Issues: Qualification – Compensation (Other), Discrimination (Gender), Management Actions (Assignment of Duties); Ruling Date: November 13, 2008; Ruling # 2009-2098; 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. 2009-2098
November 13, 2008

The grievant has requested a ruling on whether her June 4, 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 June 4, 2008 grievance to challenge alleged inequities in compensation and work assignments. The grievant asserts that employees in her office have much higher work loads than other employees in the same position in other offices. Further, she states that employees that have lighter work loads have higher salaries than certain employees in her office. The grievant has also asserted pay disparities based on gender. The grievant's overriding claim is one of "equal pay for equal work."

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. In this case, the grievant essentially claims both gender discrimination and a misapplication or unfair application of policy.

Gender Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of gender.[3] Claims of unequal pay due to gender discrimination may be analyzed under Title VII of the Civil Rights Act of 1964 (Title VII)[4] and under the Equal Pay Act (EPA).[5] Here, the grievant alleges that pay disparities

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] 42 U.S.C. § 2000e et seq.

affecting her salary are, at least in part, the result of discrimination based on gender. Specifically, she has alleged salary inequalities between herself and male employees with the same job title.

Title VII

To qualify a grievance alleging gender discrimination 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 gender. 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.[6]

In this case, relevant salary information does not support a finding of discrimination. While there are some male employees with the same job title who have higher salaries than the grievant, there are also female employees with the same job title who have higher salaries than the grievant. As such, this grievance does not raise a sufficient question of gender discrimination under Title VII, and therefore, this claim does not qualify for hearing.[7]

EPA

For a discrimination claim under the EPA to qualify for hearing, a grievant must show, for employees working in the same "establishment,"[8] that: (1) the agency has paid different wages to employees of opposite sexes; (2) those employees hold jobs that require equal skill, effort, and responsibility; and (3) those jobs are performed under similar working conditions.[9] If, however, the agency presents sufficient evidence that the wage difference between the male and female employees was the result of either (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) a differential based on any other factor other than sex, the

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[5] 29 U.S.C. § 206(d)(1).

[6] *See* Hutchinson v. INOVA Health System, Inc., No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. April 8, 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[7] This result is the same even if the grievant's claim is analyzed under a Title VII 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, 446-47 (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.

[8] 29 U.S.C. § 206(d)(1); *see also* Collins v. Landmark Military Newspapers, Inc., No. 2:06cv342, 2007 U.S. Dist. LEXIS 57572, at *38-40 (E.D. Va. Aug. 3, 2007).

[9] *See* Brinkley v. Harbour Recreation Club, 180 F.3d 598, 613 (4th Cir. 1999).

grievance will not qualify for hearing unless the grievant can produce evidence raising a sufficient question that the pay differences were nevertheless based on gender.[10]

Here, the relevant "establishment" must first be determined. Under the EPA, "establishment" means "a distinct physical place of business."[11] Ordinarily under the EPA, "each physically separate place of business" of an employer is considered a separate "establishment."[12] Only in "unusual circumstances" are an employer's physically separate locations treated as a single establishment.[13] Such circumstances could include situations where a central administrative unit hires all employees, sets wages, and assigns location of employment; employees frequently interchange work locations; and daily duties are virtually identical and performed under similar working conditions.[14]

In this grievance, while there is some commonality and central control among the various district offices throughout the agency,[15] district offices and hiring managers have controlled a fair amount of personnel and pay decisions. Thus, it does not appear that under the EPA the entire agency should be considered as one "establishment." As such, the comparable employees to consider for purposes of the EPA are those in the grievant's physical place of business, the district office in which she works.

In the grievant's district office, there is only one male employee with the same job title as the grievant. This male employee's salary is approximately $6,000 more than the grievant's. This difference is not insignificant, but it appears that the grievant's lower salary is not due to her gender, but rather to her starting salary under state policy. "Salary differentials that stem from unequal starting salaries do not violate the Equal Pay Act if the original salary inequity can be justified by one of the four exceptions to the Equal Pay Act. In other words, salary differentials based on unequal starting salaries do not violate the Equal Pay Act if the employer can show that the original disparity was based on a legitimate factor other than sex."[16] It appears that the grievant's salary at hire was the maximum allowable under state policy at the time.[17] The grievant's starting salary was

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[10] 29 U.S.C. § 206(d)(1); *see also* Brinkley, 180 F.3d at 613-15.
[11] 29 C.F.R. § 1620.9(a).
[12] *Id.*
[13] 29 C.F.R. § 1620.9(b).
[14] *Id.*; *see also* EEOC Compliance Manual § 10-IV(D) ("Two or more physically separate portions of a business should be considered one 'establishment' if personnel and pay decisions are determined centrally and the operations of the separate units are interconnected.").
[15] The agency states that its central human resources department has only recently (in the last year) exercised oversight in salary matters, for instance, in hiring situations.
[16] Hein v. Oregon College of Educ., 718 F.2d 910, 920 (9th Cir. 1983); *see also* Tornow v. Univ. of N.C., No. 1:90CV00510, 1991 U.S. Dist. LEXIS 20972, at *2 (M.D.N.C. Nov. 26, 1991), *aff'd*, 977 F.2d 574 (4th Cir. 1992) (citing *Hein* for same proposition).
[17] At the time of grievant's hire, state policy provided that starting salaries could not exceed more than 10% of a new hire's pre-employment salary, *unless*, for example, the new hire's pre-employment salary was beneath the minimum for the relevant pay grade. In such a case, the pre-employment salary could then be increased to meet the pay grade minimum, even if the increase exceeded 10% of the pre-employment

much less than the comparable male employee's, who was hired just over a year later. These policy-related differences in starting salaries, not gender discrimination, appear to explain the current pay disparity.

