

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: February 4, 2011; Ruling No. 2011-2855; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



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

In the matter of the Virginia Department of Transportation
Ruling No. 2011-2855
February 4, 2011

The grievant has requested a ruling on whether his August 20, 2010 grievance with the Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant recently obtained a Professional Engineer (PE) license. The grievant states that the agency has generally granted requests for a 10% in-band adjustment to agency employees who have obtained such a PE license. The agency apparently declined to raise the grievant's salary largely due to its assessment of the grievant's current salary in comparison to other agency employees. The agency also stated that the PE license is not a requirement for his position. The grievant submitted his August 20, 2010 grievance to challenge the agency's denial of an in-band adjustment. After proceeding through the management steps, the grievant now requests qualification of his grievance for a hearing.

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. The grievant's claims essentially allege misapplication and/or unfair application of policy and discrimination on the basis of age.

Misapplication and/or Unfair Application of Policy

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

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

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.”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 act 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 potentially asserts issues with his salary.

In-band adjustments are governed by Department of Human Resource Management (DHRM) Policy 3.05. This policy allows agencies to award an employee an in-band adjustment, which is a “non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues.”⁷ For an employee’s professional/skill development, which is at issue here, an upward salary adjustment from zero to ten percent is available.⁸

Like all pay practices, in-band adjustments are intended to emphasize merit rather than entitlements, while providing management great flexibility and a high degree of accountability for justifying their pay decisions.⁹ In assessing whether to grant a pay adjustment, including an in-band adjustment, an agency must consider 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 The agency has the duty and the broad discretion to weigh each factor.¹¹

Thus, the applicable policy appears to invest in agency management broad discretion for making individual pay decisions. Agency discretion is not without limitation, however. 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

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 DHRM Policy 3.05, *Compensation*.

⁸ *Id.*

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

¹⁰ DHRM Policy 3.05, *Compensation*.

¹¹ The applicable provisions of DHRM Policy 3.05 appear to be similar to those stated in the agency’s policies submitted by the grievant.

warranted where the grievance 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.¹²

Though the grievant has shown that he acquired a new license, he has not shown that the agency's refusal to grant an in-band adjustment 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 an in-band adjustment when they acquire an additional license. Further, the written guidance provided by the agency's human resources department and relied upon by the grievant indicates that employees like the grievant who obtain the PE license would receive an in-band adjustment of zero to ten percent.

In this case, it appears the agency has considered various factors in determining that no pay action was necessary for the grievant. For instance, the agency determined that the grievant was the highest paid agency employee statewide in his position. Salary data considered by the agency also reportedly indicated that the grievant was comparably compensated with others in his role. In addition, although he was in a position for which a PE license is preferred but not required, the grievant is apparently the fifth highest paid employee in his district among positions requiring a PE license. The agency also indicates that in light of its current "budget situation," it has taken a "conservative" approach with in-band adjustments. Based on these considerations, this Department finds no indication that the agency's decision was arbitrary or capricious or otherwise disregarded the intent of the applicable policies, which allow management great flexibility in making individual pay decisions.¹³

The grievant relies on his belief that all agency employees, to his knowledge, who have obtained the PE license have received a 10% increase. Assuming for purposes of this ruling only that this was the agency's past practice, the salary information presented regarding the grievant's comparably high salary clearly distinguishes the grievant from other past recipients, especially given the current budget environment. And while the grievant has demonstrated that other highly compensated agency employees have received in-band adjustments, there is no indication that those pay actions were granted for obtaining a PE license.

While the grievant could understandably argue that certain pay factors might support his request for an in-band adjustment, also valid is the agency's position that consideration of the pay factors does not substantiate the need for a salary increase. In decisions such as these, where a mandatory entitlement to a pay increase does not exist, the agency is given great discretion to weigh the relevant factors. Therefore, based on the totality of the circumstances, we cannot say that the agency's denial of the grievant's request for an in-band adjustment was improper or otherwise arbitrary or capricious. Consequently, the grievance does not qualify for a hearing.

¹² 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.

¹³ See, e.g., DHRM Policy 3.05; DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.

Discrimination – Age

The grievant also claims that the denial of his in-band adjustment involved age discrimination. For a claim of age discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether age was the reason for the agency's action.¹⁴ The grievant's allegations are: 1) younger employees regularly received in-band adjustments for obtaining a PE license, and 2) denying him the salary increase due to a higher salary penalizes him for being an older employee with the agency who has progressed and had his salary increase over time. However, these allegations are insufficient to raise a question that either the grievant's age was the reason for the denied in-band adjustment or a disparate impact.

Here, the agency's decision appears to have been based primarily on the level of the grievant's current compensation and the agency's budget situation. These considerations do not appear to be specifically age-dependent. For instance, the younger employees who have received in-band adjustments would also have been presumably comparably less compensated than the grievant. In addition, there could theoretically be older employees who are beginning a career with the agency who obtain a PE license and an in-band adjustment, because they, too, were compensated less than the grievant. Similarly, there could be employees who began their career very early with the agency and advance to a level of compensation similar to that of the grievant while still being much younger. Looking at the grievant's allegations from these perspectives, we cannot conclude that his arguments about the impact of length of service, to the extent it has an impact here, are sufficiently correlated to age such that an age discrimination claim could be supported. As such, the grievant's claim of age discrimination does not qualify for a 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

¹⁴ See *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350-51 (2009). To prevail on a claim of age discrimination, an employee must also be a member of the protected class. The ADEA's protections extend only to those who are at least forty years old. See 29 U.S.C. § 631. Age discrimination is also a violation of state policy. See DHRM Policy 2.05.