Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: May 31, 2017; Ruling No. 2017-4549; Agency: Richard Bland College; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of Richard Bland College
Ruling Number 2017-4549
May 31, 2017

This ruling addresses the partial qualification of the grievant's March 13, 2017 grievance with Richard Bland College (the "agency"). In her grievance, the grievant disputes the agency's denial of her request for a salary increase and alleges discrimination based on her race and/or ethnicity. The agency head qualified the grievant's claim of discrimination, but determined that her claims regarding her salary did not qualify for a hearing. The grievant has appealed the agency head's partial qualification of her grievance to the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM").

FACTS

The grievant is employed by the agency as an Educational Support Specialist III. In August 2015, she requested an in-band salary adjustment, which management declined to approve. The grievant presented her request for an in-band adjustment for a second time in July 2016. After she discussed the issue with management, the agency again decided not to approve a salary increase for the grievant. The grievant raised the issue for a third time in February 2017, and management reaffirmed its position that a salary increase was not warranted.

The grievant filed a grievance on March 13, 2017, alleging that the agency's failure to approve an in-band adjustment is improper and constitutes discrimination on the basis of her race and/or ethnicity. After the grievance advanced through the management resolution steps,[2] the agency head partially qualified the grievance for a hearing, stating that the grievant's allegation of discrimination qualified for a hearing, but that her claims relating to her salary did not. The grievant now appeals that determination to EDR, alleging that her claim the agency misapplied and/or unfairly applied policy by declining to approve an in-band adjustment should proceed to a hearing.

[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 several of the management steps were repeated because a face-to-face meeting was not initially held with the grievant, as required by Section 3.2 of the *Grievance Procedure Manual*.

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 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 she asserts issues with her compensation.

Misapplication and/or Unfair Application of Policy

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. 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] An upward in-band salary adjustment of zero to ten percent during a fiscal year is available under DHRM policy.[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

[3] *See* Va. Code § 2.2-3004(B).
[4] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[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*.

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.[11]

In support of her position, the grievant claims that employees of other state agencies who work in similar positions are compensated more highly than she, that she participated in the creation of a program that generates revenue for the agency, and that other factors such as "retention, performance, professional/skill development, and changes in duties" support her request for an in-band adjustment. The grievant further states that she has received "mixed messages" from management about the reason an in-band adjustment is not warranted and that other agency employees "are either brought in at a higher salary than mine or are awarded merit-based increases." In response, the agency asserts that the grievant is fairly compensated based on its consideration of the relevant pay factors, and further notes that she received a one-time bonus in 2016 because of her work on a special project.

There appears to be no dispute between the parties that the grievant is a competent and valued employee. However, having reviewed the information provided by the parties, EDR finds that there is insufficient evidence to demonstrate that the agency's refusal to approve her request for an in-band adjustment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. Furthermore, it appears the agency fully considered the applicable factors in reaching the decision that no pay action was necessary for the grievant in this case, and that the comparator employees cited by the grievant are not sufficiently similarly situated to her such that the agency's consideration of the relevant pay factors could be considered inconsistent here. The agency has indicated that only one other person is employed by the agency in the grievant's Role, that this employee has worked for the agency longer than the grievant, and that the employee is paid less than the grievant. 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, would not support her 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

[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.

job-related skills, and retention.[12] 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 her 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.[13] 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 an in-band adjustment was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Discrimination

Although the agency head's qualification decision states that the grievant's claim of discrimination is qualified for a hearing, the circumstances of this case require EDR to further address the qualification decision and the issue of discrimination. Grievances that may be qualified for a hearing include actions related to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[14] The *Grievance Procedure Manual*, however, further states that a grievance must raise a question as to whether an adverse employment action has occurred for a claim of discrimination to proceed to a hearing.[15] The qualification decision states that "claims relating only to wages do not qualify for a hearing," and the agency asserts that the grievant has not experienced an adverse employment action. In short, the agency has essentially qualified the theory of discrimination without the underlying action (the salary dispute). In the absence of a management action to consider, it would be pointless to hold a grievance hearing because there would be no action with regard to which a hearing officer could award relief.[16] Accordingly, EDR finds that the agency has, in effect, denied qualification of the grievance, despite its decision appearing to state otherwise. As such, the claim of discrimination will only proceed to hearing if EDR determines the issue qualifies for a hearing in this ruling.

To qualify for a hearing, a grievance alleging discrimination must present facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status in order to qualify for a hearing. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for a hearing, absent sufficient evidence that the agency's

[12] *See* DHRM Policy 3.05, *Compensation*.
[13] *Id.*
[14] *See Grievance Procedure Manual* § 4.1(b); *see also* Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[15] *Grievance Procedure Manual* § 4.1(b).
[16] *See id.* § 5.9; *Rules for Conducting Grievance Hearings* § VI(C).

professed business reason was a pretext for discrimination.[17] In this case, there are no facts to indicate that the agency's decision to deny an in-band adjustment had a discriminatory motive. Indeed, as discussed more fully above, EDR finds that the agency has identified a legitimate, nondiscriminatory business reason for that decision based on its consideration of the relevant pay factors under DHRM Policy 3.05, *Compensation*, and there is no basis to conclude that reason is a pretext for discrimination. While the grievant may disagree with the agency's decision, a grievance must present more than a mere allegation of discrimination to qualify for a hearing – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[18]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[17] *See* Hutchinson v. INOVA Health Sys., Inc., C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[18] Va. Code § 2.2-1202.1(5).