Issues: Qualification – Compensation (position classification) and Discrimination (race); Ruling Date: June 16, 2017; Ruling No. 2017-4562; 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 2017-4562
June 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 his March 31, 2017 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 was originally hired by the agency as a General Administration Manager I, a Pay Band 5 position. In 2016, the agency conducted a classification and compensation study of the grievant's work group, which was completed on or about November 11, 2016. As a result of the study, the agency recommended that the grievant's position should be reclassified as an Information Technology Manager I, a Pay Band 6 position, and receive an in-band salary adjustment of 10%. The agency did not immediately implement these changes to the grievant's position due to identified issues with the structure of the work group that resulted in changes to the grievant's Employee Work Profile ("EWP"). When the grievant's job duties and EWP had been modified, the agency conducted a second classification and compensation study specific to the grievant's position, with the goal of determining the appropriate position classification and compensation consistent with the changes in his job responsibilities.

While the second classification study was ongoing, the grievant filed a grievance on March 31, 2017, challenging the agency's implementation of the first study. In the grievance, the grievant alleges that the agency "discriminated against [him] through the selective implementation of the recommendations found in the [study] to [his] detriment" while others benefited from an immediate implementation of those recommendations, and requested a "[f]ull and complete implementation of the classification recommendations and associated compensation recommendation (including any back pay) . . . with the same effective date as other benefiting individuals . . . ."

On or about April 12, 2017, while the grievance was advancing through the management resolution steps, the second classification study was completed. This study resulted in a recommendation that the grievant's position should be reclassified as an Information Technology

[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.

Specialist III, a Pay Band 6 position, and receive an in-band salary adjustment of 10%.[2] The recommendations for the grievant's position identified in the second study were implemented on April 25, 2017. In addition, the agency retroactively increased the grievant's salary by 10% as of January 10, 2017. 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

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[3] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[4] Thus, claims relating to issues such as to the establishment or revision of wages, salaries, position classifications, or general benefits 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 or agency policy may have been misapplied or unfairly applied.[5]

Furthermore, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically the 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, EDR will assume the grievant has alleged an adverse employment action, in that he raises issues relating to his position classification and compensation.

Implementation of Classification Study

While the grievant alleges that the challenged management actions were discriminatory, a fair reading of the grievance also indicates that he disputes the agency's overall application of policy as it relates to the implementation of the November 2016 classification 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.

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[2] The grievant has filed a second grievance disputing the changes in his job duties that were implemented in conjunction with the second classification study. That grievance is currently proceeding through the management steps, and will not be addressed in this ruling.
[3] *See Grievance Procedure Manual* § 4.1.
[4] *See* Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (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).

In support of his position, the grievant alleges that another employee whom he formerly supervised was reclassified and given a 10% salary increase in November 2016, based on the recommendations contained in the first classification study, while he was denied the benefits of the November 2016 study as they would have applied to him. The grievant also claims that the results of the November 2016 study and its application to him were not clearly communicated to him. In effect, the grievant appears to argue that the agency improperly delayed implementing the November 2016 study's recommendations for his position, with the result that his compensation was not increased at the same time as others who were reclassified. The grievant further claims that the agency's approval of a retroactive salary increase dating from January 10, 2017 is insufficient to correct this issue, because the increase should have taken effect in November 2016.[9]

Having conducted a thorough review of the information provided by the parties, EDR finds no basis to conclude that the agency's actions in this case violated a mandatory policy provision or was outside the scope of the discretion granted to the agency. It appears instead that the agency had valid business reasons for choosing not to implement the changes to the grievant's position that were initially recommended in the November 2016 study because there were identified issues with the grievant's work group that would be addressed through a separate restructuring effort. As a part of that restructuring, the agency made modifications to the grievant's job duties and EWP. Once those changes to the grievant's position had been identified, the April 2017 study specifically reviewed the grievant's position, based on his new job responsibilities, and determined that a role change to Information Technology Specialist III and an accompanying 10% salary increase were warranted.

Although the grievant is correct that the agency implemented the recommendations outlined in the first classification study for other employees in November 2016, those employees' positions were not reviewed as part of the restructuring that occurred after the November 2016 study was completed. In other words, there was no justification for delaying the implementation of the recommended changes for other employees, as their positions were not identified for review in conjunction with the restructuring of the work unit. The grievant's position, on the other hand, had been selected for such a review. When the agency completed the April 2017 study, it also approved the recommended 10% salary increase retroactive to January 10, 2017. In support of that decision, the agency has explained that the changes to the grievant's EWP and subsequent completion of the April 2017 study took longer than initially anticipated, and it determined that a period of approximately 60 days from the completion of the November 2016 study represented a reasonable time in which these reclassification efforts should have occurred.

While the grievant is understandably concerned about these changes to his job and disagrees with the agency's implementation of the November 2016 classification study, the grievance has not raised a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding

[9] The grievant further alleges that positions in his work unit had been misclassified by the agency prior to the completion of the November 2016 study. With regard to any previous issues with the classification of the grievant's position pre-dating the November 2016 classification study, such issues are not only moot, as they have now been corrected by the two studies discussed in this ruling, but are also untimely to be challenged in a grievance, as they occurred well outside the thirty calendar days within which the grievance was filed. *See Grievance Procedure Manual* § 2.2.

reorganization and/or reclassification of positions, or was otherwise arbitrary or capricious. Greater transparency by the agency, particularly relating to the reasons for delaying implementation of the November 2016 study's recommendations to the grievant's position and the need for additional review of his job duties, may have resulted in less frustration on the part of the grievant. However, in the absence of evidence that the agency has acted in a manner that is plainly inconsistent or arbitrary or capricious, those are determinations to be made by the agency, not EDR. In summary, it appears that the agency's actions with regard to its implementation of the recommended changes to grievant's position were proper under the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

Discrimination

In addition, the grievant alleges that the agency's actions relating to implementation of the classification study constituted discrimination on the basis of his race, sex, and/or veteran status. Grievances that may be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[10] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, 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. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[11]

In this case, there are no facts that raise a question as to whether the changes to the grievant's classification and compensation, or the manner in which those changes were implemented, had a discriminatory motive. Indeed, as discussed more fully above, EDR finds that the agency has identified legitimate, nondiscriminatory business reasons for its actions, and there is no basis to conclude those reasons are a pretext for discrimination. A grievance must present more than a mere allegation of discrimination – 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. Consequently, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[12]

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[10] *See, e.g.*, Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[11] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).
[12] *See* Va. Code § 2.2-1202.1(5).