

Issue: Qualification – Work Conditions (employee/supervisor conflict); Ruling Date: June 16, 2017; Ruling No. 2017-4545; Agency: Virginia Department of Agriculture and Consumer Services; 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 Agriculture and Consumer Services
Ruling Number 2017-4545
June 16, 2017

The grievant has requested a ruling on whether his January 26, 2017 grievance with the Department of Agriculture and Consumer Services (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) finds that this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Public Relations and Marketing Specialist III with the agency. On January 26, 2017, he initiated a grievance, broadly challenging allegedly unfair treatment he receives from his supervisor, as well as concerns with his compensation and role classification. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁴

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 See *Grievance Procedure Manual* §§ 4.1 (a), (b).

³ See Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

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

Timeliness

As a preliminary matter, the agency notes that “[t]hroughout this grievance the incidents or situations you reference occurred more than 30 days ago,” and as such, are time-barred. The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.⁸ When an employee initiates a grievance beyond the 30 calendar-day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed.

To the extent the grievant is seeking to challenge discrete adverse employment actions, such as past selection processes, missed training opportunities or “promotional trips,” EDR agrees that, with respect to those adverse actions occurring on or before December 27, 2016 (thirty days prior to the initiation of this grievance), any direct challenge to those actions is untimely. For example, the agency indicates that recruitments for open positions in which the grievant participated unsuccessfully occurred in August 2014, August 2016, and November 2016. A grievance seeking to challenge those recruitments at this time would not be in compliance with the grievance procedure. However, those actions will be considered for purposes of determining whether the grievant has demonstrated a hostile work environment,⁹ as described in more detail below.

Unfair Treatment/Interaction with Supervisor

The grievant alleges that his supervisor treats him unfairly, improperly favoring other employees and engaging in frequent disrespectful treatment towards him, essentially, creating a hostile work environment. However, there is no indication that the grievant has experienced any significant effect as a result of these interactions that would rise to the level of an adverse employment action.¹⁰ To the extent that the grievant also argues that his supervisor engaged in a

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

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

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

⁸ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2, 2.4.

⁹ See *Guessous v. Fairview Prop. Invs., LLC*, 828 F.3d 208, 221-23 (4th Cir. 2016).

¹⁰ The grievant’s allegations regarding his supervisor providing him a religious pamphlet, if true, are troubling. To the extent that the agency may not have been aware of this occurrence, EDR hopes that it would be addressed with the supervisor. Though it is not explicitly raised, the grievant’s claims regarding the religious material given to him by his supervisor could be construed as a claim of discrimination on the basis of religion. However, EDR is unable

pattern of behavior that could constitute workplace harassment, based on a review of the facts as stated in his grievance, we cannot find that the grievance issues rose to a “sufficiently severe or pervasive” level such that an unlawfully abusive or hostile work environment was created.¹¹ Thus, the grievance does not qualify for a hearing on this basis.

Informal Discipline

The grievant also alleges, in effect, that his supervisor has engaged in informal discipline against him with respect to his assigned work location. For state employees subject to the Virginia Personnel Act,¹² appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM. For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.¹³ These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grievance management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., the action was taken primarily to correct or punish perceived poor performance).¹⁴ In this case, the grievant argues that he has asked to be transferred and was denied, and requests in his grievance as relief “reinstatement to previous areas of responsibility which were given to another employee who was in [Area L] to which I was reassigned.”

Under the facts presented to EDR, it does not appear that the grievant has experienced an adverse employment action with respect to his work location. A transfer or reassignment, or denial thereof, may constitute an adverse employment action if a grievant can show that the transfer/reassignment had some significant detrimental effect on the terms, conditions, or benefits of his/her employment.¹⁵ However, in general, a lateral transfer will not rise to the level

to find facts raising a sufficient question that any of the events described in the grievance were the result of prohibited discrimination based upon a protected status.

¹¹ See generally *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹² Va. Code § 2.2-2900 *et seq.*

¹³ See DHRM Policy No. 1.60, *Standards of Conduct*.

¹⁴ See, e.g., EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; see also Va. Code § 2.2-3004(A) (indicating that grievances involving “formal disciplinary actions, including . . . transfers and assignments,” as well as “dismissals resulting from formal discipline or unsatisfactory job performance” may qualify for a hearing).

