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QUALIFICATION RULING

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2022-5351
April 18, 2022

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 October 13, 2021 grievance with Virginia Polytechnic Institute and State University (the “university” or the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant works for the university as an Engineering Technician III in Pay Band 4. In May 2021, one of the grievant’s colleagues, an Information Technology Specialist II in Pay Band 5, announced his intention to retire later in the year. The university developed a plan to divide the retiring colleague’s duties between four employees, one of whom was the grievant, until the retiring colleague’s position was filled. The grievant and one other employee (the “comparator”) appear to have assumed the majority of the retiring colleague’s duties beginning in July 2021. According to the grievant, management told her and the comparator that they would receive additional compensation for taking on the additional work.

After the colleague retired, the university posted his position for recruitment. The grievant submitted an application, but learned several weeks later that the posting had been withdrawn. When the grievant asked about compensation in approximately September 2021, she learned that, as a nonexempt employee, she was eligible to work up to 10 hours of overtime per week. The grievant claims that, despite her eligibility for overtime, she did not actually receive approval from management to work overtime for over a month afterward. The grievant later submitted an estimate of her overtime hours worked from May through September 2021 and the university paid the grievant overtime compensation for those hours. The grievant later learned that the comparator who had taken on additional job duties “had received compensation to her salary” for her increased workload. According to the university, the comparator is an exempt employee and received a supplement to her base salary.

On October 13, 2021, the grievant initiated a grievance with the university alleging that she had “taken on additional duties of the [retired colleague’s] position” and had “not been

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compensated for the change in [her] role.”¹ As relief, the grievant asked “[t]o be fairly compensated for the additional work load going forward.”

During the management steps, the grievant alleged that her workload was excessive and asked the university to either fill the retired colleague’s position, move her into the retired colleague’s position and fill her former position, or reassign the retired colleague’s duties elsewhere, which would restore her workload to a reasonable volume. The university offered to revise the grievant’s position description based on the additional duties she had assumed and request a review of the grievant’s salary, which the grievant initially accepted. In December 2021, the university provided the grievant with a revised job description, including a new job title, but determined that her position should continue to be classified as an Engineering Technician III in Pay Band 4. The university also approved a salary increase for the grievant of approximately 2.5 percent, retroactive to July 2021, and continued her approval to work overtime as needed. Finally, the university informed the grievant that it would hire three new employees in the grievant’s department to “reduce the work increase caused by [the retired colleague’s] departure,” including a wage position that would “directly offset the volume of work” the grievant had taken on beginning in July 2021.

Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that decision 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 Claims relating solely to the establishment and revision of salaries, wages, and general benefits 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 or agency policy may have been misapplied or unfairly applied.⁴

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

¹ While this ruling was pending, the grievant provided EDR with additional information relating to perceived issues with her absence in September 2021 due to a medical issue. Because this matter was not raised in the grievance and does not appear related to the challenged issues relating to her compensation and classification, we will not address it in this ruling.

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(b), (c).

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

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

employment.⁷ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action because she asserts issues with her compensation and position classification.

Compensation

First, the grievant contends that she and the comparator who has taken on additional duties after the retired colleague's departure should be paid in the same manner, *i.e.* they both should receive overtime pay or they should be receive a supplement to their pay. The grievant appears to argue that the comparator's position should be nonexempt and receive overtime pay instead of a pay supplement because the comparator "does not manage any employees."

In relevant part, the Fair Labor Standards Act ("FLSA")⁸ requires employers to pay their employees at a rate equal to one-and-one-half times their standard hourly rate for every hour worked in excess of 40 during a given week.⁹ The FLSA, however, also articulates exemptions to this general rule for workers "employed in a bona fide executive, administrative, or professional capacity."¹⁰ Here, the grievant's position description and other documentation confirm that her position is designated as nonexempt and thus eligible for overtime. The comparator works in an exempt position. The grievant has not presented any evidence to suggest that the university erred in designating her position as nonexempt and we therefore have no basis to find that she should be exempt. Likewise, apart from her assertion that the comparator is not a supervisor, nothing in the grievance record indicates that the comparator's position should be nonexempt. Whether a position supervises others is not necessarily determinative to the question of whether an employee is exempt or nonexempt, though it could be a relevant factor. For these reasons, it would not appear that approving overtime pay for both the grievant and the comparator would have been appropriate in this case.

