

Issue: Qualification – Compensation (Temporary Pay); Ruling Date: May 6, 2010; Ruling #2010-2490; Agency: State Council of Higher Education for Virginia; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of State Council of Higher Education
Ruling No. 2010-2490
May 6, 2010

The grievant has requested a ruling on whether her grievance with the State Council of Higher Education (“SCHEV” or the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify.

FACTS

The grievant is employed by SCHEV as an assistant director. In the spring of 2008, SCHEV was awarded a federal grant for one year (August 14, 2008 through August 13, 2009) for over one million dollars. The grant provided a total of \$57,675 in funding to SCHEV for salaries and wages needed to administer the one year grant. Following the grant award, SCHEV agreed to pay the grievant, over and above her regular state salary, \$25,000 as temporary pay for her duties in administering the grant that first year. Discussions later ensued between the agency and Department of Human Resource Management (DHRM) staff, with DHRM’s Director of Human Resource Services agreeing to grant an exception to policy in the amount of a 15% temporary pay adjustment for the remainder of the grant period, which was less than the \$25,000 awarded by the federal grant. DHRM’s Director of Human Resource Services later noted that while the grievant’s additional duties under the grant did not appear to constitute higher level duties normally required for a 15% increase under policy, DHRM approved the agency’s request for an exception at that level as a “good faith measure since [the grievant] had been ‘promised’ much more.”

Due to an administrative error, however, the full amount of \$25,000 was posted to the grievant’s personnel record. The error was discovered in March of 2009, upon which the grievant’s salary going forward was increased by only 15%; again, as an exception to policy granted by DHRM. Shortly thereafter, the agency denied the grievant’s request to provide her a bonus and/or incentive payment from the grant funding to make up the difference between the \$25,000 and the 15% approved by DHRM. The agency stated that due to dire budgetary constraints, and the prospect of impending layoffs, it would not award the grievant any bonus or incentive payment.

After the expiration of the first year of the grant in August 2009, the grant was renewed for a second year. The agency again requested DHRM to grant an exception to policy enabling it to continue to provide the grievant with a 15% increase in salary for the second grant year. By memorandum dated November 19, 2009, the DHRM Director of Human Resource Services allowed an interim exception of 15% through February 24, 2010, but no further, on the basis that a longer period could not be viewed as “temporary” as required for a temporary pay adjustment under policy.

On September 4, 2009, the grievant initiated this grievance asserting that the agency had “unfairly applied or misapplied state and agency personnel policies, procedures, rules, and regulations as pertaining to pay (including but not limited to DHRM Policy 3.05, relating to, among others, temporary pay, In-Band pay bonuses, and Project-based incentives, and its failure to follow the proper implementation of [the grievant’s] P-3 payments as set forth by [Ms. X, a human resources consultant at the Department of Human Resources Management] per a March 10, 2009 e-mail) for [the grievant’s] service and work as the Principal Investigator” for the [federal] grant. The grievant further alleged that the agency refused “to utilize the proper alternatives under state policy so as to provide the compensation agreed upon for [the grievant] to administer and implement the [federal] grant” and has “discriminated against [the grievant] in its application (or lack of application) of these policy options.”

After the parties failed to resolve the dispute during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant’s request, and she has appealed to this Department.

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 “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

The grievant claims that the agency unfairly applied or misapplied state compensation policies, including but not limited to Department of Human Resource Management (DHRM) Policy 3.05, when it allegedly failed to pay her in accordance with a federally funded grant (over and above her existing annual state salary) for her administration of that grant.⁴ For an allegation of misapplication of policy or unfair

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

³ *Grievance Procedure Manual* § 4.1(c).

⁴ The grievant also refers to “discrimination” in her grievance, but has not identified any protected class (e.g., race, gender, age) upon which she claims discrimination has occurred. Thus, her grievance fails to raise a sufficient question of discrimination and cannot be qualified for hearing on that basis.

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.⁵ The grievant, in effect, puts forth two arguments to support her claim of misapplication or unfair application of policy: (1) that the agency should have paid her the agreed-upon grant amount in salary, or (2) if that amount could not be paid in salary under policy, the agency should have provided her with an equivalent amount of compensation through the use of bonuses.

