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QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2023-5512
May 8, 2023

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 October 17, 2022 grievance with the Virginia Department of Health (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

Given that EDR previously administered a compliance ruling for this grievance in November 2022, the relevant facts from that ruling are as follows:

> On October 17, 2022, the grievant submitted a grievance in relation to multiple issues, including the denial of a director-level position on or about February 24, 2020 that allegedly was due to age discrimination. The grievance also addressed several months of alleged ongoing harassment and retaliation. In particular, the grievant claims that he has been retaliated against since his initial complaint of discrimination in 2020, including being given duties far below his pay grade, such as stapling papers, moving chairs, and other forms of physical labor, despite his official role being in Pay Band 6 as a General Administration Manager II since November of 2021. He also claims that he was given roles such as an interim Human Resources Director for which he had no experience or training. As of the date of the October grievance, the grievant has alleged that he continues to carry out duties outside of his pay grade, training, and experience. The grievant additionally claims that the agency's human resources department has either denied or failed to give a decision on multiple disability accommodations requests. The most recent accommodation request was on or about October 3, 2022. The agency administratively closed the grievance, asserting that the grievance was not timely initiated on the basis that there was no action or event within the 30-calendar-day period of the grievance.[1]

[1] EDR Ruling No. 2023-5481 at 1.

EDR determined in its compliance ruling that the grievance was timely regarding the retaliation claims and the claims related to the disability accommodation requests, but not regarding the age discrimination claim.[2] The retaliation claims are related to an interim position the grievant held, for which he alleges he was wrongly deprived temporary pay, as well as his current position being misclassified and/or being given duties below his paygrade. On January 12, 2023, the agency approved the grievant's most recent ADA accommodation requests. Although the agency has indicated that the manager who had assigned the grievant's duties is no longer with the agency, the grievant claims that he continues to have duties not consistent with his job title since September 2021, including clearing paper jams, drafting memos, and setting up appointments for his supervisor. At the second-management-step meeting on November 29, 2022,[3] the respondent stated that the Director of the Office of Financial Management would create a Pay Band 6 Employee Work Profile (EWP) and, upon its creation, the grievant would work in that Office and report to its Director. The respondent stated that the reassignment would occur by the end of the first quarter of the 2023 calendar year.[4] The grievance has since gone through all of the required management steps, with the agency denying the grievant's request for a hearing. 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.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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."[9] Adverse employment

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[2] *Id*. at 2.
[3] The grievant submitted his initial grievance to the Deputy Commissioner for Administration, who would normally be the third-step respondent. However, the agency allowed for the first and second steps to collapse into one step due to the grievant's high level within the agency, and the State Health Commissioner served as the third-step respondent instead.
[4] EDR delayed issuing this ruling to account for any changes in the grievant's position that might be relevant to this grievance. To EDR's awareness, no reassignment has occurred and the grievant has not received a new EWP as of the date of this ruling.
[5] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[6] *See* Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).

actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10]

Compliance Issues

As a preliminary matter, the grievant and the agency each raised separate compliance issues within the management steps. First, the agency states that the grievant's objection to an October 4 phone call with the second-step respondent was untimely grieved. The grievant filed the grievance after this conversation. The agency is arguing that because the grievant did not mention this October 4 phone call in the original grievance, or anywhere in the chronology he included, he would have to file a new grievance to challenge the non-selection. The agency is correct in their assertion that management actions or omissions cannot be added to a grievance after it is filed.[11] The grievant may file another grievance, if timely, to challenge additional management actions or omissions. Any such grievance must comply with the initiation requirements of the grievance procedure, as set forth in section 2.4 of the *Grievance Procedure Manual*. However, it appears based on the record as a whole that the grievant mentioned this phone conversation as a small, collective part of his overall retaliation claim, and not as a primary reason for the grievance. Therefore, while the agency is correct that the grievance cannot be read to challenge the non-selection, the situation involving the October 4 phone call itself can be referenced as part of the grievant's overall retaliation claim.

Second, the grievant argues that the third-step respondent was out of compliance regarding the timeliness of issuing the response to his grievance. He states that "[f]ollowing two (2) requests for five (5) workdays extensions each, the Third-Step Respondent failed to use the dated, and signed Form A that had been returned on the 19th of December 2022." The grievance procedure requires both parties to address procedural noncompliance through a specific process.[12] 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 in writing and allow five workdays for the opposing party to correct any noncompliance.[13] While the grievant's frustration with the agency's time extensions and failure to utilize the form is understandable, the agency appears to have corrected its noncompliance by issuing the response. Therefore, EDR considers the compliance issue regarding the third-step response resolved.

ADA Accommodations

One of the two primary issues that EDR considered timely in its November 2022 compliance ruling is the status of the grievant's accommodation requests. In the original grievance, the grievant alleged that as one instance of retaliation, the agency was delaying the process of approving his ADA accommodation requests. At that time, the most recent request was on or about October 3, 2022, and the agency had yet to approve it because of required medical documentation. However, since then, the medical documentation was provided and the agency approved the request to the extent that they could accommodate. The grievant has affirmed that there are no

[10]Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[11] *Grievance Procedure Manual* § 2.4.
[12] *Grievance Procedure Manual* § 6.3.
[13] *See id*.

outstanding issues regarding this matter. For these reasons, EDR considers the matter of ADA accommodations resolved for purposes of this grievance.

