



JANET L. LAWSON
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 Marine Resources Commission
Ruling Number 2023-5513
March 20, 2023
Revised May 16, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) on whether his January 17, 2023 grievance with the Marine Resources Commission (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about January 17, 2023, the grievant filed an expedited grievance alleging a retaliation claim against the agency’s Commissioner. In particular, the grievant addresses the reporting of a past incident involving theft of oysters for which he claims the Commissioner has retaliated by not acting upon pay revisions for the division (“Division”) in which the grievant is currently employed as Deputy Chief. On September 12, 2022, the grievant, along with the former Shellfish Division Chief (“former Chief”) and another Division Chief, met with the new Commissioner to discuss the correspondence that the grievant and the former Chief had with the Department of Health (“VDH”) a week prior. In this meeting, the grievant claims that the Commissioner was verbally abusive, slamming his fists on the desk and yelling at the group.¹

In September 2022, a full Salary Study was conducted for every division of the agency and a decision package was submitted to seek funding in the agency’s budget.² On October 27 and November 10, 2022, the agency’s Human Resources (“HR”) Director received memos and email chains regarding Employee Work Profile (“EWP”) revisions and proposed salary increases. The HR Director was told that the former Chief was negotiating directly with the Secretary regarding these revisions. Also on November 10, the former Chief submitted his retirement paperwork with his official date of retirement set for January 1, 2023.

¹ The Commissioner contends that while he did slam his fists, he never raised his voice or was in any way verbally abusive.

² Information available to EDR suggests that the decision package was not approved for inclusion in the budget.

On November 30, 2022, the grievant emailed the HR Director with evidence of past correspondence and memos regarding the requests to modify Division employee EWP's, suggesting that the plan was approved by the previous acting Commissioner and submitted to the Secretary. Information available to EDR does not indicate that any further approval from the Secretary exists and no Pay Action Worksheets were submitted. The EWP revisions and pay increases appear to have been placed on hold following a December meeting with the new Commissioner. Specifically, the HR Director recommended this hold on December 5 pursuant to the former Chief of the Division's retirement, to allow for the new Chief and grievant to further discuss the logistics of the EWP revisions. The grievant alleges that the former Chief tried to initiate a meeting with the Secretary regarding these revisions in December 2022, but there is no evidence showing that this meeting ever took place.

The first interview for the open Chief of the Division position began on January 12, 2023. On January 17, upon finding out he was not selected for the second round of interviews, an alleged altercation occurred between the grievant and human resources. The grievant was allegedly raising his voice, inquiring about the second round of interviews and why he was not called for them. The HR Director sat down with the grievant to talk out these issues, and shortly thereafter she received his grievance via email.

On January 19, 2023, the grievant met with the Commissioner, along with the HR Director. The meeting included discussion about allowing the newly-selected Chief of the Division to review, evaluate, and partner with the grievant for the proposal to structure and/or restructure the Division. On January 24, the Commissioner, acting as the second-step respondent, responded to the grievance. Subsequently, the Commissioner, along with the HR Director's guidance, determined that the grievance did not qualify for a hearing.³ The grievant now appeals this denial 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.⁴ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out 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.⁶

³ There was confusion among the parties as to the official expedited grievance process since the Agency Head was the one to respond to the second management step. EDR stepped in to clarify that the Agency Head must then issue a formal qualification determination and complete that section of the grievance form. It appears that the Agency Head followed suit on this guidance. The HR Director also clarified that the Agency Head was necessary for both steps because of the Chief of the Division's recent retirement.

⁴ See *Grievance Procedure Manual* § 4.1.

⁵ Va. Code § 2.2-3004(B).

⁶ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve “adverse employment actions.”⁷ 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.”⁸ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁹

Compensation

It appears that the grievant’s primary issue is centered on the restructuring of pay and/or EWP’s within the Division. In essence, the grievant claims that the agency’s Commissioner is misapplying state policy by refusing to review and approve pay actions and/or EWP’s for the Division, as well as for all other divisions, and by continuing to delay in providing updates regarding pay action requests. 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*, is relatively broad when discussing the requirements of agencies in overseeing pay actions. In particular, it states that agencies must “conduct market and/or salary alignment studies on a periodic basis as needed” and “continuously review[] agency compensation practices and actions to ensure that similarly situated employees are treated consistently”¹⁰ However, the Policy does not explicitly state any requirements as to when and how agencies review and approve or deny pay actions for their divisions. Following the language given, it appears that agencies have broad discretion to review pay actions on a periodic basis whenever they feel it is necessary, and as long as the pay actions adhere to discrimination policies. 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

Here, the grievant is alleging that the Commissioner, who was newly appointed in July 2022, is misapplying policy by refusing to review and approve pay actions and/or EWP’s for the

⁷ Va. Code § 2.2-3004(A); *see Grievance Procedure Manual* § 4.1(b).

