



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 Virginia Employment Commission
Ruling Number 2023-5442
September 9, 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 his July 5, 2022, grievance with the Virginia Employment Commission (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant participated in a competitive recruitment process for a Regional Tax Manager position with the agency. Following interviews, the grievant was selected as the top candidate for the position and received an offer to accept the promotion. However, the salary originally offered to the grievant (\$77,000) was 7 percent below his current salary. The grievant states that he countered, requesting a 10 percent salary increase. The agency’s second offer was for \$83,000, which was slightly above the grievant’s current salary. The grievant again requested a 10 percent pay increase. The agency’s final offer was \$86,000, which would have been an approximate 3.6-percent increase above the grievant’s current salary. A justification for the salary offer, at least initially, was internal alignment. The grievant declined the promotion.

The grievant filed a grievance on July 5, 2022, alleging that the agency had misapplied or unfairly applied compensation policy and the agency’s salary administration plan, noting that other employees who had been promoted by the agency received higher percentage increases when compared to their previous salaries. The grievant further claims that the agency’s salary decision constitutes discrimination based on his age. Following the management resolution steps, the agency head declined to qualify the grievance 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.¹ Additionally,

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action because he asserts issues with a promotion and the associated compensation he alleges he was denied.

Misapplication/Unfair Application of Policy

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*, authorizes salary negotiations when an employee is promoted to a different position in a higher Pay Band through a competitive selection process.⁷ When an employee is promoted, "the promotional increase is negotiable from the minimum of the new Salary Range."⁸ Like all pay practices, salary negotiations in connection with a promotion are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.⁹ Although DHRM 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

² See Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *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)).

⁶ See *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").

⁷ DHRM Policy 3.05, *Compensation*, at 3, 23.

⁸ *Id.* at 3.

⁹ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

implications; (12) long term impact; and (13) current salary.¹⁰ According to the policy, “[a]gencies may approve promotional increases above the hiring range minimum and below the hiring range maximum as long as the resulting salary is within the new Pay Band and the action is supported by the Pay Factors.”¹¹ 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.¹²

Having reviewed the information in the grievance record, EDR finds insufficient evidence to demonstrate that the agency’s final salary offer violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. First, that other employees received double-digit percentage salary increases in other promotions is not persuasive. A percentage increase is a function of the individual’s current salary, which is generally not to be used as a factor in determining promotional pay increases.¹³ Thus, the pertinent issue as to the grievant’s salary offer is not the percentage of the increase, but whether the actual salary offered was consistent with the discretion granted by policy.¹⁴ The agency has relied on internal alignment in its justifications for the salary offer in this case. This factor, among others, does indeed seem to support the agency’s position. The agency has noted that the grievant would have been the highest paid employee in his position had he accepted the final salary offer. Additionally, although the individual previously employed in the position had been making \$2,804 more than the grievant’s final salary offer, the agency notes that both the grievant and that individual had comparable years of service (over 40 years with the agency), but that the incumbent had “substantially more management experience” and more years in the higher role than the grievant would have had on assuming the promotion. Thus, it is understandable why the agency would determine that a salary offer below the incumbent’s was reasonable. The agency has also noted that a Joint Legislative Audit and Review Commission examination of agency salaries found that “median salary for [the agency’s] tax representatives (including regional leads) was 36 percent higher than the median salary for comparable positions at other Virginia state agencies.”

The grievant disagrees with the agency’s conclusion that internal salary alignment justifies the salary offer he received, noting that all the pay factors should be considered beyond reliance solely on alignment. Although we understand the grievant’s concerns, 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. For example, DHRM policy does not mandate that each pay factor be given particular weight or even equal weight. As stated above, DHRM Policy 3.05 is intended to grant the agency flexibility to make such determinations on compensation matters.¹⁵ The policy is not intended to entitle employees to salary increases at a

¹⁰ See DHRM Policy 3.05, *Compensation*, at 19-24. The “current salary” factor is generally only considered for pay actions related to demotions and downward pay actions. *Id.* at 20.

¹¹ *Id.* at 3.

¹² 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).

¹³ See DHRM Policy 3.05, *Compensation*, at 20.