Next, we turn to the grievant's claims regarding the differences in additional compensation the university has approved for her and the comparator. The grievant received approval to work up to 10 hours of overtime per week. In addition, she received a salary increase during the management steps of approximately 2.5 percent retroactive to July 2021, corresponding with the additional duties she assumed at that time and has continued to perform since. The comparator, on the other hand, received approval for a fixed amount of temporary pay for a one year-period.

DHRM Policy 3.05, *Compensation*, governs agency decisions regarding temporary pay.¹¹ Temporary pay is available for employees who are "assigned different duties at the same or higher level of responsibility on an interim basis"¹² Agencies must consider the applicable pay factors when making decisions regarding temporary pay.¹³ Policy 3.05 reflects the intent that similarly

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

⁸ *See* 29 U.S.C. §§ 201 through 219.

⁹ *Id.* § 207(a)(1).

¹⁰ *Id.* § 213(a)(1). The FLSA also exempts certain other types of employees from coverage. *See generally id.* § 213.

¹¹ DHRM Policy 3.05, *Compensation*, at 5.

¹² *Id.*

¹³ *Id.* The pay factors are (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.¹³ *See id.* at 19-24.

situated employees should be comparably compensated, though it also invests agency management with broad discretion to make individual pay decisions, including those relating to temporary pay. The university has adopted its own policy on temporary pay that appears broadly similar to Policy 3.05 in its scope and applicability.

There appears to be no dispute in this case that the grievant is a competent and valued employee. She has worked for the university for several years and, by all accounts, effectively performs her job responsibilities to the university's satisfaction. Having reviewed the information in the grievance record, however, EDR finds insufficient evidence to demonstrate that the university's pay decisions that are challenged in this case violated a specific mandatory policy provision or were outside the scope of the discretion granted to the university by the applicable compensation policies. The university has stated that it determined overtime pay was most appropriate for the grievant because of her current salary at the time and the scope of new tasks she took on, which in the university's judgment did not support approval for temporary pay.¹⁴ The comparator was not eligible for overtime pay and thus the university approved temporary pay for a defined period for her. Apart from her general disagreement with the university's decisions about additional compensation for her and the comparator, the grievant has not presented evidence to demonstrate that the university failed to consider any applicable factors in determining how and whether her salary or the comparator's salary should be adjusted.

Although the grievant understandably disagrees with the university's choice, she has not identified, and EDR has not found, a mandatory policy provision that the university has misapplied or unfairly applied. As stated above, DHRM Policy 3.05 is intended to grant agencies the flexibility to address issues such as changes in an employee's job duties, agency business need, and internal salary alignment.¹⁵ 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. In cases like this one, where a mandatory entitlement to a pay increase does not exist, agencies have great discretion to weigh the relevant factors. Consequently, EDR cannot find that the university's compensation decisions in this case were improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on these grounds.¹⁶

Position Classification

In addition to her concerns regarding compensation, the grievant also challenges her position classification. She alleges that the retired colleague served as the "team lead" for the grievant's work and that she has essentially assumed the role of "team lead" since the colleague's retirement based on how the university has reassigned his duties. She contends that these changes

¹⁴ The information provided by the university indicates that, even accounting for the comparator's temporary pay, the grievant's compensation is greater than the comparator's.

¹⁵ See DHRM Policy 3.05, *Compensation*.

¹⁶ The grievant also notes that the university paid her retroactively for several months of overtime based on an estimate of the work she performed, and has expressed concern that she was asked to confirm the overtime hours she worked from May through September 2021. As the confirmation of the overtime hours arose after the filing of the grievance, it was not a matter grieved at the time of initiation and, accordingly, will not be specifically addressed as a claim in this ruling. See *Grievance Procedure Manual* § 2.4. To the extent the grievant worked overtime hours from May through September 2021, information has not been presented as to why those hours were not reported at the time. In any event, it appears that the university has addressed this through the retroactive pay described above. To the extent there remains a dispute about whether the handling of this overtime matter was appropriate, information has not been presented to EDR such that a qualifiable issue is demonstrated.

essentially reflect that she has assumed the retired colleague's position without an appropriate change in her Role or salary, while a newly-created wage position would take over her former job duties. The grievant claims that the retired colleague's position "should remain a pay band above" hers because the "job duties and responsibilities increase the scope of the position to making more high-level decisions." As a result, the grievant argues that her Role should be changed to a higher level to account for the increase in her duties caused by the colleague's retirement.

