Issues: Qualification – Compensation (In-Band Adjustment) and Workplace Issues (Supervisor/Employee Conflict); Ruling Date: June 22, 2017; Ruling No. 2017-4548; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2017-4548
June 22, 2017
Updated: August 16, 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 her March 2, 2017 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.[2]

FACTS

The grievant is employed by the agency as an Information Technology Specialist II. On or about March 2, 2017, she initiated a grievance broadly challenging allegedly unfair treatment she receives from her supervisor, as well as concerns with her compensation and denial of promotional opportunities. After the grievance advanced through the management resolution steps, the agency head denied qualification of the grievance for a hearing. 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] To the extent that the supporting information provided by the grievant's counsel challenges a Group II Written Notice received by the grievant, that matter has been separately grieved and qualified for a hearing. Thus, EDR will not address the Group II Written Notice in this ruling. If issues raised in the March 2, 2017 grievance addressed in this ruling are relevant to her challenge to the Group II Written Notice, they can be raised at the hearing on that grievance.

[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]

Unfair Treatment

The grievant alleges that her supervisor treats her unfairly, denying her opportunities provided to other employees and engaging in disrespectful treatment towards her, essentially, creating a hostile work environment. As a preliminary matter, in its second step response, the agency notes that several of the discrete events challenged by the grievant are time-barred because "they have far exceeded the 30 calendar day requirement" in which the grievance should have been initiated. 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. EDR agrees that, with respect to those employment actions occurring on or before January 31, 2017 (thirty days prior to the initiation of this grievance), any direct challenge to those actions is untimely.[9] However, those actions will be considered for purposes of determining whether the grievant has demonstrated a hostile work environment,[10] as described in more detail below.

For a claim of hostile work environment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or conduct; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[11] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[12]

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[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] Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.2, 2.4.
[9] For example, it appears three training events occurring between 2009 and 2013 were discussed in the second step response. A grievance seeking to challenge the grievant's exclusion from those trainings would not be in compliance with the grievance procedure at this time.
[10] *See* Guessous v. Fairview Prop. Invs., LLC, 828 F.3d 208, 221-23 (4th Cir. 2016).
[11] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[12] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

In this instance, EDR thoroughly reviewed the grievance packet, including the agency's detailed second step-response to the grievance. However, there is no indication that the grievant has experienced any significant detrimental effect as a result of these interactions that would rise to the level of an adverse employment action, nor is there evidence that any adverse employment action has occurred as a result of a misapplication of policy, discrimination, or retaliation.[13] To the extent that the grievant also argues that her supervisor engaged in a pattern of behavior that could constitute workplace harassment, based on a review of the facts as stated in her grievance, we cannot find that the grieved issues rose to a "sufficiently severe or pervasive" level such that an unlawfully abusive or hostile work environment was created.[14] Thus, 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 by declining to approve an in-band adjustment for her, based on several factors that she alleges justify a salary increase.[15] 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."[16] An upward in-band salary adjustment of zero to ten percent during a fiscal year is available under DHRM policy.[17] 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.[18] 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

[13] *See Grievance Procedure Manual* § 4.1(b).
[14] *See generally* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[15] To the extent that grievant's counsel argues she is misclassified in her role as an Information Technology Specialist II, EDR has thoroughly reviewed the grievance as initiated by the grievant and determined that issue was not explicitly raised therein. Should the grievant wish to challenge her classification, she may file a subsequent grievance in order to do so.
[16] DHRM Policy 3.05, *Compensation*.
[17] *Id.*
[18] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

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.[19]

The grievant claims that she is making the lowest salary in her department, despite having been employed by the agency for eighteen years. She asserts that there is no explanation for why she has not been promoted. In response, the agency asserts that the grievant is fairly compensated based on its consideration of the relevant pay factors, and disputes the grievant's assertion that she is the lowest paid Information/Technology Specialist II. The agency further notes that the grievant has received the following pay increases: 1) Role change from IT Specialist I to IT Specialist II with a 16.9% increase effective 6/25/2002, 2) In-band adjustment with a 10% increase for internal alignment effective 6/10/2011, and 3) In-band adjustment with a 7% increase for internal alignment effective 6/25/2013. The agency also indicates that the grievant has not applied for any vacancies within the agency which may have been promotional opportunities for her.

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 her 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 an Information Technology Specialist II. It has also provided EDR with justification as to why other employees classified as Information Technology Specialist II may be earning higher salaries, such as having competed for a lateral transfer within the department, or having received a competitive salary offer. As such, an analysis of many of the individual pay factors—for example, job duties and responsibilities, internal salary alignment, and salary reference data—with respect to the comparators cited by the grievant, whether they are employed in different work units or at other state agencies, may not support the grievant's arguments that an in-band adjustment was warranted.

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.[20] 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 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.[21] In cases

[19] *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.
[20] *See* DHRM Policy 3.05, *Compensation*.
[21] *Id*.

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.[22]

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[22] Va. Code § 2.2-1202.1(5).