EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Corrections
Ruling Number 2022-5376
April 1, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management as to whether her October 7, 2021 grievance with the Virginia Department of Corrections (the "agency") qualifies for a hearing. For the reasons set forth below, EDR finds that the grievance is not qualified for a hearing.

FACTS

The grievant works as a full-time licensed practical nurse at one of the agency's facilities. On or about October 7, 2021, she filed a grievance taking issue with the agency's recent incentive pay practices. Specifically, part-time nurses at her facility have been receiving a "crisis pay" addendum to their regular wage rate, while full-time nurses like the grievant are receiving no such addendum.[1] The grievant contends that this practice amounts to "discrimination" against long-serving agency employees who work more hours in more hazardous conditions than wage staff do.

While the grievance was proceeding through the management resolution steps, the agency announced separate bonuses for various nursing staff, including both full-time and wage employees. The grievant contends that these bonuses presented another example of disfavoring full-time staff: to receive their bonus, staff nurses had to sign a one-year employment commitment, while wage staff received bonuses without making any such commitment.

As relief, the grievant seeks to "receive the same enhanced pay rate or comparable enhanced pay as wage nurses with no stipulation or amount of hours worked," as well as "back compensation" for the duration of time that wage staff received a crisis addendum but full-time staff did not. The agency head declined to grant relief or to qualify the grievance for a hearing. The grievant now appeals the latter determination to EDR.

[1] The grievant notes that, although the agency previously offered crisis/hazard pay to full-time staff in connection with the COVID-19 virus, employees were ineligible for the pay addendum for any week in which they worked fewer than 40 hours onsite. The grievant asserts that, by contrast, wage staff receive pay at the "crisis" rate regardless of whether they work fewer hours than usual in a given week.

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 means, methods, and personnel by which work activities are to be carried out, as well as 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 policy may have been misapplied or unfairly applied.[4] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must 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 applicable policy's intent.

Further, while grievances that allege misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[5] Typically, then, 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."[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, we assume that the grievance sufficiently alleges an adverse employment action because it presents a claim regarding the grievant's compensation.

Pay Practices

The grievant claims that the agency is unfairly providing better pay incentives to wage employees than to its full-time staff.[8] According to the agency, it maintains a Nurse Registry Plan to "provide a pool" of nurses "available to work on a part-time wage basis to supplement the full-time classified staff to ensure nursing services to offenders and staff." Registry nurses may not work more than 29 hours per week, and they do not receive benefits or merit raises. The agency has established a standard wage rate for its registry nurses effective July 10, 2021 through June 30, 2023. The Plan also allows the agency to also "offer an enhanced hourly rate to [registry n]urses at facilities who are experiencing staffing shortages . . . and/or having difficulty with shift

[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] Va. Code § 2.2-3004(A); *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] The grievant has described the differences in the agency's pay incentives as "discrimination." By state law and policy, state agencies may not "discriminate in employment on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, disability, sexual orientation, gender identity, or military status." Va. Code § 2.2-2901.1(B); *see* DHRM Policy 2.05, *Equal Employment Opportunity*. Because the grievance does not appear to challenge discrimination on the basis of any of these protected categories, we do not read the grievant's allegations to include illegal discrimination.

coverage." This enhanced rate is known as the "Crisis Rate." Under the Plan, the current regular hourly wage for licensed practical nurses is $26; the Crisis Rate is $32. It appears that the Crisis Rate was in effect at the grievant's work facility during the period at issue in this matter.

The grievant contends that the agency's decision to implement crisis pay only for its wage employees unfairly disfavors full-time staff with decades of service to the agency, who have helped meet the agency's staffing needs by working irregular hours in areas with a higher risk of COVID-19 transmission. She alleges that the agency's failure to offer corresponding enhanced pay to full-time staff has had a negative impact on employee morale.

Although the grievant's arguments are understandable, EDR cannot conclude that the grievance presents a sufficient question whether the agency has violated a mandatory policy provision, or whether its pay practices amount to a disregard of a particular policy's intent. As a matter of state policy, DHRM Policy 3.05, *Compensation*, provides that "[s]tarting pay guidelines are flexible to attract a highly skilled, competent workforce."[9] Agencies **may** also offer pay supplements, for example, in response to "a demonstrated need based on staffing problems or market conditions" for non-standard work shifts, or in acknowledgment of work hazards "that exceed the risks normally associated with the work environment of state employees."[10] The policy also permits agencies to offer "[e]xceptional incentive options" in "situations where employees are extremely difficult to recruit and retain and critical to the agency's mission and ongoing operations."[11]

These and all pay practices are intended to provide management with great flexibility and a high degree of accountability for justifying their pay decisions.[12] Although Policy 3.05 reflects the intent that similarly situated employees should be comparably compensated, it also invests agency management with broad discretion to make individual pay decisions in light of 13 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.[13] 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.[14]

According to the agency's Nurse Registry Plan, the purpose of its registry-nurse pool is to help the agency meet emergent staffing needs that are not fulfilled by its existing full-time workforce; the Crisis Rate applies when staffing challenges are unusually difficult. As such, the Crisis Rate appears to be a standardized hiring incentive that the agency uses to attract skilled