For the grievant's claims regarding her position classification to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. The General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.¹⁷ In addition, the Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."¹⁸

The above statutes evince a policy that would require state agencies and institutions to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. While agencies are afforded great flexibility in making decisions such as those at issue here, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, classifying a position in a particular Role), qualification is warranted 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

Prior to the colleague's retirement, the grievant, the colleague, and a third employee worked together in what the grievant describes as a "team" performing tasks relating to floor plan drawing, space coordination, and data input.²⁰ The retired colleague appears to have functioned as the "team lead," reviewing and assessing the group's work (in addition to other tasks). The grievant and the university seem to agree that the grievant's and the retired colleague's job responsibilities overlapped in at least some respects, though they were not identical. With the colleague's retirement, the grievant describes herself as currently performing the work of the "team lead" by reviewing and inputting data, among other things. The grievant also states that she is now the primary contact for others in her department who have questions, whereas the retired colleague formerly served as the primary contact. As a result, the grievant alleges that there have been changes to both the scope and volume of her job duties that indicate increased responsibility consistent with a higher Role.

The retired colleague's departure appears to have prompted what is essentially a reassessment of how job responsibilities are assigned within the grievant's department. For

¹⁷ Va. Code § 2.2-2900.

¹⁸ *Id.* § 2.2-103(B)(1).

¹⁹ See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling 2010-2365; EDR Ruling No. 2008-1879.

²⁰ It does not appear that the grievant, the retired colleague, and the third employee had a direct reporting relationship, but were instead peers performing similar work.

example, the university has allocated the retired colleague's duties among several employees on both permanent and interim bases. The university has provided EDR with position descriptions for the grievant's current position and former position, as well as the retired colleague and other employees who were affected by his retirement. It is apparent from a thorough review of the relevant documents that the grievant's current position description reflects her responsibility for a portion of the retired colleague's former duties. The university's changes to her position description and job title indicate that the adjustment to her job duties is intended to be permanent, though, as the university has noted, it intends to hire a wage position that will assume a portion of the grievant's current tasks to make her workload more manageable.²¹ It appears that this structure would restore a three-person "team" formerly comprised of the grievant, the retired colleague, and the third employee, but with the grievant now serving as the most senior employee. In addition, the university has indicated that two new managerial positions will also be filled, though it is unclear precisely how they may affect the scope of the grievant's job duties or what the function of those positions will be at all.²²

Nonetheless, one significant distinction between the grievant's current position and the retired colleague's position is their Roles: the grievant is an Engineering Technician III in Pay Band 4, whereas the colleague was an Information Technology Specialist II in Pay Band 5. According to the university, differences in the autonomy of the retired colleague's position supported its classification in a different, higher Role. The relevant tasks that involved greater independent decision-making involved computer programming, data analysis, and reporting for executive management and other stakeholders at the university. The grievant does not have a background in those responsibilities and they have been reassigned to another manager in the grievant's department. Notably, those aspects of the retired colleague's position description involving data reporting and analysis do not appear in the grievant's current position description. The grievant has not disputed that the retired colleague's reporting responsibilities are performed by another manager in the department or claimed that she is performing programming, analysis, and reporting tasks. Moreover, though the grievant's current position description incorporates elements of the retired colleague's former duties, she has also retained a substantial portion of job responsibilities from her own former position description. As a result, we cannot say that the university has simply reassigned the grievant to perform the retired colleague's job without making corresponding adjustments to her classification or pay.

Considering the grievant's claims regarding her current position classification, it therefore does not seem appropriate that she could be reclassified as an Information Technology Specialist II in Pay Band 5, if her position is indeed misclassified. Alternatively, the grievant also identified another higher-level Role as reflecting the level of responsibility she believes she now holds: Engineering Technician IV in Pay Band 5. The job classification structure on DHRM's website indicates that the Engineering Technician III role the grievant currently occupies applies to employees who provide "advanced level to supervisory in support of a broad range of engineering

²¹ It appears the wage position is still vacant, though both parties have indicated that the university is attempting to fill the position.

