

Issue: Qualification – Compensation (Salary Dispute, Other) and Discrimination (Race);
Ruling Date: March 21, 2011; Ruling No. 2011-2843; Agency: College of William
and Mary; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of College of William and Mary
Ruling No. 2011-2843
March 21, 2011

The grievant has requested a ruling on whether his October 4, 2010 grievance with the College of William and Mary (the agency) qualifies for a hearing. For the reasons below, this grievance does not qualify for a hearing.

FACTS

In his October 4, 2010 grievance, the grievant included allegations of misapplication of policy and discrimination. The grievant asserts that his salary is out of alignment with others in the same position at his facility. The grievant asserts that he has been a licensed plumber with the agency since 1993 and that several Caucasian co-workers hired since he was are paid at a higher rate.

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 increase his pay to the level of Caucasian co-workers.

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 generally limits grievances that qualify for a hearing to those that involve “adverse employment

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

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 he asserts issues with his salary.

Salary – Internal Alignment

The grievant argues that his salary is inconsistent with other facility employees performing the same work. Department of Human Resource Management (DHRM) Policy 3.05 is implicated here. This policy requires agencies to continuously review agency compensation practices and actions to ensure that similarly-situated employees are treated the same.⁷ 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.⁸ 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.⁹ In assessing whether to grant pay actions, including internal alignments, 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.¹⁰ 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.

In this case, the agency evaluated the salaries of employees who work in plumbing and other trades positions within the agency. It would appear that this study was prompted in part, if not entirely, by the grievant’s October 4, 2010 grievance. Based on the study, the grievant’s salary was raised by 10%. Based on the agency’s actions in this case, in particular, the granting of the 10% pay increase, which was the maximum allowed under policy, this Department concludes that this grievance fails to raise a sufficient question as to whether the relevant

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.

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 See DHRM Policy 3.05.

⁸ *Id.*

⁹ See DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.

¹⁰ DHRM Policy 3.05, *Compensation*.

compensation policies have been either misapplied and/or unfairly applied. As such, the grievance does not qualify for hearing on that basis.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis asserted by the grievant: race.¹¹ To qualify such a grievance 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 a protected status. 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.¹²

The grievant essentially asserts that his pay has been suppressed on the basis of his race. He points to Caucasian co-workers hired after he was who are now paid more than he. The grievant asserts that there is nothing that warrants him receiving a lower wage than his Caucasian counterparts. The agency, however, has provided legitimate business reasons for the apparent pay disparity. First, it asserts that wage compression has crossed many classes of jobs, including faculty. The agency claims that while the issues of compression are complex, much of the compression stems from dates of employment and the job market at the time of hire. The agency notes that once the pay disparity in the plumbing trades was brought to the attention of management, the agency granted the grievant a 10% pay increase, which the agency points out leaves the grievant with a salary higher than all but two employees: a supervisor and an employee that the agency claims has additional responsibilities in heating, ventilation, and air conditioning (HVAC).

The grievant counters that he does not challenge the disparity between the pay he earns and that paid to the supervisor. However, he does challenge the pay disparity between himself and the other employee who allegedly has additional HVAC responsibilities. The grievant notes that he too has performed HVAC-related work and that the other employee is not a licensed HVAC Mechanic but merely a helper. The agency concedes that the grievant has done significant HVAC work over the years but that his work is essentially plumbing work. The agency explains that the other employee has knowledge of HVAC control systems and can do diagnostic work on HVAC systems, though he may be required to call in additional help to accomplish repairs.¹³ In addition, this Department notes that at least one Caucasian was found to be underpaid as compared to his co-workers. This individual also received a pay increase. Finally, we note the grievant concedes that it was through his grievance that he first raised the issue of pay disparity. Once raised, the agency acted immediately and increased his pay by 10%.

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

¹² See *Hutchinson v. INOVA Health System, Inc.*, Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

¹³ The grievant notes that all actual repair and replacement of control systems is performed by independent contractors. The agency essentially does not challenge this contention but points out that it relies on agency employees, including the grievant, to monitor and troubleshoot systems. The agency notes that not even the most experienced HVAC employees do the actual repair and replacement of controls, a function reserved for the independent contractor.

Accordingly, based on all of the forgoing, this Department cannot conclude that the grievant has raised a sufficient question of discrimination to 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.

Claudia T. Farr
Director