievance to challenge what he perceived as an unfair disbursement among the Security Officers. He states that different adjustments and bonuses were received, and suggested an "across the board" disbursement be made.

In addition to his claims related to the compensation adjustments, he asserts a claim of "unfair pay-band." The grievant is in Pay Band 3 and believes he should be in Pay Band 4. While the grievant is a Security Officer, he performs the duties of a criminal investigator. He is a sworn deputy of the County and attends court regularly. The grievant states that the facility also has employees who investigate issues of patient abuse or neglect. These investigators are in Pay Band 4. The grievant believes that his investigative duties are similar and, therefore, he should be paid at a Pay Band 4 level as well.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, by statute and under the grievance

[1] *See* Va. Code § 2.2-3004(B).

procedure, complaints relating solely to the establishment and revision of salaries and position classifications "shall not proceed to hearing"[2] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. In this case, the grievant claims that 1) the agency did not fairly adjust the salaries of employees in his department during a compensation study, and 2) the agency has classified him in the wrong pay band. The grievant is effectively arguing that the agency has misapplied or unfairly applied 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."[3] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he potentially asserts issues with his salary. Whether the grievant has raised a sufficient question that the agency has misapplied or unfairly applied policy is discussed below separately for each of the grievant's claims.

Compensation Study

The primary policy implicated by the grievant's claim regarding the compensation study is Department of Human Resource Management (DHRM) Policy 3.05. This policy requires agencies to continuously review agency compensation practices and actions to ensure that similarly situated employees are treated the same.[7] 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.[8] 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

[2] Va. Code § 2.2-3004(C).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] 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.
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] 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).
[7] *See* DHRM Policy 3.05, *Compensation*.
[8] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.

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.[9] 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). 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.[10]

While the grievant's concern of fair treatment "across the board" is understandable, he has not shown that the agency's decision granting him only a 5% upward 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. The agency was concerned with recognizing the efforts the grievant had taken to become a sworn deputy and keeping the grievant's salary equitably above the new entry-level salary. There is no evidence that the agency disregarded the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.[11] The grievant has also presented no evidence that his salary adjustment was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Although the agency did not provide equal adjustments to all employees, there is no indication that the agency's actions were without a reasoned basis under the applicable policy. Accordingly, this Department concludes that the grievant has not presented evidence raising a sufficient question that the relevant compensation policies have been either misapplied and/or unfairly applied in relation to the compensation study and its application to his salary.

---

[9] DHRM Policy 3.05, *Compensation*.

[10] *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).

[11] *See* DHRM Policy 3.05, *Compensation*.

"Unfair Pay-Band"

The grievant has also claimed that he should be classified one pay band higher to be equal with investigators of abuse or neglect of patients. This claim appears to be a new claim, which was not included on the Form A, added after the initiation of the grievance. Section 2.4 of the Grievance Procedure Manual provides that once a grievance is initiated, additional claims may not be added. However, even if this claim had been properly initiated, it would not qualify for hearing.

The General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.[12] In addition, the Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."[13] The above statutes evince a policy that would require state agencies and institutions to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. Accordingly, this Department has long held that a hearing officer may not substitute his or her judgment for that of management regarding the correct classification of a position.[14] Thus, a grievance that challenges the substance of an agency's assessment of a position's job duties does not qualify for a hearing, unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions within the agency or that the assessment was otherwise arbitrary or capricious.

This Department cannot conclude that classifying the grievant's position differently than patient abuse or neglect investigators is arbitrary or capricious. While work performed by both is investigatory in nature, the positions are quite different. The grievant conducts investigations of criminal conduct, goes to court, and acts, effectively, as a sworn police officer at the agency's facility. However, the patient abuse investigators support the services the agency provides to clients by investigating conduct directly related to the agency's mission. Further, the grievant's position and the abuse or neglect investigator position appear in unrelated occupational families and career groups (Security Services vs. General Administration respectively). Because there are clear differences in the duties of these positions, it cannot be said that classifying them differently is arbitrary or capricious. As such, the grievant has not raised a sufficient question that the agency has misapplied or unfairly applied policy to 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

[12] Va. Code § 2.2-2900.
[13] Va. Code § 2.2-103(B)(1).
[14] *See, e.g.*, EDR Ruling No. 2001-062.

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.

_____

Claudia T. Farr
Director