

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: March 19, 2012; Ruling No. 2012-3286; Agency: Virginia Employment Commission; Outcome: Not Qualified.



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

In the matter of the Virginia Employment Commission
Ruling Number 2012-3286
March 19, 2012

The grievant has requested a ruling on whether his October 6, 2011 grievance with the Virginia Employment Commission (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In his October 6, 2011 grievance, the grievant seeks an increase in his salary.¹ The grievant states that other employees have been hired into the same position he holds at higher rates of pay than he makes. Yet, he states he was told at the time of his hire that the agency could not pay him more than others in the same position with more experience and time with the agency. The grievant also asserts that his work load is higher than others in his position. The grievant also appears to assert that discrimination may play a role in the salary determinations.

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 discrimination in relation to his salary and seeks a pay increase.

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

¹ The grievant also had initiated this grievance to challenge a selection in which he had competed unsuccessfully. However, during the management steps, he chose to no longer pursue that claim and to focus only on his salary claim. As such, only the salary issue will be addressed in this ruling.

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(C).

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

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

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.*

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

¹¹ DHRM Policy 3.05, *Compensation*.

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

While the grievant's assertion that paying new hires more than he makes is certainly an understandable concern, there is no mandatory provision of the applicable policy that is violated by such a practice. Further, this Department cannot find that the agency's actions in this regard were arbitrary or capricious. For instance, it appears that the salary determinations made for the more recent hires cited by the grievant were based on a reasonable assessment of the relevant pay factors, principally, it appears, the new employee's pre-employment salary and experience. Consequently, this Department can find no basis to question the broad discretion granted to the agency in making such determinations as in this case.

While the grievant could understandably argue that certain pay factors might now support his request for an in-band adjustment to increase his salary, especially internal alignment, there is no 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 grievant's current salary is the result of any improper or otherwise arbitrary or capricious action by the agency. Given 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.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the grounds discussed in the grievance, race and/or gender.¹³ However, based on a review of the salaries of employees in the same position in the grievant's region, it appears that the agency's decisions have been largely driven by the experience and pre-employment salary of the new employee, and there is no indication that any perceived salary inequities are based upon any discriminatory factors. Consequently, there is an insufficient factual basis to infer discrimination in pay. As the grievant has failed to present any evidence that raises a sufficient question of discrimination, 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

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 *Grievance Procedure Manual* § 4.1(b). Although the grievant does not specifically allege discrimination on the basis of race or gender, his grievance could be read to include such allegations.

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