

Issue: Administrative Review of Hearing Officer's Decision in Case No. 8856/8857;
Ruling Date: August 5, 2008; Ruling #2008-2055, 2008-2056; Agency: Virginia
Department of Transportation; Outcome: Remanded to Hearing Officer.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

ADMINISTRATIVE REVIEW OF DIRECTOR

In the matter of the Department of Transportation
Ruling Numbers 2008-2055, 2008-2056
August 5, 2008

The Department of Transportation (the agency) has requested that this Department (EDR) administratively review the hearing officer's decision in Case Number 8856/8857. For the reasons set forth below, the case will be remanded to the hearing officer for reconsideration and clarification.

FACTS

The hearing officer found the facts as follows:

The Virginia Department of Transportation employs Grievant A as a Program Administrative Specialist I at one of its facilities. Her working title is Civil Rights Analyst. She began working for the Agency on March 16, 1990.

On July 26, 2007, Grievant A discovered that her salary was "significantly" lower than the other VDOT Program Administration Specialist I's throughout the State and that these employees had recently received an upward adjustment to their salaries. Grievant A contacted her supervisor, Ms. A, and complained that her salary was out of alignment. Ms. A told Grievant A that in January 2007 she had submitted a pay action worksheet to the Agency's central office seeking an in-band salary adjustment for Grievant A based on an internal salary alignment. The Agency's central office staff either did not receive the pay action worksheet or failed to process it. As a result, Grievant A did not receive an upward adjustment to her salary.

On August 13, 2007, Grievant A filed a grievance challenging the Agency's denial of an in-band pay adjustment for her while awarding such adjustments to her counterparts throughout the State. The Agency denied Grievant A's request for relief because the Agency had frozen all in-band adjustments on July 12, 2007 pursuant to a directive of the Agency's Chief of Organizational Development. On February 29, 2008, the Agency ended the "freeze". On April 28, 2008, the Agency approved a pay action worksheet and raised Grievant A's salary by ten percent.

Grievant W is employed as an Administrative and Office Specialist III at one of the Agency's facilities. Her working title is Civil Rights Technician. On July 26, 2007, Grievant W discovered that her salary was "significantly" lower than the other VDOT Administrative and Office Specialist III's throughout the State and that these employees had recently received an upward adjustment to their salaries. Grievant W contacted her supervisor, Ms. A, and complained that her salary was out of alignment. Ms. A told Grievant W that in January 2007 she had submitted a pay action worksheet to the Agency's central office seeking an in-band salary adjustment for Grievant W based on an internal salary alignment. The Agency's central office staff either did not receive the pay action worksheet or failed to process it. As a result, Grievant W did not receive an upward adjustment to her salary.

On August 13, 2007, Grievant W filed a grievance challenging the Agency's denial of an in-band pay adjustment for her while awarding such adjustments to her counterparts throughout the State. The Agency denied Grievant W's request for relief because the Agency had frozen all in-band adjustments on July 12, 2007 pursuant to a directive of the Agency's Chief of Organizational Development. On February 29, 2008, the Agency ended the "freeze". On April 28, 2008, the Agency approved a pay action worksheet and raised Grievant W's salary by ten percent.¹

The hearing officer determined that the grievants "were entitled to in-band pay adjustments at the same time the Agency concluded in-band pay adjustments were appropriate for other comparable employees."² The hearing decision further provided that the increase of the grievants' salaries granted by the agency on April 25, 2008 "serves as an admission" that their salaries were inconsistent with similarly situated employees.³ As such, the hearing officer ordered the agency to change the effective date of the April 25, 2008 salary increases to 30 calendar days prior to August 13, 2007, the date the grievances were initiated.⁴ The agency now requests administrative review from this Department.

DISCUSSION

By statute, this Department has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure."⁵ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, this Department

¹ Decision of Hearing Officer, Case No. 8856/8857, June 23, 2008 ("Hearing Decision"), at 2-3 (footnotes omitted).

² *Id.* at 4.

³ *Id.*

⁴ *Id.* at 5.

⁵ Va. Code § 2.2-1001(2), (3), and (5).

does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.⁶

Relief Not Requested on Form A

The agency asserts that the hearing officer erred because the relief he awarded was not requested by the grievants until after the initiation of their grievances. The agency cites to section 2.4 of the *Grievance Procedure Manual* to suggest that the hearing officer improperly accepted and acted upon the grievants' "expansion" of their grievances. The *Grievance Procedure Manual* states, "[o]nce the grievance is initiated, additional claims may not be added."⁷ This Department has interpreted this language as preventing grievants from challenging new or different management actions in a grievance once initiated.⁸ The grievants raised the issue of increases to their salaries in their grievances. The matter of when such increases might be effective is naturally a part of these claims and the potential relief awardable. As such, this is not a case of acting upon additional claims. Further, the *Rules for Conducting Grievance Hearings* provides that "the hearing officer is not limited to the specific relief requested by the employee on the Form A."⁹ Thus, we cannot find that the hearing officer erred by granting relief not expressly referenced on the Form A.

