Issues: Qualification – Compensation (In-Band Adjustment and Temporary Pay) and Retaliation (Grievance Participation); Ruling Date: March 25, 2010; Ruling #2010-2505; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling No. 2010-2505
March 25, 2010

The grievant has requested a ruling on whether her August 27, 2009 grievance with the Department of Juvenile Justice (the agency) qualifies for a hearing. For the reasons below, this grievance does not qualify for a hearing.

FACTS

In her August 27, 2009 grievance, the grievant has included general allegations of disparate treatment, unfair and unjust acts, and retaliation. The grievant further asserts that she is entitled to temporary pay for her role in frequently serving as an acting shift commander, a role normally filled by a Lieutenant. She additionally argues that her salary is out of alignment with others in the same position at her facility. The grievant also complains of retaliation against her, primarily in regard to her various unsuccessful applications for promotion to Lieutenant.

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 challenges management's failure to provide her with temporary pay, to upwardly realign her salary, and to promote her to Lieutenant, on the grounds of 1) misapplication and/or unfair application of policy and 2) retaliation.

Misapplication and/or Unfair Application of Policy – Compensation

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

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).

generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] 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.

Temporary Pay

The primary policy implicated in a claim for temporary pay is Department of Human Resource Management (DHRM) Policy 3.05. This policy provides that "[a]gencies may provide temporary pay to an employee who is assigned different duties on an interim basis, or because of the need for additional assignments associated with a special time-limited project, or for acting in a higher-level position in the same or different Role in the same or a higher Pay Band, or for military pay supplements. Temporary pay is a non-competitive management-initiated practice paid at the discretion of the agency."[7] In assessing whether to grant pay actions, including temporary pay, 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.[8] 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, the applicable policy appears to reflect the intent to invest in agency management broad discretion for making individual pay decisions 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

[3] *See Grievance Procedure Manual* § 4.1(b).
[4] 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. The grievant's claim of retaliation is discussed below.
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] DHRM Policy 3.05, *Compensation*, "Temporary Pay."
[8] DHRM Policy 3.05, *Compensation*.

the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[9]

Though the grievant has shown that she performed the duties of a shift commander, she has not shown that the agency's refusal to grant her temporary pay violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policy. There is no provision of DHRM Policy 3.05 that requires the agency to provide employees with temporary pay any time they are assigned different or additional duties.[10] Indeed, the agency's Salary Administration Plan provides that temporary pay will only be awarded if an employee undertakes additional duties for a continuous period of at least 30 days. The grievant states that she currently assumes the role as watch commander approximately three to four times per cycle. As such, the grievant would not be entitled to temporary pay under the agency's Salary Administration Plan because it does not appear that she is performing the duties of a shift commander without interruption for more than 30 days.

The grievant does indicate that for some period between December 2008 and June 2009, there was no Lieutenant on her shift. Consequently, she was the shift commander on every shift she worked during that period. Even if that is the case,[11] these facts do not provide a basis to qualify this grievance for a hearing. Assuming for purposes of this ruling only that the grievant's allegations about her continuous service as a shift commander until June 2009 are true, there are still some cases when qualification is inappropriate even if policy has been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

It appears that this is a case in which the requested relief of temporary pay for the period December 2008 – June 2009 is not relief that a hearing officer could order. Under the *Rules for Conducting Grievance Hearings*, a hearing officer is limited in awarding back pay in a non-disciplinary action to the 30 calendar day period immediately preceding the initiation of the grievance.[12] Here, the grievant initiated her grievance on or about August 27, 2009. As a result, even if the grievant were able to establish at hearing that she should have received temporary pay during December 2008 – June 2009, the hearing officer could not order any portion of that back pay relief sought by the grievant. That period ended no later than June 30, 2009, which is beyond the 30 calendar day period preceding the initiation of this grievance. Consequently, effectual relief is unavailable to the grievant through the grievance procedure regarding that portion of her claim.

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[9] *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.

[10] In addition, the grievant's Employee Work Profile lists serving as an acting shift commander (as required) as a special assignment duty.

[11] The agency states, however, that it reviewed the grievant's work history and determined that there was no period in which the grievant worked at least 30 days consistently as a shift commander.

[12] *Rules for Conducting Grievance Hearings* § VI(C)(1).

