Issues: Qualification – Compensation (In-Band Adjustment), Discrimination (Gender), and Retaliation (Grievance Activity Participation); Ruling Date: July 29, 2008; Ruling #2008-2026; 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. 2008-2026
July 29, 2008

The grievant has requested a ruling on whether her January 3, 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 January 3, 2008 grievance to challenge alleged disparities between her salary and other similarly-situated employees. She alleges, in part, that the disparities are the result of unequal pay based on gender. The grievant is an "Advanced" computer programmer with the agency. She was previously slotted as an "Intermediate" programmer, a more junior level, until the agency was ordered to re-evaluate the grievant's level following a hearing decision on August 28, 2007.[1] Upon being slotted as an Advanced programmer, the grievant asserts that her salary is inconsistent with other Advanced programmers who are male.

There appear to be three full-time male Advanced programmers. Two of these programmers have higher salaries than the grievant. In addition, the grievant points to another male comparator, an Intermediate programmer, who has a higher salary. All of these programmers, including the grievant, were hired very close to the same time.[2] The grievant was initially hired at a lower salary than the male comparators.

The grievant has also asserted that the agency misapplied or unfairly applied policy in failing to make adjustments to her salary. Lastly, the grievant argues that the "[f]ailure to make a salary adjustment is retaliation for utilizing the grievance process."

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, by statute and under the

[1] Decision of Hearing Officer, Case Nos. 8589/8591, Aug. 28, 2007.
[2] The one male Advanced programmer whose salary is just below the grievant's was not hired at the same time. He had been an agency employee for six years prior to the hiring of the other programmers.
[3] *See* Va. Code § 2.2-3004(B).

grievance procedure, complaints relating solely to the establishment and revision of salaries "shall not proceed to hearing"[4] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[5] In this case, the grievant claims unequal pay due to discrimination on the basis of gender, misapplication or unfair application of policy, and retaliation. Each of these claims is considered below.

Discrimination

To qualify her discrimination claim for hearing, the grievant must demonstrate that she is a member of a protected class, and that her job was similar to higher paying jobs of employees of the opposite sex.[6] However, if the agency offers a legitimate non-discriminatory justification for the wage differential, the grievance will not be qualified for hearing absent sufficient evidence that the agency's proffered explanation was a pretext for discrimination.[7]

The grievant has identified other male Advanced programmers as comparators. It would appear that the Advanced programmers, including the grievant, have "similar" jobs because their EWP's are virtually identical. In addition, the grievant has stated, and information gathered from the agency confirms, that two of the three male Advanced programmers have higher salaries than the grievant.[8] There is also at least one Intermediate male programmer who has a higher salary than the grievant. However, the evidence of pay disparities is also contradicted, in part, by the fact that at least one male Advanced programmer has a salary just below the grievant's.

In response, the agency states that the grievant was not entitled to additional compensation when she was re-slotted as an Advanced programmer because her salary was above the minimum of the salary range for the position. The agency also asserts that salaries are set at the time of hire and any disparities that exist are a carryover from those determinations. Because the grievant was hired at a lower salary initially than the other Advanced programmers (and at least one Intermediate programmer), her salary continues to be lower than the other male programmers. Further, evidence provided by the agency appears to indicate that salaries were set at the time of hire partially based upon the candidate's pre-employment salary. The male comparators' pre-employment salaries all appear to have been higher than the grievant's. Indeed, it appears the male comparators received salary decreases upon accepting their positions with the agency.

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[4] Va. Code § 2.2-3004(C).
[5] *Grievance Procedure Manual* § 4.1(c).
[6] *See* Brinkley-Obu v. Hughes Training, Inc., 36 F.3d 336, 343 (4th Cir. 1994).
[7] *See id.* at 344. It should be noted that this analysis could differ if the grievant's claim was analyzed under the Equal Pay Act. However, because it appears the grievant falls under the computer employee exemption, *see* 29 U.S.C. § 213(a)(17), her position would not be subject to the Equal Pay Act provisions of the Fair Labor Standards Act. *See* Downes v. J.P. Morgan Chase & Co., No. 03 Civ. 8991, 2007 U.S. Dist. LEXIS 36677, at *12-29 (S.D.N.Y. May 16, 2007).
[8] There were also previously two other male Advanced programmers who have left the team. These male programmers also appear to have been paid more than the grievant.