Temporary Pay

The grievant asserted as part of his retaliation claim that the agency misapplied or unfairly applied compensation policy by not including temporary pay when he served as Interim SBS-CHS Director from May 6, 2020 through October 24, 2021.[14] Throughout the grievance process, the grievant has cited DHRM Policy 3.05, *Compensation*, specifically § 5, *Temporary Pay*. He claims that he was working a Pay Band 7 position, in comparison to his normal Pay Band 6 position, and that all employees working additional duties or temporary positions should receive additional compensation regardless of what level of salary they are receiving at the time. He further claims that all other employees performing the duties of a higher pay band received additional compensation. 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.

DHRM Policy 3.05, *Compensation*, § 5 states that:

> Agencies may provide temporary pay to an employee who is assigned different duties at the same or higher level of responsibility on an interim basis, or because of the need for additional assignments associated with a special time-limited project, or for acting in a higher-level position in the same or different Role in the same or a higher Pay Band, or for military pay supplements. . . .
>
> Temporary pay is a non-competitive management-initiated practice paid at the discretion of the agency.[15]

Here, the grievant was assigned an interim director position in response to the heightened workload and shortfall of staff in key positions resulting from the COVID-19 pandemic, and was at one point in the interim position tasked with "recruiting, hiring and training professionals for the Covid-19 Project Management Team." While the grievant argues that his official position was in Pay Band 6 and the interim position he was assigned to was a Pay Band 7 position, the agency disagrees. The agency states that the interim director position was misclassified as a Pay Band 7 position, was in fact a Pay Band 6 position, and has since been properly classified in Pay Band 6. The agency further notes that the grievant was making in excess of the hiring range of this director position at the time, and thus required no additional pay.

DHRM Policy 3.05 uses permissive language such as "may" and "at the discretion of the agency" with regard to temporary pay.[16] The section states that the agency *may* utilize temporary pay as a way of compensating employees for taking on temporary roles or additional duties; the

[14] There is some inconsistency in the facts regarding the exact name of the interim position in question, but the grievant includes an email that clarifies the position as "SBS-CHS Director," so that is the name EDR will adhere to. The final date of the position also varies greatly in the facts, ranging from September 2020 to October 2021. However, the initial grievance provides the dates as May 6, 2020 through October 24, 2021.
[15] DHRM Policy 3.05, *Compensation*, at 5.
[16] *Id*.

Policy does not require agencies to do so. At the same time, it suggests that the agency may consider relevant factors in determining whether temporary pay is needed. Here, the agency has stated that temporary pay was not necessary because the grievant was already making in excess of the salary range of the interim director position that he was assigned. The grievant opposed this by citing the pay maximum for Pay Band 7, which exceeded his salary. However, the agency here is stating that the pay range for the grievant's specific interim director position was smaller and lower than the grievant's then-salary. Further, as the agency noted, the position was supposed to have been a Pay Band 6 position – the grievant's Pay Band – and was misclassified as a Pay Band 7 position. Although the grievant argues that other employees who received additional duties received additional compensation, EDR is aware of no information that indicates that employees similarly-situated to the grievant with respect to the applicable pay factors were treated differently. Accordingly, EDR cannot find that the agency misapplied or unfairly applied policy by not granting temporary pay.

Although we understand the grievant's position, the agency is responsible for reviewing individual pay actions to ensure that they are consistent with DHRM Policy 3.05, both in relation to the affected employee and the agency as a whole. DHRM policy does not mandate temporary pay – it only allows the agency to grant such pay increases within their own discretion. In this case, the agency determined that the additional duties combined with the grievant's salary already being in excess of the director position's pay range did not justify increasing the grievant's salary, and we have not reviewed evidence to suggest that the agency disregarded any relevant facts in making that decision. As stated above, DHRM Policy 3.05 is intended to grant the agency flexibility to address issues such as changes in an employee's job duties and temporary salary adjustment in response to necessary factors such as increased workload or decreased staff availability.[17] The policy is not intended to limit the agency's discretion to evaluate whether an individual pay action is warranted. Considering the totality of the circumstances, the record does not support a conclusion that the agency's decision to not administer additional temporary pay to the grievant violates any specific policy requirement. For these reasons, EDR cannot find that the agency's decision was improper or otherwise arbitrary or capricious.

Position Classification

The grievant also claims that his position is misclassified and that he continues to be given job duties below his pay grade and inconsistent with his EWP job duties. The grievant's current official position title is Administrative Deputy, a Pay Band 6 position, but he claims he is being given duties below that position, such as clearing paper jams, drafting memoranda, and setting up appointments for his current supervisor. As relief, he requests an equivalent position he qualifies for as a Director within Pay Band 7, along with an updated EWP that reflects that new position.