¹⁵ See *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

of an adverse employment action.¹⁶ Further, subjective preferences do not render an employment action adverse without sufficient objective indications of a detrimental effect.¹⁷

Based on the information presented in this grievance, the grievant has not experienced an adverse employment action with respect to his job location or assignments. The agency asserts that the grievant has not been transferred since his commencement of employment with the agency. It appears that in 2016 the grievant did apply for, but did not receive, a position within the agency that would have been a lateral transfer; however, as indicated above, this selection process occurred outside of the thirty calendar-day period in which the grievant should have initiated a grievance in order to challenge his non-selection, and accordingly, EDR considers any claims relating to that action as time-barred. The agency further indicates that, like all other employees in his workgroup, the grievant is assigned by management to certain markets based on agency business needs. It asserts that he is treated consistently with the other Public Relations and Marketing Specialist III. The grievant has requested as relief in his grievance the use of a personal computer, and in response, the agency obtained a computer for the employees in the grievant's office to share. Neither the grievant nor the other Public Relations and Marketing Specialist III have the use of an individual computer.

Thus, the grievant has presented insufficient evidence that any particular assignment, or lack thereof, has had a significant detrimental effect on his employment such that he may have experienced an adverse employment action. An employee's unmet preference regarding job location is not enough to result in an adverse employment action. Accordingly, the grievance does not qualify for a hearing on this basis.

Compensation

The grievant argues, in effect, that management has misapplied and/or unfairly applied policy with respect to his compensation and requests "equal pay" compared to his colleagues. During the management resolution steps, the agency maintained that the grievant's salary is appropriate for his role title¹⁸ and pay band, and declined to adjust his salary. 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.

DHRM Policy 3.05, *Compensation*, 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

¹⁶ See *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996).

¹⁷ See, e.g., *Jones v. D.C. Dep't of Corr.*, 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377; *Fitzgerald v. Ennis Bus. Forms, Inc.*, No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); *Stout v. Kimberly Clark Corp.*, 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).

¹⁸ To the extent the grievant has challenged his classification as a Public Relations and Marketing Specialist III, insufficient information has been presented to EDR that would suggest the grievant is incorrectly classified.

specific salary issues.”¹⁹ An upward in-band salary adjustment of zero to ten percent during a fiscal year is available under DHRM policy.²⁰ 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.²¹ 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.²²

Having reviewed the information provided by the parties, EDR finds that there is insufficient evidence to demonstrate that the grievant’s salary as compared to other agency employees in his workgroup violates a specific mandatory policy provision or is outside the scope of the discretion granted to the agency by the applicable compensation policies. The agency asserts that the grievant is fairly compensated based on its consideration of the relevant pay factors and the grievant’s duties as a Public Relations and Marketing Specialist III. The grievant’s salary as compared to the only other Public Relations and Marketing Specialist III is slightly lower, per the agency, reflecting approximately eight years less experience possessed by the grievant. Further, EDR has carefully reviewed the Employee Work Profile of the grievant alongside the Employee Work Profile for a Public Relations and Marketing Specialist IV, which is classified in a higher pay band. While the duties of the Public Relations and Marketing Specialists IV are more complex with respect to their responsibilities for strategic planning of activities and the oversight of other employees’ work, the grievant is actually paid at a higher rate than one of the Public Relations and Marketing Specialists IV in the same program.

As stated above, DHRM Policy 3.05, *Compensation*, is intended to grant the agencies the flexibility to address issues such as changes in an employee’s job duties, the application of new job-related skills, and retention.²³ The policy is not intended to entitle employees to across-the-board salary increases or limit the agency’s discretion to evaluate whether an individual pay action is warranted. While the grievant could argue that certain pay factors might support a request for an in-band adjustment, the agency’s position that its consideration of the pay factors does not substantiate the need for a salary increase is also valid. An employee’s work

¹⁹ DHRM Policy 3.05, *Compensation*.

²⁰ *Id.*

²¹ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

²² 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.

²³ See DHRM Policy 3.05, *Compensation*.

performance, experience, and education represent just several of the many different factors an agency must consider in making the difficult determination of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.²⁴ In cases like this one, 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, EDR cannot find that the agency's denial of the grievant's request for a pay increase was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.²⁵



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²⁴ *Id.*

²⁵ Va. Code § 2.2-1202.1(5).