¹⁴ For example, after the grievant declined the promotion, the position was offered to the next candidate who accepted. That person received a nearly 40% increase from their former salary. However, the salary offered was \$70,000, much less than what was offered to the grievant.

¹⁵ See DHRM Policy 3.05, *Compensation*.

certain percentage or limit the agency's discretion to evaluate whether an individual pay action is warranted.

Considering the totality of the circumstances, and even assuming that the agency relied heavily on internal alignment as a determining factor, the final salary offer does not appear to be inconsistent with any specific policy requirement. The grievant argues that certain pay factors might support his arguments that he should have received a larger salary offer, but the agency's position that its final offer was consistent with its application of policy is also valid. In cases like this one, where a mandatory entitlement to a salary offer at a particular level does not exist, agencies are given great discretion to weigh the relevant factors. For these reasons, EDR cannot find that the agency's salary offer was improper or otherwise arbitrary or capricious.

Discrimination

The grievant further questions whether the agency's refusal to offer a higher salary in the selection process was based on his age and, thus, in violation of the Age Discrimination in Employment Act and related law and policy. 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 or expression, age, political affiliation, genetics, disability, or veteran status.¹⁶ 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.¹⁷

The grievant asserts that the agency's reliance on internal salary alignment discriminates against "older, senior employees." He states that his years of experience "related to [his] age" were held against him in that the salaries with which the agency was attempting to align the grievant's offer were allegedly for less experienced and lower paid agency employees. The grievant is understandably disappointed that the final offer he was given was not substantially higher than his current salary.¹⁸ The length of the grievant's state service with the agency is a likely contributing factor as to why his current salary is high in his current position, which he describes as close to the top of his current pay band. However, we do not agree that this argument raises a sufficient question that the grievant's age was a factor in the agency's salary offer determinations. Although the grievant connects his higher salary and the agency's resulting salary offer with his age, the grievant's assertion does not appear to be sufficiently correlated with his age to suggest discriminatory intent. Rather, as described above, the agency offered the grievant what would have been the highest salary for the role in the agency due, in part, to his years of experience.

Moreover, to the extent the grievant argues that the internal salary alignment Pay Factor is inherently discriminatory against older workers, we cannot agree. DHRM Policy 3.05 defines

¹⁶ See, e.g., Va. Code § 2.2-3004(A); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁷ See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852 (4th Cir. 2001) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993)).

¹⁸ Per policy, the agency did not take the grievant's current salary into account in determining the salary offer.

“internal salary alignment” as “a fairness criterion that takes into consideration the proximity of one employee’s salary to the salaries of others who have comparable levels of training and experience; duties and responsibilities; performance; and knowledge, skills, abilities and competencies.”¹⁹ By its terms, this Pay Factor allows for the alignment of employee salaries in accordance with their respective experience, among other employee qualifications. It does not suggest that internal alignment should be driven by the salaries of younger workers.

EDR has thoroughly reviewed the information provided by the parties and finds that the grievance does not raise a sufficient question as to whether the agency’s salary offers for the grievant was based on a discriminatory basis (age). As discussed above, the agency’s assessment was based on a reasonable consideration of the applicable pay factors, and EDR has found no reason to dispute that decision. EDR has been unable to identify any evidence, and the grievant cites to none, that raises a sufficient question whether the agency’s justification for that decision was mere pretext.²⁰ Consequently, the grievance does not qualify for a hearing on this basis.

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.²¹ Because the grievance does not raise a sufficient question whether the agency misapplied or unfairly applied compensation policy or engaged in discrimination based on the grievant’s age, the grievance does not qualify for a hearing on those grounds.

EDR’s qualification rulings are final and nonappealable.²²

Christopher M. Grab
Director
Office of Employment Dispute Resolution

¹⁹ DHRM Policy 3.05, *Compensation*, at 21.

²⁰ *See, e.g., Bennett v. Permanente*, 931 F. Supp. 2d 697, 705 (D. Md. 2013) (“An employer's reliance on factors that are analytically distinct from age in reaching the adverse decision rules out age as its but-for cause.”).

²¹ *Grievance Procedure Manual* § 4.1.

²² *See* Va. Code § 2.2-1202.1(5).