

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: May 18, 2017; Ruling No. 2017-4541; Agency: Department of Game and Inland Fisheries; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

QUALIFICATION RULING

In the matter of the Department of Game and Inland Fisheries
Ruling Number 2017-4541
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 October 21, 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 District Terrestrial Biologist. On October 21, 2016, the grievant initiated a grievance challenging the agency’s decision not to award him any additional compensation as a result of a compensation study. In particular, the grievant asserts that the agency wrongfully considered the Northern Virginia salary differential in making its determinations. In addition, the grievant asserts that the agency made a “conscious decision” to ignore his requests for information.² 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.³ Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits “shall not proceed to a hearing”⁴ unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of

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 Challenges to an agency’s noncompliance with the grievance procedure must be pursued through the noncompliance process set forth in Section 6.3 of the *Grievance Procedure Manual*. The grievant’s claims of noncompliance were addressed, at least in part, in EDR Ruling No. 2017-4458.

³ See Va. Code § 2.2-3004(B).

⁴ *Id.* §§ 2.2-3004(A), 2.2-3004(C).

policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ 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.”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 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 that the agency wrongfully considered the Northern Virginia salary differential he receives in assessing his compensation and that he was treated unfairly in comparison to co-workers. In addition, the grievant alleges that the agency’s discretionary decisions, such as not to credit previous work outside his field (such as at Pizza Hut), evidences a “lack of rigor” in the compensation 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.”⁸ 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.”⁹ 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.¹⁰

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)

⁵ See *Grievance Procedure Manual* § 4.1(b).

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

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

⁸ DHRM Policy 3.05, *Compensation*.

⁹ *Id.*

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

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.¹¹

In this case, the agency did not develop any written methodology or guidelines for the compensation study.¹² 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. 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.¹³ Further, when the results of the study are reviewed using an employee's total years of relevant experience as the determining factor, the study results appear to be consistent. In particular, the grievant's base salary, without the Northern Virginia differential, is comparable to that of other employees with similar levels of total experience.

In this case, there are certainly some discretionary decisions by the agency that could be subject to argument, such as, for example, whether prior work is considered "relevant" and 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.

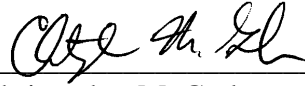
Therefore, based on the totality of the circumstances, EDR cannot say that the agency's decision not to approve an in-band adjustment for the grievant was improper or otherwise arbitrary or capricious. Likewise, EDR has reviewed nothing to indicate that the agency's decision not to approve an in-band 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.

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 No. 2008-1879.

¹² See EDR Ruling No. 2017-4476.

¹³ For example, although the agency apparently used a total of 11.75 years of total relevant service for the grievant in its compensation study, it now asserts that the number used should have been 10.75.

EDR's qualification rulings are final and nonappealable.¹⁴



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¹⁴ Va. Code § 2.2-1202.1(5).