

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: June 10, 2011; Ruling No. 2011-2975; Agency: Department of Social Services; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Social Services
Ruling No. 2011-2975
June 10, 2011

The grievant has requested a ruling on whether his February 23, 2011 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his February 23, 2011 grievance, the grievant seeks an increase in his salary. He argues that other agency employees in his role have higher salaries. The grievant states that based on such things as his education, experience, and accomplishments, he should be compensated at the same rate as the highest paid employee in his role. The agency has not granted his requested salary increase and maintains that the grievant is not eligible for such an increase under its current policy. Having proceeded through the management steps without receiving his requested relief, the grievant now seeks 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.

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 actions."³ Thus, typically, a threshold question is whether the grievant has suffered an adverse

¹ See Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(C).

³ See *Grievance Procedure Manual* § 4.1(b).

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 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 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

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.

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.¹¹

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 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.

According to the agency, since 2008, it has had a policy that in-band adjustments be granted only in limited, exceptional circumstances, such as a change in duties. The grievant does not allege a change in duties. Effective February 2011, the agency has also adopted guidance that permits in-band adjustments for employees who have attained new knowledge and/or skills acquired through job-related training, education, certification, and/or licensure in the last 18 months. The agency states, and this Department agrees, that the grievant does not qualify under any of these rationales for an in-band adjustment. Indeed, the grievant has not alleged these grounds in his grievance. Consequently, the agency's decision to deny the grievant's requested salary increase appears to be consistent with its written policies and practices regarding salary. There is no indication of inconsistent treatment. In addition, 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.¹²

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.

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

¹² See DHRM Policy 3.05; DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.