

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: April 25, 2012; Ruling No. 2012-3178; Agency: Department of Corrections; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Number 2012-3178  
April 25, 2012

The grievant has requested a ruling on whether his June 28, 2011 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his June 28, 2011 grievance, the grievant seeks an increase in his salary due to the alleged inconsistencies between his salary and his co-workers. During the course of this grievance, a request to increase the grievant's salary was submitted and approved by his facility. Due to circumstances unknown, that request was not processed through the remaining channels within the agency, which meant the salary increase was not approved. However, during this Department's investigation for this ruling, the agency has now approved and implemented the increase in the grievant's salary. The increase became effective on the recent approval date, and not retroactively back to the date of the original request. The grievant now seeks to have his salary increase retroactive to that point.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries "shall not proceed to hearing"<sup>2</sup> unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant essentially asserts 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

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(C).

actions.”<sup>3</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>4</sup> 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.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts potential 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.”<sup>7</sup> 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.<sup>8</sup>

In this case, such a request for an increase of the grievant’s salary was eventually approved. The issue in dispute is whether the increase should be retroactive from the date the original request was submitted. However, this Department cannot find any portion of the applicable policy that has been violated by the agency in implementing the salary increase based on the date it was approved. Given the discretion granted by the applicable compensation policies, this Department cannot find that the agency violated any mandatory policy provision by doing so in this case. Nor is there any indication that the grievant was treated differently than other similarly situated employees or that the agency’s decision was arbitrary or capricious or otherwise disregarded the intent of the applicable policies. Based 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.

#### 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

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<sup>3</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> 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.

<sup>5</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>7</sup> DHRM Policy 3.05, *Compensation*.

<sup>8</sup> *Id.*

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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.

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Claudia T. Farr  
Director