Misapplication or Unfair Application of Policy

In a number of different ways, the agency has challenged the hearing officer's finding that the grievants were "entitled" to in-band adjustments. The agency argues that 1) the grievants did not carry their burden to establish that the agency misapplied policy, 2) the grievants did not present evidence regarding pay factors other than internal alignment, 3) the hearing officer improperly assumed the grievants' salaries must be in alignment with those of other employees', 4) the hearing officer incorrectly presumed that because the grievants qualified for in-band adjustments in April 2008, they were also deserving of the adjustments before that time, and 5) the hearing officer disregarded the testimony of the agency's witness regarding compensation and classification issues. Further, the agency points out that the hearing decision does not state that the agency misapplied policy.

This Department is unable to address the above points largely because of the last concern. The hearing decision merely concludes that the grievants were entitled to in-band adjustments at the time the agency determined that in-band adjustments were appropriate for other comparable employees. The hearing decision does not expressly state whether or how the agency misapplied or unfairly applied policy in this case, why the grievants were entitled to the in-band adjustments, or, why the grievants were entitled to the adjustments at the time that in-band adjustments were deemed appropriate for other comparable employees.

The hearing decision discusses at least three different considerations: 1) the grievants were not provided pay adjustments when the agency considered such adjustments were

⁶ See *Grievance Procedure Manual* § 6.4(3).

⁷ *Grievance Procedure Manual* § 2.4.

⁸ See, e.g., EDR Ruling Nos. 2007-1561 & 2007-1587; EDR Ruling No. 2007-1457; EDR Ruling No. 2007-1444.

⁹ *Rules for Conducting Grievance Hearings* § VI(A).

appropriate for other comparable employees, 2) the April 25, 2008 adjustments were admissions that the grievants' salaries were not consistent with similarly situated employees, and 3) internal alignment issues existed prior to April 25, 2008.¹⁰ These factors could support different findings under potentially disparate theories. However, because there are different theories on which the hearing officer might have based his decision, this Department cannot respond to the agency's arguments about the sufficiency of the grievants' evidence and the hearing officer's resulting findings on the misapplication or unfair application of policy issue. Therefore, the matter must be remanded to the hearing officer for reconsideration and clarification.

Accordingly, the hearing officer is ordered to reconsider and clarify the grounds for his decision and how those grounds impact the decisions themselves. The hearing officer must expressly address whether the agency misapplied or unfairly applied policy and he must describe the basis for his findings. Further, the reconsidered decision must clarify the rationale for its determinations on whether and when the grievants were entitled to the in-band adjustments, and the grounds or theories for those determinations. The agency may then renew its request for administrative review with this Department **within 15 calendar days** of the date of the issuance of the reconsideration decision. Both parties will also have the opportunity to request review of the hearing officer's reconsidered decision on any other new matter raised in the reconsideration decision (i.e., any matters not previously part of the original decision).¹¹ Any such requests must be **received** by the administrative reviewer **within 15 calendar days** of the date of the issuance of the reconsideration decision.¹²

Hearing Officer Authority

The agency also argues that in changing the effective date of the grievants' in-band adjustments, the hearing officer was revising the compensation of the grievants, which is an example of relief not available in a grievance hearing, as provided in *Grievance Procedure Manual* § 5.9(b). In light of the forthcoming reconsidered decision as required above, this challenge will not be addressed here, but may be renewed by the agency, if it so chooses, in a request for administrative review following the issuance of the reconsideration decision.

Generally speaking, however, hearing officers are authorized to order salary adjustments if that result is necessitated upon finding a misapplication or unfair application of policy. As provided in the *Rules for Conducting Grievance Hearings*, in a misapplication or unfair application of policy case, "the hearing officer may order the agency to reapply the policy from the point at which it became tainted, including, where written policy mandates a certain level or type of compensation, making an appropriate upward pay adjustment for the 30 calendar day statutory period preceding the initiation of the grievance."¹³ However, whether the hearing officer's order upon reconsideration is consistent with this provision of the *Rules* can only be determined when the hearing officer reconsiders and clarifies the decision as to the

¹⁰ Hearing Decision at 4.

¹¹ See EDR Ruling Nos. 2007-1563, 2007-1637, 2007-1691; EDR Ruling No. 2007-1556.

¹² See *Grievance Procedure Manual* § 7.2(a).

¹³ *Rules for Conducting Grievance Hearings* § VI(C).

misapplication or unfair application of policy in this case. As such, this Department must also reserve decision on this issue.

CONCLUSION AND APPEAL RIGHTS AND OTHER INFORMATION

Based on the foregoing, the hearing officer is ordered to reconsider and clarify the decision in this case. The parties may seek administrative review of the reconsidered decision **within 15 calendar days** of the date of that decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.¹⁴ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.¹⁵ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.¹⁶

Claudia T. Farr
Director

¹⁴ *Grievance Procedure Manual* § 7.2(d).

¹⁵ Va. Code § 2.2-3006 (B); *Grievance Procedure Manual* § 7.3(a).

¹⁶ *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).