²² The university does not appear to have yet determined specific Roles or functions for these managerial positions. The circumstances at issue in this grievance appear to have given the university cause to reassess the grievant's department as a whole. EDR would observe that the university could develop opportunities for advancement and development as positions are created and revised here. The opportunity to advance seems to be at the heart of the grievant's concerns, as well. Providing pathways for growth and advancement could enhance the university's ability to recruit and retain talent and succession planning for the grievant's department.

specialty activities,” including “interpreting engineering guidelines[,] coordinating varied activities[,] performing engineering drafting and design work[,] . . . providing technical assistance to others[,] and performing detailed reviews of engineering related projects.”²³ The Engineering Technician IV role, on the other hand, applies to employees who “perform as experts and/or supervisors of technical specialty engineering support and/or coordination of research, planning, design, construction and/or rehabilitation of comprehensive engineering projects and activities,” including “ensuring that projects, programs and procedures are effectively and efficiently administered to providing practical technical expertise in making decisions in the review, analysis, coordination and delivery of a specialty engineering function.”

DHRM’s guidance further explain these differences between the two Roles in terms of complexity, accountability, and results. For example, an Engineering Technician III’s responsibilities includes performing “a range of engineering related tasks requiring independent analysis and formulation of solutions to problems,” “[d]rafts and details elements needed to produce plans for construction,” and making decisions that impact “the approval, rejection or modifying of processes and methods.” An Engineering Technician III “[m]ay provide leadership, guidance and supervision to staff” and is “[r]esponsible for coordination of a program activity or portion of a project on district wide or statewide basis.” An Engineering Technician IV, meanwhile, “[a]ppplies knowledge of supervisory principles and practices” to “plan[], direct[], and coordinate[] the work of others.” The Engineering Technician IV Role also “[d]evelops, reviews, and prepares complex and detailed analytical and technical reports,” performs work that “[i]mpacts [the] appropriateness of staffing and resources in meeting project needs,” and “[e]xercises independent judgment and decision-making in the review, analysis and coordination of construction and/or operational projects.”

In considerations of these distinctions, and having carefully considered the grievant’s arguments regarding her classification as well as the evidence provided by the parties, EDR concludes that the university appears to have exercised appropriate discretion under policy in determining the classification of the grievant’s position. Significantly, the grievant does not appear to assert that her current EWP inaccurately describes her job responsibilities, but rather disputes the university’s decision that her duties do not support classification of her position into a higher-level Role. The grievant has undoubtedly taken on both an increased workload and some level of increased responsibility throughout this process. The grievant argues that these modifications to her job warrant a corresponding increase in her classification and/or pay. However, EDR’s review of the available evidence does not support a conclusion that the grievant’s duties clearly reflect the level of complexity, accountability, or results such that policy would mandate reclassification as an Engineering Technician IV. Though the grievant’s concern is understandable, the university’s determination that the changes to the grievant’s position does not support reclassification into a higher Role is also reasonable in light of DHRM’s guidance describing the differences between the Engineering Technician III and Engineering Technician IV Roles. In short, EDR cannot conclude that the university lacked a reasoned basis for its decision regarding the grievant’s classification in this case.

²³ Further information about the Engineering and Technology Career Group, including full descriptions of the complexity, results, and accountability for each Role, is available at <https://web1.dhrm.virginia.gov/itech/DHRMWebAssets/careergroups/engtechnology/eng39070EnginTech.htm>.

In summary, EDR has been unable to identify any mandatory policy provision that the university may have violated here, and the grievant has cited to none. The grievant may disagree with the university's assessment of how best to redistribute the retired colleague's workload, her position classification, and other related actions, but she has not raised a sufficient question as to whether the university misapplied or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding reorganization or reclassification of positions, or was otherwise arbitrary or capricious. It appears instead that the university's classification of the grievant's position is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on these grounds.²⁴

CONCLUSION

For the reasons discussed above, EDR finds that the facts presented in the grievance record do not constitute a claim that qualifies for a hearing under the grievance procedure.²⁵ Because the grievance does not raise a sufficient question whether the university misapplied or unfairly applied policy relating to position classification or compensation, the grievance does not qualify for a hearing on those grounds.

EDR's qualification rulings are final and nonappealable.²⁶

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²⁴ To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the university may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.

²⁵ *Grievance Procedure Manual* § 4.1.

²⁶ See Va. Code § 2.2-1202.1(5).