

Issues: Compensation (In-Band Adjustment) and Retaliation (Grievance Activity);
Ruling Date: March 9, 2012; Ruling No. 2012-3177; Agency: Virginia Department of
Health; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Health
Ruling Number 2012-3177
March 9, 2012

The grievant has requested a ruling on whether his January 5, 2011 grievance with the Department of Health (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his January 5, 2011 grievance, the grievant seeks an increase in his salary in challenging the agency's allegedly arbitrary and capricious salary practices.¹ He argues that other agency, state, and national employees sharing his role and/or type of position have higher salaries. The grievant's position is funded by a federal government grant. The grievant applied for and obtained additional grant funding from the federal government to increase his salary through grant funds. A request to increase the grievant's salary was submitted, but essentially placed on hold by the agency as no salary requests were being considered at the time due to the "fiscal crisis."

Although it is not clear that the salary request has been formally processed to date, the agency states it has reviewed the request. For example, in the second resolution step response, the second step-respondent indicates that based on her review there was not a "compelling business reason" to grant the grievant's salary request. The agency also asserts that policy has not been misapplied in either delaying action upon or denying the salary request. However, the agency head has also granted the grievant a 10% salary increase, effective July 25, 2011, upon further review of the request.

Although the grievant has been granted this increase, he continues to seek further relief through the grievance process. For example, the salary increase granted by the agency did not cover the entirety of the period of his grievance. As such, the grievant now seeks qualification of his grievance for a hearing.

¹ To the extent the grievant is challenging such practices generally, this Ruling only addresses the alleged impact on the grievant (denied salary increase). See *Grievance Procedure Manual* § 2.4 (requiring grievances to relate "personally and directly" to his/her employment).

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries “shall not proceed to hearing”³ unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant asserts misapplication and/or unfair application of policy as well as retaliation.

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.”⁴ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁵ 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.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷ 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.”⁸ 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.⁹

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(C).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ 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.

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁸ DHRM Policy 3.05, *Compensation*.

⁹ *Id.*

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.¹⁰ 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.¹¹ 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.¹²

In this case, a request for an increase of the grievant's salary was held pending the "fiscal crisis." In light of such budgetary considerations, it is understandable that priority would be placed on certain pay factors, like finances, over others. This Department cannot find that the agency's consideration of the pay factors in this regard was arbitrary or capricious. For instance, we are not persuaded by the grievant's argument that because his position was funded by a federal grant, concerns about the availability of state funds were not present. The agency is correct to point out that by selectively granting salary requests without assessing the broader agency compensation structure could lead to unintended consequences and the appearance of or actual inconsistent treatment of employees. Consequently, the agency's hold on the grievant's salary request would be an understandably reasonable approach.

Further, it appears that the grievant's was not the only such salary request that was held. Rather, many other employees, including some in his department, were subject to this same hold. The agency was not granting salary requests during that time absent a "compelling business need" such as retention and/or recruitment of critical or hard-to-fill positions, which the grievant's position was not. Given the discretion granted by the applicable compensation policies, this Department cannot find that the agency violated any mandatory policy provision by holding the grievant's salary request. Nor is there any indication that the grievant was treated differently than other similarly situated employees, as other salary requests were also held, or that the agency's decision was arbitrary or capricious or otherwise disregarded the intent of the applicable policies.

While the grievant could understandably argue that certain pay factors might have supported his request for an in-band adjustment, especially internal alignment, there is no

¹⁰ See DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.

¹¹ DHRM Policy 3.05, *Compensation*.

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.

provision of policy that would mandate the grievant's salary increase in this case. 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 failure to act and/or grant initially the grievant's request for a salary increase was improper or otherwise arbitrary or capricious. Moreover, it appears that once the agency has taken a renewed look at the request at the agency head level, the grievant has now received an in-band adjustment. 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.

Retaliation

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;¹³ (2) the employee suffered a materially adverse action;¹⁴ 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.¹⁵ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁶

Although the grievant has engaged in past protected activities and arguably suffered a materially adverse action (denied salary request, at least initially), there is no basis to infer a causal link between the two. As stated above, as to the hold of the grievant's salary request, the agency's decision was based on budget considerations. Further, the grievant's salary request was put on hold just like other employees. Consequently, given that he was treated similarly to other employees who presumably did not file grievances, this Department cannot infer any causal link of retaliatory intent. Further, once these budgetary concerns were removed from consideration, and the agency head examined the grievant's situation, a salary increase was granted. Based on these facts, the grievance does not raise a sufficient question as to whether retaliation occurred. As such, the grievant's claim of retaliation does not qualify for a hearing.

¹³ 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).

¹⁴ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

¹⁵ See, e.g., *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005).

¹⁶ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

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