Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: May 18, 2017; Ruling No. 2017-4524; Agency: Department of Game and Inland Fisheries; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2017-4524
May 18, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his November 2, 2016 grievance with the Department of Game and Inland Fisheries (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Terrestrial Wildlife Biologist. By letter dated June 22, 2016, the grievant was advised that, under the agency's career track program, he had been advanced to a "Scientist II" position and would receive a 6% raise. Several days later, the grievant was advised in writing that he would not receive any additional compensation as a result of a compensation study conducted by the agency, which began in the Spring of 2015.[2] On November 2, 2016, after attempting to resolve his concerns through discussions with the agency, the grievant initiated a grievance challenging the results of the study and arguing that he was, in effect, penalized by his advancement to Scientist II.[3] After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] Thus, by statute and under the grievance

[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] It appears that one source of confusion for the grievant has been the agency's decision to use April 30, 2015 as the date for determining length of employment with the agency. Thus, at the time the grievant was advised of the study's conclusions, he was only credited with 1.25 years of employment with the agency, although he had actually been employed by the agency for over 2 years.

[3] In addition, the grievant challenged the agency's failure to provide adequate explanations for the results of the study.

[4] *See* Va. Code § 2.2-3004(B).

procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"[5] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

In this case, the grievant argues, in effect, that management has misapplied and/or unfairly applied policy in determining that additional compensation was not warranted for him based on the results of the compensation study. In particular, the grievant contends, among other things, that he receives less compensation than co-workers with similar, although not identical, education and experiences; and that had he not received a raise upon becoming a Scientist II, he would have received compensation from the study. In addition, the grievant alleges that the agency made factual errors that impacted the results of the study. 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.

In-band adjustments are governed by DHRM Policy 3.05, *Compensation*. This policy allows agencies to grant 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."[9] Under DHRM policy, an upward increase from zero to ten percent is available "to align an employee's salary more closely with those of other employees' within the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, competencies, and/or knowledge and skills."[10] Like all pay practices, in-band adjustments are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.[11]

---

[5] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[9] DHRM Policy 3.05, *Compensation*.
[10] *Id.*
[11] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

While DHRM Policy 3.05, *Compensation*, reflects the intent that similarly situated employees should be comparably compensated, it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of thirteen enumerated 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. Because agencies are afforded great flexibility in making pay decisions, EDR 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, the agency did not develop any written methodology or guidelines for the compensation study.[13] Further, despite extensive investigation, it has been difficult for EDR to discern clearly the manner in which the study was undertaken and whether any safeguards or practices existed to ensure that the study utilized correct data or applied standards consistently.[14] Upon review, however, it appears that, notwithstanding any challenges in the compensation study itself, the results of the study were neither plainly inconsistent or otherwise arbitrary or capricious. A review indicates that a primary determinant used by the agency in assessing whether compensation was appropriate was an employee's years of relevant work experience. Further, when the results of the study are reviewed using years of relevant service as the determining factor, the study results appear to be consistent. Of those individuals employed as a Scientist II, the grievant has the least experience and he is paid the least.[15] By comparison, another Scientist II who was promoted at the same time as the grievant has approximately 10 years of relevant experience and received a raise as part of the compensation study: prior to the compensation study, that employee earned less than the grievant, but he now earns slightly more.

In this case, there are certainly some discretionary decisions by the agency that could be subject to argument, such as, for example, awarding credit for part time and volunteer work. In addition, greater transparency by the agency, both in its methodology and in its explanations, would likely have resulted in less frustration on the part of its employees. However, in the absence of evidence that the agency has used its discretion in a plainly inconsistent or arbitrary or capricious manner, those are determinations to be made by the agency, not EDR.

---

[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 No. 2008-1879.

[13] *See* EDR Ruling No. 2017-4476.

[14] For example, although the June 28 letter advised the grievant that he had been evaluated as a Scientist II , the spreadsheet used by the agency to determine whether the grievant should receive additional compensation is limited to employees working as a Scientist I. There are also discrepancies between what relevant experience was credited to the grievant in various documents.

[15] For purposes of this review of the final results, EDR assumed the grievant's relevant experience was 7.25 years, consistent with the highest possible number identified by the agency, regardless of how he was actually assessed in the compensation study itself.

Therefore, based on the totality of the circumstances, EDR cannot say that the agency's decision not to approve an in-band adjustment for the grievant was improper or otherwise arbitrary or capricious. Likewise, EDR has reviewed nothing to indicate that the agency's decision not to approve an in-band adjustment for the grievant was inconsistent with its treatment of other similarly situated employees with comparable relevant work experience. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[16]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[16] Va. Code § 2.2-1202.1(5).