It appears that the grievant in this case is a salaried employee, employed in a classified position, whose terms and conditions of employment are subject to the Virginia Personnel Act. Thus she is a “covered employee” under DHRM Policy 2.20 (Types of Employment), regardless of the extent to which her salary is covered by federal funding. Further, under Policy 2.20, the compensation for “covered employees” is determined by DHRM Policy 3.05 (Compensation). Under DHRM Policy 3.05, an agency may grant an employee a salary increase of up to 10% of his or her current salary as a temporary pay adjustment for assuming the duties of the same or different Role in the same Pay Band; and up to 15% as a temporary pay adjustment for assuming the duties of a different Role in a higher Pay Band. Further, DHRM may approve or disapprove an agency’s request for exceptions to pay practices permitted by Policy 3.05, such as temporary pay adjustments, when “circumstances justify an action outside the policy’s parameters.”⁶

In this case, the additional \$25,000 provided in the federal grant and initially agreed to by the agency for the first grant year increased the grievant’s existing state salary well above 15%,⁷ and thus was inconsistent with DHRM Policy 3.05. Moreover, it appears that providing any “temporary pay adjustment” of up to 15% would not be permissible beyond February 24, 2010, when the extension of the 15% temporary pay adjustment allowed by DHRM through its exception process (in light of the agreement between the grievant and the agency) ended. As DHRM’s Director of Human Resource Services concluded -- in rejecting the agency’s request for an exception beyond February 24, 2010 -- the grievant’s duties were not temporary in nature.⁸ In light of all the above, this grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied Policy 3.05, the controlling policy in this case.

⁵ Further, the grievance procedure generally limits grievances that qualify for hearing to those that involve “adverse employment actions.” See *Grievance Procedure Manual* § 4.1(b). 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.” *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). 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.

⁶ See DHRM Policy 3.05 (Compensation).

⁷ According to the agency, the initially agreed-upon amount represented an increase of 34%.

⁸ Indeed, the Director of Human Resource Services indicated that the grant duties appeared to be an ongoing core requirement, which would not justify a temporary pay adjustment under Policy 3.05.

Similarly, the grievance fails to raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy by not giving the grievant a bonus and/or incentive payment to compensate for the difference between her regular state salary and the additional \$25,000 that had been designated as salary under the federal grant. DHRM Policy No. 3.05 allows agencies to provide in-band bonuses of up to 10% of an employee's base salary as well as project-based incentives of up to \$10,000 per fiscal year. In assessing whether to grant any pay action allowed by Policy 3.05, including bonuses and project-based incentives, an agency must consider, for each proposed pay action, 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.⁹ 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.

Thus, Policy 3.05 appears to reflect the intent to invest in agency management broad discretion for making individual pay decisions. However, 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

Here, the grievant has not shown that the agency's refusal to grant her a bonus or incentive payment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by applicable policy. There is no provision of Policy 3.05 that requires the agency to provide an employee with a bonus or incentive due to funding under a grant for the provision of different or additional duties. In this case, the agency states that it chose not to award the grievant a bonus or incentive payment due to the state's dire budgetary circumstances and expected layoffs at the agency, a possibility which in fact occurred. While the grievant questions the agency's decision, 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 the failure to grant a bonus or incentive payment was inconsistent with other decisions made by the agency, was otherwise arbitrary or capricious, or that the agency's actions were without a reasoned basis under the applicable policy. Accordingly, this Department concludes that the grievance fails to raise a sufficient question as to whether the agency misapplied

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, e.g., EDR Ruling 2008-1879.

¹¹ See DHRM Policy 3.05 (Compensation).

or unfairly applied applicable compensation policy by denying her a bonus and/or project-based incentive.

Finally, to the extent the grievant is alleging a breach of contract or a failure by the agency to abide by the terms of its federal grant, such claims are not among the issues identified by the General Assembly that may qualify for a grievance hearing¹² and are not appropriate for adjudication by a hearing officer.

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 this determination to the circuit court, she should notify the human resources office, in 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 notifies the agency that she does not wish to proceed.

Claudia T. Farr
Director

¹² See Va. Code § 2.2-3004(A).