Issue: Qualification – Compensation (Other); Ruling Date: June 12, 2008; Ruling #2008-2021; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
EDR Ruling No. 2008-2021
June 12, 2008

The grievant has requested a ruling on whether her February 26, 2008 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant initiated her February 26, 2008 grievance to challenge "ongoing discrimination and disparity in hiring practices which includes education, experience, age and gender." The grievant asserts that "younger staff and male staff" hired after her have received salaries higher than hers or only slightly lower than hers. She also points to one co-worker who allegedly makes nearly $9,000 more than she makes, but has "no college education" and more limited experience. The grievant states that she has been employed by the agency nearly 22 years and has substantial experience. She recently requested an in-band adjustment, but was denied by her supervisor.

During its investigation for this ruling, EDR reviewed the salaries of the employees sharing the same job title as the grievant in the same office. Of the 21 current employees, the grievant has the fourth highest salary in the office. The three employees who have higher salaries are all women, two of whom are also older than the grievant.

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 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.[3] In this case, the grievant claims both discrimination and misapplication or unfair application of policy.

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *See Grievance Procedure Manual* § 4.1(c).

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the grounds asserted by the grievant, age and/or gender.[4] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[5]

The grievant alleges that the pay disparities that have affected her salary were, at least in part, the result of discrimination based on age and/or gender, and has provided information specifically concerning two comparators with whom the grievant alleges salary inconsistencies.[6] However, there are other employees with the same job title as the grievant, in the grievant's office, who have higher salaries and are both female and older than the grievant. Consequently, there is no basis for the grievant's claim of discriminatory pay practices based on age or gender.[7] As the grievant has failed to present any evidence that raises a question of discrimination, the claims of gender and age discrimination do not qualify for hearing.[8]

Misapplication or 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

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[4] *See Grievance Procedure Manual* § 4.1(b).

[5] *See* Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 7, 1998).

[6] One of these comparators, a male who is older than the grievant, left his position over two years ago. The other comparator is a woman who is younger than the grievant.

[7] The grievant also asserts discrimination based on education and experience. These are not actionable grounds for a claim of discrimination. *See, e.g.*, Va. Code § 2.2-3004(A); DHRM Policy 2.05, *Equal Employment Opportunity*. However, those issues are addressed by the misapplication of policy analysis below.

[8] This result is the same even if the grievant's claim that younger employees are hired at higher salaries is analyzed under a disparate-impact theory. In order to state a disparate-impact discrimination claim under the ADEA, "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.'" Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (quoting Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989)). The agency can avoid liability if it can show that the employment practice was based on reasonable factors other than age. *Id.* at 241-43. As discussed above, the evidence does not even indicate "statistical disparities." Rather, the comparable employees with higher salaries than the grievant, with one exception, are older than the grievant. Accordingly, a disparate-impact claim in this case does not qualify for a hearing.

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."[9] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[10] 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."[11] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[12] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she potentially asserts issues with her salary.

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).[13] A SAP outlines how the agency will implement the Commonwealth's Compensation Management System, and is "the foundation for ensuring consistent and equitable application of pay decisions."[14]

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.[15] 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.[16] 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.[17]

Under DHRM Policy 3.05, in-band salary adjustments may be authorized for internal alignment purposes.[18] However, in assessing whether to grant an in-band

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[9] *See Grievance Procedure Manual* § 4.1(b).
[10] 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.
[11] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[12] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[13] *See generally* DHRM Policy 3.05.
[14] DHRM Policy 3.05.
[15] *See* DHRM Policy 3.05.
[16] *See* DHRM Policy 3.05.
[17] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.
[18] As to an in-band adjustment based on internal alignment, DHRM policy indicates that "[a]n increase of 0-10% may be granted to align an employee's salary more closely with those of other employees' within

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.[19] 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). Likewise, the need for internal salary alignment is just one of the 13 different factors an agency must consider in making the difficult determinations of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.

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.[20]

While we understand the grievant's argument that some newer employees with less experience and education may receive salaries close to or higher than the grievant's, DHRM Policy 3.05 does not mandate that new or more junior employees be paid at a rate lower than the rate paid to existing or more senior employees, or that the rate of existing employees be increased to match or exceed that of newer hires. The grievant has not identified any specific policy requirement violated by the agency's existing salary structure. There is no evidence that the agency disregarded the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.[21] The grievant has also presented no evidence that the refusal to grant her a salary

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the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, competencies, and/or knowledge and skills." DHRM Policy 3.05.

[19] *See* DHRM Policy 3.05.

[20] *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, e.g.*, EDR Ruling 2008-1879.

[21] *See* DHRM Policy 3.05; DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.

adjustment was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious.[22]

Based on all the above, and in particular, the agency's broad discretion in determining individual pay decisions, this Department concludes that this grievance fails to raise a sufficient question as to whether the relevant compensation policies have been either misapplied and/or unfairly applied and as such, the February 26, 2008 grievance does not 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 writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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

[22] This ruling is not meant to indicate that the agency would be unwarranted in granting the grievant an in-band adjustment. Indeed, there may be sufficient support in analyzing the 13 pay factors for the agency to justify such an adjustment under the provisions of DHRM Policy 3.05. However, the grievant has not provided evidence indicating that the agency's decision not to grant an in-band adjustment was a misapplication or unfair application of the relevant policies.