The grievant has also presented no evidence that the agency's denial of temporary pay was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. As stated above, the denial appears consistent with the agency's Salary Administration Plan. Although the grievant performed the duties of a shift commander, it cannot be said that the grievant's service in this regard was so substantial to find that the agency was arbitrary or capricious in refusing to grant her a temporary pay increase.

Salary – Internal Alignment

The grievant also argues that her salary is inconsistent with other facility employees performing the same work. Again, DHRM Policy 3.05 is implicated. This policy requires agencies to continuously review agency compensation practices and actions to ensure that similarly situated employees are treated the same.[13] 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, for example.[14] 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.[15]

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. Because agencies are afforded great flexibility in making pay decisions, this 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.[16]

Here, 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 or raise a sufficient question as to 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.[17] Further, the grievant has presented no evidence that the agency's treatment of her salary is inconsistent with other decisions made by the agency or is otherwise arbitrary or capricious.

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[13] *See* DHRM Policy 3.05.
[14] *Id.*
[15] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.
[16] *See supra* note 9.
[17] *See* DHRM Policy 3.05; DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*. The salary differences at issue here could be explained by a number of factors, including years of service, years of service in the particular grade/position, initial salaries, changing hiring and compensation systems, different hiring managers, economic factors, and the knowledge, skills, and abilities of the individual employees.

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. As such, the grievance does not qualify for hearing on that basis.[18]

Retaliation[19]

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;[20] (2) the employee suffered a materially adverse action;[21] 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.[22] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[23]

The grievant engaged in protected activity by initiating multiple grievances, including a 2005 grievance, which she won at a hearing. The grievant asserts that the retaliation she has experienced stems from this grievance in 2005. Further, she could be viewed as having potentially suffered a materially adverse action due to the agency's inaction regarding acting pay, salary realignment, or promotional opportunities. However, as explained below, the grievance does not raise a sufficient question as to whether the materially adverse actions were taken as a result of her protected activity.[24]

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[18] Nothing in this ruling is meant to indicate that the grievant could not have been awarded an upward adjustment or other form of compensation. Indeed, analysis of the pay factors and policy provisions might justify a favorable pay action if the agency chose to take it. Rather, this ruling finds only that the grievant has failed to show sufficient evidence that the agency misapplied or unfairly applied policy or otherwise abused the discretion granted under DHRM Policy 3.05.

[19] Upon investigating this grievance, it appears that the grievant's theory of "unfair/disparate treatment" is in essence the same as her retaliation argument, and challenges the same management actions. As such, her claims of unfair/disparate treatment will be analyzed under a retaliation theory.

[20] *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).

[21] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

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

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

[24] The grievant also listed a situation in which a member of management suggested that disciplinary action be taken against the grievant, but her supervisor decided not to take that action. The grievant also alleges that a member of agency management told her she was "not liked by men." First, there is insufficient indication that the latter statement was actually made. Further, there is nothing about these situations that suggests retaliation.

The grievant argues that some of the competitions for promotion to Lieutenant were closed and/or re-advertised to deny her the promotion. However, the agency has stated that the selection processes were closed because of budget issues and to expand the field of applicants (in particular, in one situation when four applicants did not appear for their interviews). While the grievant may dispute these actions, she has presented no evidence that would counter the agency's stated non-retaliatory explanations. There is nothing to suggest that the agency's handling of these selections was in any way retaliatory beyond the grievant's mere allegation.

The grievant also asserts that a member of agency management told her that a high level member of agency management had stated that the grievant's applications for promotion would not be approved due to her involvement in an incident in 2004 that led to her grievance.[25] The member of agency management who is alleged to have told her this information was contacted during this Department's investigation for this ruling. The grievant's allegation could not be corroborated. Further, it is unclear, even based on the grievant's stated allegation, that such a statement would necessarily indicate retaliation. For instance, if the agency was taking into account the grievant's handling of the incident in 2004, rather than her subsequent grievance activity related to the incident, that would not equate to retaliation for filing a grievance. For all the above reasons, this grievance fails to raise a sufficient question of retaliation such that a hearing is warranted on that basis.

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

[25] The grievant was involved in a situation that led to disciplinary action against her. That disciplinary action was overturned by a hearing officer.