The grievant has not presented any indication that the agency's non-discriminatory justifications for the wage differentials and pay decisions were pretextual. In her grievance paperwork, the grievant has stated that her knowledge, skills, and abilities exceeded those of her male comparators, suggesting that her lower salary is not warranted.[9] However, these statements do not support a finding of discriminatory intent. Taken together with the lack of sufficient evidence of pay disparities based on gender, this Department cannot find that the grievance raises a sufficient question of intentional discrimination to qualify for hearing.[10]

Misapplication or Unfair Application of Policy

The grievant appears to argue that the agency has misapplied or unfairly applied policy by not granting her an in-band adjustment. 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."[11] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[12] 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."[13] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[14] 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.

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[9] These issues could be more relevant to the issue of whether the grievant is deserving of an in-band adjustment.

[10] This result is the same even if the grievant's claim is analyzed under a disparate impact theory. "To establish a prima facie case of disparate impact discrimination under Title VII, a plaintiff must 'show that the facially neutral employment practice had a significantly discriminatory impact.'" Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 265 (4th Cir. 2005) (quoting Walls v. City of Petersburg, 895 F.2d 188, 191 (4th Cir. 1990)). An employer can avoid a finding of discrimination by demonstrating that the practice has "'a manifest relationship to the employment in question.'" *Id.* (quoting Connecticut v. Teal, 457 U.S. 440, 446 (1982)). "Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* The grievant's evidence does not demonstrate statistical disparities sufficient to establish a "significantly discriminatory impact." Accordingly, a disparate impact discrimination claim in this case does not qualify for a hearing.

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

[12] 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.

[13] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[14] 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).

The primary policy implicated by the grievant's claim 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.[15] 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.[16] 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.[17] 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). 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.[18]

In this case, the grievant has not shown that the agency's decision not to grant the grievant an 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

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[15] *See* DHRM Policy 3.05, *Compensation*.
[16] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.
[17] DHRM Policy 3.05, *Compensation*.
[18] *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).

compensation policies. When the grievant was re-slotted as an Advanced programmer, her salary fell within the pay range for such programmers. Therefore, the agency determined that the grievant was not automatically due any salary adjustment. The agency states that such adjustments were only made upon re-slotting if the employee's salary was outside the pay range for the employee's new position.

There is no evidence that the agency disregarded the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.[19] The grievant has also presented no evidence that the failure to grant a salary adjustment was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. 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.[20]

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[21] (2) the employee suffered a materially adverse action;[22] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[23] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[24]

Initiating and participating in a grievance is clearly protected activity.[25] However, even if it is assumed that the grievant has experienced a materially adverse action,[26] the

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

[20] This ruling is not meant to indicate that the grievant is not deserving of 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.

[21] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[22] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[23] *See, e.g.,* EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[24] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[25] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

grievant has presented no evidence that a causal link exists between the grievant's prior protected acts and the alleged adverse action at issue in this case. The grievant has not presented any evidence that the agency's decision not to increase her salary once she was re-slotted as an Advanced programmer was motivated by improper factors. Rather, as discussed above, it appears that the determination was based on the fact that the grievant's salary already was within the pay range for Advanced programmers. Further, it appears adjustments were only made upon re-slotting when an employee's salary was outside such a range. The grievant has not presented evidence that raises a sufficient question that the agency's stated rationale was pretextual. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievant's claim 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 appeal to the circuit court in the jurisdiction in which the grievance arose 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.

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Claudia T. Farr
Director

[26] In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).