---

[9] DHRM Policy 3.05, *Compensation*, at 2.
[10] *Id.* at 15-16.
[11] *Id.* at 9. Consistent with consideration of all the pay factors in making individual pay decisions, there is no requirement that hiring incentives under these provisions must correlate with comparable retention incentives for existing staff.
[12] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[13] DHRM Policy 3.05, *Compensation*, at 4.
[14] *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.

workers during acute labor shortages, specifically for positions that are not entitled to paid leave, access to the grievance procedure, or other benefits of full-time state employment. Based on the number of full-time staff nurses at her facility, the grievant disputes whether a staff shortage exists to justify the Crisis Rate. However, any alleged misapplication of the Crisis Rate policy in this regard would not appear to support the grievant's argument that her own pay should increase, as that policy does not govern the pay of full-time nursing staff.[15]

Although the grievant may reasonably perceive that the agency should offer more retention incentives for existing staff like herself, EDR has not reviewed evidence to demonstrate that the agency's failure to implement retention incentives for full-time staff, comparable to its Crisis Rate for part-time nurses, is inconsistent with state or agency policy, that it disregarded any applicable pay factors, or that it was otherwise arbitrary or capricious.[16] In light of the agency's "exclusive right" to manage its affairs and operations,[17] and the considerable discretion agencies are afforded in determining appropriate pay practices, we conclude that the grievance does not qualify for a hearing.

Compliance with the Grievance Procedure

The grievant has also asserted that the agency has denied her due process by failing to comply with the requirements of the grievance procedure during the management steps. The grievant points out that the management-step responses and the agency head's qualification determination all significantly exceeded the grievance procedure's five-workday response deadlines, drawing out the grievance process without good cause. In addition, the grievant asserts she was "never . . . afforded a formal meeting to discuss" the issues in her grievance, despite the meeting requirement described in section 3.2 of the *Grievance Procedure Manual*. The grievant has expressed that these compliance failures contributed to her perception that "this matter has not been taken seriously" and that she deserves a more substantial opportunity to be heard about the issues raised in the grievance than she has received thus far. She asks that these issues be "taken into consideration" in this matter.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[18] That process assures that the parties first communicate with each other about the noncompliance and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party of any noncompliance in writing and allow five workdays for the opposing party to correct it.[19] If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, which may in turn order the party to

[15] *See generally Grievance Procedure Manual* § 2.4 (requiring grievances issues to "[p]ertain[] directly and personally to the employee's own employment").
[16] Although the grievant has also objected to the requirement to sign a one-year employment commitment in order to receive her retention bonus, it would appear that this issue is outside the scope of the grievance, as the agency announced the retention bonus and its conditions in a memorandum dated November 8, 2021 – approximately one month after the grievant filed the grievance. However, we observe that, according to DHRM Policy 3.05, one condition for a retention bonus is that "[t]he employee must agree to work for the Commonwealth and remain with the employing agency for a period up to one year." DHRM Policy 3.05, *Compensation*. It appears that the one-time bonus offered separately to wage employees was conditional on a minimum number of hours already worked.
[17] Va. Code § 2.2-3004(B).
[18] *Grievance Procedure Manual* § 6.3.
[19] *See id*.

correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. However, by proceeding with the grievance after becoming aware of a procedural violation, a party generally forfeits the right to challenge the noncompliance at a later time.[20]

Although the record suggests a dispute regarding whether the grievant participated in or waived a second-step meeting, EDR concludes that the grievant forfeited the right to challenge noncompliance during the resolution steps by subsequently proceeding with the grievance.[21] That said, we observe that the grievance procedure encourages managers to resolve workplace complaints "fairly and promptly," which can often be done "through effective interpersonal communication and problem-solving at the lowest possible level."[22] The grievance procedure provides mechanisms to support these goals, including escalating management steps with timely written responses and at least one meeting between the parties for "fact-finding" and "open discussion of the grievance issues to promote understanding of the other party's position."[23] Following this process can serve as a signal that the agency takes its employees' concerns seriously and values their work, especially when a grievance includes allegations that the employee has experienced unfairness or lack of appreciation. Although the record does not ultimately present either a qualifiable issue or agency non-compliance that is susceptible to remedy under the grievance procedure at this time, the conclusion of a grievance does not prevent the parties from voluntarily pursuing ongoing discussion of outstanding workplace issues. To the extent that the grievant had insufficient opportunities for an open discussion during the grievance process and still seeks to be heard on the issues herein, the parties are encouraged to engage in further dialogue to explore options for improving the employment relationship.

CONCLUSION

For the foregoing reasons, this grievance does not present issues that qualify for a hearing. EDR's qualification rulings are final and nonappealable.[24]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

---

[20] *Id.*

[21] EDR favors having grievances decided on the merits rather than procedural violations. Thus, EDR will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. It would appear that the agency had already brought itself into compliance with the time requirements by issuing the required responses at each step. While delays in responses are not preferred, EDR generally extends the same flexibility to agencies and grievants under the five workday rule. Where, as here, there is no evidence of bad faith, EDR would not have a basis to conclude that the agency had failed to adequately correct any noncompliance.

[22] *Grievance Procedure Manual* §§ 1.1, 1.2; *see generally* Va. Code § 2.2-3004(B) ("In any employment matter that management precludes from proceeding to a grievance hearing, management's response . . . shall be prompt, complete, and fair.").

[23] *Grievance Procedure Manual* § 3.2.

[24] *See* Va. Code § 2.2-1202.1(5).