

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: February 14, 2011; Ruling No. 2011-2882; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Department of Transportation
Ruling No. 2011-2882
February 14, 2011

The grievant has requested a ruling on whether his November 1, 2010 grievance with the Virginia Department of Transportation (VDOT or the agency) qualifies for a hearing. For the reasons below, this grievance does not qualify for a hearing.

FACTS

The grievant is a Transportation Operator II. In his November 1, 2010 grievance, the grievant alleges that when he was initially offered a position in 2001, he was told that new employees could not be hired at a salary higher than those currently working at the area headquarters. The grievant has learned that ten employees who have since been hired have higher salaries than his. The grievant argues that he has been unfairly treated because his salary is out of alignment with other employees at the area headquarters.

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. Here, the grievant essentially claims that the agency has misapplied or unfairly applied policy by failing to align his salary with other area headquarter employees, who, like himself, have at least 19 years of service.

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 he asserts his salary is out of alignment with others.

The Department of Human Resource Management Policy 3.05 specifically addresses salary and in-band adjustments. 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.⁸ In-band adjustments, like all 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

Similarly, VDOT guidelines for administering in-band adjustments provide that such adjustments “are not an employee entitlement, they are granted with sound decision-making at management’s discretion.”¹⁰ Those guidelines indicate too that the agency may align “salaries of one employee with that of newer staff coming into the work unit who are requiring a substantially higher starting salary to employ.”¹¹ Importantly, however, the guidelines also note the agency may not consider internal alignment simply when one employee’s salary is below that of other incumbents who are not truly comparable; when one employee’s salary is “not exactly the same” as other employees in the work group; or when used to recognize years of experience or service.¹²

Here, even though the agency determined the grievant was 3.2% behind the average salary of his working group (thus “not exactly the same” as some others in the work group) the agency determined that this was not a substantial disparity and considered the grievant fairly

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 VDOT Guidelines for Administering In-Band Adjustments and Bonuses for Classified and Wage Employees – Effective July 1, 2008, p.1.

¹¹ *Id.* at 2.

¹² *Id.*

compensated. Furthermore, under VDOT's guidelines, the agency could not consider the grievant's years of experience and service for purposes of internal alignment.

Because agencies are afforded great flexibility in making pay practice 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.¹³ In this case, the grievant has not presented sufficient evidence to show that he is similarly situated to other employees that are paid higher salaries, or that the agency's decision not to increase his salary was arbitrary or capricious. 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.¹⁴

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.¹⁵

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

¹³ See *Grievance Procedure Manual* § 9 (defining arbitrary and capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling No. 2008-1879.

¹⁴ 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.

¹⁵ Nothing in this ruling is meant to indicate that the grievant could never be awarded an upward adjustment or other form of compensation. Rather, this ruling finds only that this grievance fails to show sufficient evidence that the agency misapplied or unfairly applied policy or otherwise abused the discretion granted under DHRM Policy 3.05.