For the grievant's claims regarding his 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.[18] In addition, the Commonwealth's classification plan

[17] *See* DHRM Policy 3.05, *Compensation*.
[18] Va. Code § 2.2-2900.

"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."[19] 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.[20]

At first glance, some of the grievant's apparent job duties are clearly below the typical duties of Pay Band 6 and potentially inconsistent with the grievant's actual position title. However, the agency has also provided information about the greivant's duties and assignments that do appear to be consistent with his role level. Considering the totality of the information available, EDR finds the grievance does not raise a sufficient question whether the agency has violated any mandatory policy or unfairly applied such policy to the point of disregarding its intent. Additionally, EDR cannot find that the grievant's current position arises to the level of an adverse employment action sufficient to qualify the grievance for a hearing.

Further, the agency clarified in the second-step response that the Director of the Office of Financial Management will create a Pay Band 6 EWP for the grievant and assign the grievant to a position within that Office and report to its Director; the agency claimed that this will be done by the end of the first quarter of 2023, though that has yet to occur as of the date of this ruling. EDR is aware of no impediment to the agency moving forward with assigning the grievant a new position, if this remains the intended plan. EDR would observe that a reassignment and reassessment of the grievant's position and duties appears to be a laudable goal to address any past inconsistencies with the grievant's assignments that may have a current impact. Consequently, EDR would recommend that the agency move forward with its planned reassignment as soon as possible. EDR would also observe that to the extent the grievant has any concerns with a future reassignment, he would have the option to file a new grievance to challenge the agency's action, including as to whether there is a continuation of any alleged retaliation.

Retaliation

Regarding the grievant's overall allegation that management retaliated against him, a claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[21] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[22] If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing unless the

[19] *Id.* § 2.2-103(B)(1).
[20] *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.
[21] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[22] *Id.*

employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[23] Ultimately, to support a finding of retaliation, EDR must find that, but for the protected activity, the alleged adverse action by the employer would not have occurred.[24]

The grievant here is alleging a broad retaliation claim that encompasses the issue of not being granted temporary pay for his interim director position, being given duties below his paygrade, and treatment such as not being invited to meetings and generally not being informed about what is going on at work. The protected activity in question is when the grievant complained of age discrimination regarding the position he applied for in 2020.[25] The grievant's claims are essentially that the agency has created a retaliatory hostile work environment. As already discussed above, however, the grievance does not raise a sufficient question as to a misapplication of policy regarding denied temporary pay and assignment of duties. As such, EDR does not find evidence linking an improper motive, such as retaliation, to these agency actions.

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 prior protected activity; (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.[26] In the analysis of such a claim, the "adverse employment action" requirement is satisfied if the facts raise a sufficient question as to whether the conduct at issue was sufficiently severe or pervasive so as to alter the conditions of employment and to create and abusive or hostile work environment.[27] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances.

The grievant originally brought a retaliation claim alleging that, due to his age discrimination claim, he was bullied by the former Deputy Commissioner of Administration in the presence of the former Chief of Shared Business Services. The agency notes in their second-step response that while there was sufficient evidence of a hostile work environment claim regarding this issue, the matter has concluded as those two employees are no longer with the agency. The grievant has since then brought additional claims of retaliation, particularly mentioning instances such as not being invited to meetings and not being told what is going on at work. These perceptions of isolation cannot be considered sufficiently severe or pervasive enough to alter the conditions of the grievant's employment and to create a hostile environment, based on the information available to EDR. Unlike the prior hostile work environment claims involving the former Deputy Commissioner, there are no specific instances of prohibited conduct by any specific employee. Further, if the agency follows through on its decision to reevaluate the grievant's misclassification, that would potentially change the overall work environment of the grievant as he will be working in a different Office. For these reasons, EDR finds the grievance does not raise a sufficient question of a hostile work environment to qualify for a hearing.

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[23] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[24] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[25] EDR has since held in its previous compliance ruling that the age discrimination claim was not considered timely; however, EDR can still consider any lingering retaliatory effects of bringing the age discrimination claim. *See* EDR Ruling No. 2023-5481.
[26] *See* Gilliam v. S.C. Dep't of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).
[27] *See generally id.* at 142-43.

Attorney Fees

Finally, the grievant alleges that he is entitled to personal compensation for the attorney fees he has paid throughout the grievance process. EDR finds that there is no relevant DHRM policy that provides for such compensation. Hiring an attorney is within the personal choice and discretion of the employee, and DHRM does not have the authority to compel an agency to compensate the employee for making this choice.[28] Regardless of the grievant's rationale for incurring attorney fees, the decision to incur such fees ultimately belongs to the grievant. For that reason, EDR cannot order the agency to compensate the grievant for any attorney fees he has accrued throughout this process.

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.[29] EDR's qualification rulings are final and nonappealable.[30]

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[28] Attorneys fees are generally only available as relief in a termination case in which the grievant is reinstated after prevailing at a hearing. *Grievance Procedure Manual* § 5.9(a).
[29] *Grievance Procedure Manual* § 4.1.
[30] *See* Va. Code § 2.2-1202.1(5).