Furthermore, the EEOC Compliance Manual indicates that "if other women are paid the same as or more than males, this may indicate that a factor other than sex explains the complainant's compensation."[18] Because there are other female employees with higher salaries than comparable male employees in the same position occupied by the grievant, it bolsters the argument that the salary differentials resulted from a "factor other than sex." Based on this analysis, this grievance does not raise a sufficient question that any differentials in the grievant's salary were the result of gender-based discrimination. As such, this claim does not qualify for a hearing.

Misapplication or Unfair Application of Policy

The grievant asserts that she has a heavier work load than others in the agency, for instance, those in other offices, but is paid the same or less than these employees. 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."[19] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[20] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues with her salary.

Work Loads

The grievant has raised an issue regarding her work load as compared to other employees around the state.[21] However, this claim regarding work loads is not a claim that qualifies for hearing. By statute and under the grievance procedure, complaints relating solely to the methods, means, and personnel by which work activities are to be carried out "shall not proceed to hearing"[22] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair

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salary. In grievant's case, her pre-employment salary was beneath the pay grade minimum, so the agency raised it by more than 25% to meet the minimum pay grade amount.

[18] EEOC Compliance Manual § 10-IV(E)(1).

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

[20] *See, e.g.,* Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[21] While not dispositive in this ruling, it is noteworthy that the agency appears to have promised to attempt to alleviate the work load issues by transferring a vacant position to the grievant's office, although the grievant states the agency has not yet effectuated this change. In any event, however, a hearing officer would not have authority to order an agency to put such a transfer into effect. *See Grievance Procedure Manual* § 5.9(b).

[22] Va. Code § 2.2-3004(C).

application of policy. This Department has found no policy provision violated, in this case, by the alleged differences in case loads, and the grievant cites to none. Further, there is no indication that the alleged work load inequities described by the grievant are so extreme or arbitrary to rise to the level of a misapplication or unfair application of policy.[23] Accordingly, there is no basis to qualify this claim for a hearing.

Compensation

The primary policy implicated in this grievance 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.[24] 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.[25] 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.[26]

In assessing pay decisions, 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.[27] 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. Because agencies are afforded great flexibility in making pay decisions, this

[23] Additionally, the grievant has presented no evidence that the alleged inequities were retaliatory or discriminatory as prohibited by policy.
[24] *See* DHRM Policy 3.05.
[25] *Id.*
[26] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.
[27] DHRM Policy 3.05.

Department has repeatedly held that qualification is warranted only 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.[28]

Thus, while we understand the grievant's concerns about alleged disparities in work loads and pay, this Department cannot see, under the facts of this case, how DHRM Policy 3.05 would require that the grievant be paid at a higher rate for the sole reason that she is performing a heavier work load than others.[29] The agency certainly would appear to have the discretion to provide upward salary adjustments to employees who exhibit extraordinary performance, and carrying a heavier work load would appear relevant to some of the 13 pay factors. Indeed, analysis of the pay factors might support granting the grievant such an upward adjustment in pay. However, the grievant has not identified any specific policy mandating that such an adjustment be made here.

Further, although DHRM Policy 3.05 states that similarly situated employees should be treated the same, the grievant has not presented sufficient evidence to show that she is similarly situated to other employees making higher salaries. Even if job duties are identical, they are but one potential factor among many when considering whether employees are similarly situated. Thus, a showing of different salaries alone does not support a finding of arbitrariness; and the large range of salaries for employees with the same job title and duties as the grievant, in and of itself, does not raise a sufficient question as whether a misapplication or unfair application of policy has occurred. While salary inconsistencies might exist, this grievance presents insufficient evidence to show that the agency disregarded the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.[30] The grievant has also presented no evidence that the agency's treatment of her salary is plainly inconsistent with other decisions made by the agency or otherwise arbitrary or capricious.[31]

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

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[28] *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.

[29] The "equal pay for equal work" concept is embodied in the EPA, which is not based on comparisons of work loads, but rather solely on pay discrimination because of gender. 29 U.S.C. § 206(d).

[30] *See* DHRM Policy 3.05; DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*. Inconsistent initial salaries could be explained by a number of factors over time, including changing hiring and compensation systems, different hiring managers, economic factors, and the knowledge, skills, and abilities of the individual employees.

[31] 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. This ruling merely holds that the grievant has not provided evidence indicating that the agency's failure to grant an in-band adjustment was a misapplication or unfair application of the relevant policies.

either misapplied and/or unfairly applied. As such, the 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.

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Claudia T. Farr
Director