⁸ *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)).

⁹ *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”).

¹⁰ DHRM Policy 3.05, *Compensation*, at 5.

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 (and authorities cited therein).

Division. However, the recent adjustments in leadership personnel have provided a rational basis for this delay. The new Commissioner was appointed in July 2022. On October 10, a new HR Director for the agency officially took over. Finally, on November 14, the Chief of the Division announced his retirement, opening the position for selection. Given all of these staffing changes, the new HR Director recommended on December 5 that pursuant to the Chief's retirement, the Commissioner should postpone the new EWP proposals and pay actions until the new Chief of the Division would come on board, which the Commissioner agreed to. The grievant and the new Chief will be able to discuss all pay and EWP proposals for the Division before the Commissioner considers an agency-wide plan as a whole. Further, while the grievant mentions pay action proposals that were submitted to the Secretary on May 31, 2022 that have yet to be approved, these were apparently submitted by the former Acting Commissioner. It would make sense to allow for the new Commissioner to submit their own proposals for a new review by the Secretary.

Given all of these changes, EDR finds that the agency has not misapplied policy by delaying the pay action and EWP proposals. In addition to the fact that Policy 3.05 does not explicitly state when these proposals should be reviewed and approved, the recent management changes have created a necessary allowance of delay for the proposals, with the Commissioner further delaying the discussion until the Chief of the Division has come on board to review them with the grievant. Having reviewed the information in the grievance record, EDR finds insufficient evidence to demonstrate that the agency's decision to delay the pay action requests and EWP revisions has violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable policies. Indeed, it appears the agency fully considered relevant circumstances in reaching a decision to delay the requests and has substantiated these circumstances with evidence in the record. For these reasons, EDR cannot find that the agency's decision to delay the requests was improper or otherwise arbitrary or capricious.

Retaliation

The grievant also alleges a claim of retaliation by the current Commissioner. In particular, the grievant claims that as a result of reporting theft of oysters, the Commissioner has retaliated in the form of delaying the pay action requests, as well as refusing to grant travel requests. He also alleges verbal abuse and attempted intimidation, specifically referring to a meeting in which he claims the Commissioner repeatedly slammed his fists and yelled at the grievant. The meeting involved the grievant, along with the former Chief of the Division, and another division Chief.

In the Commissioner's response, he states that the theft incident occurred a year or more ago, when he was not the current Commissioner but the Deputy Chief at the time. The incident was reported to him in December 2021 and an investigation was subsequently initiated in January 2022. As to the September 2022 meeting, which was unrelated to the topic of oyster theft, the Commissioner admits to slamming his fists, but denies any verbal abuse or intimidation. Finally, the Commissioner confirms that he denied the travel requests in question because he requires all Deputy Chiefs to be present on Commission Day, the day of the travel request.

Regarding the grievant's 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.¹² Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.¹³ Even assuming that the grievant engaged in protected activity by attempting to address his concerns over the oyster theft,¹⁴ the grievance record does not reflect that he has suffered an adverse employment action as described above. Other than the Commissioner hitting his fist on the desk during the September 2022 meeting, EDR has been presented with no other evidence to indicate verbal abuse or intimidation in the workplace by the Commissioner. As to the pay actions, while they are currently on hold, there is no evidence in the record that suggests the decision to delay was based on retaliation. As was discussed above, the delays are well within applicable policy and discretion given all the recent managerial changes. The HR Director also confirms that the grievant most recently received a pay increase in July 2022 due to a statewide increase. The grievant has not identified acts or omissions that could reasonably be viewed as amounting to an adverse employment action or would not have occurred but for a retaliatory motive.

CONCLUSION

For the reasons expressed above, the facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.¹⁵ EDR's qualification rulings are final and nonappealable.¹⁶

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹² 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).

¹³ *Id.*

¹⁴ See Va. Code § 2.2-3000(A).

¹⁵ See *Grievance Procedure Manual* § 4.1.

¹⁶ See Va. Code § 2.2-1202.1(5).