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 Department of State Police
Ruling Number 2023-5467
December 20, 2022

The grievant seeks a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) as to whether his August 28, 2022 grievance with the Department of State Police (the "agency") qualifies for hearing. For the reasons set forth below, the grievance is qualified for a hearing.

FACTS

On or about August 28, 2022, the grievant initiated a grievance claiming that he had been "improperly reclassified" to a new position that represented a demotion from his former position. The grievant has been a Surveillance Agent with the agency since 2001. At the time he became a Surveillance Agent, the grievant understood that position to be senior in rank, pay, and duties as compared with the position of Special Agent. However, during the summer of 2022, the grievant learned that the agency had been classifying him as a Special Agent. Consistent with that classification, in determining the grievant's eligibility for a salary-compression bonus, the agency apparently compared the grievant's salary with the salaries of Special Agents. As a result of his high salary within that group, the grievant was deemed ineligible for the compression bonus. As relief, the grievant sought to be "moved back to my correct salary classification" above Special Agents, and on par with Senior Special Agents. The grievant also requested corrective back pay and also to be awarded a salary compression bonus based on a comparison with Senior Special Agents. During the management resolution steps, the management respondents maintained that, although Surveillance Agent was the grievant's working title, he was properly classified at the Special Agent level according to the agency's personnel records going back several years. The agency head declined to qualify the grievance for a hearing, and the grievant now appeals that decision to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, by statute and under the grievance procedure,

[1] *See* Va. Code § 2.2-3004(B).

complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"[2] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. 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, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Typically, then, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action" constituting "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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5]

For purposes of this ruling, we assume that the grievant has alleged an adverse employment action in that he asserts he should have received additional compensation as a bonus. He also alleges that, by classifying him as a Special Agent, the agency has now unilaterally implemented a demotion that the grievant had declined to voluntarily accept in 2010. Therefore, the issue in this ruling is whether these actions constitute a misapplication or unfair application of policy susceptible to relief at a hearing.

In general, state compensation policy is intended to provide management with both great flexibility and a high degree of accountability for justifying their pay decisions.[6] DHRM Policy 3.05, *Compensation*, reflects the intent that similarly situated employees should be comparably compensated; however, it also reflects the intent to invest agency management with broad discretion for making individual pay decisions as well as corresponding accountability in light of each of the 13 Pay Factors.[7] Thus, Policy 3.05 establishes a mandatory framework for pay practices that nevertheless affords agencies a large degree of discretion in making compensation decisions most appropriate for their specific needs. Accordingly, EDR has repeatedly held that qualification for a hearing on such issues 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 was otherwise arbitrary or capricious.[8]

---

[2] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] 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)).
[5] 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").
[6] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[7] *See* DHRM Policy 3.05, *Compensation*, at 2, 22.
[8] *See Grievance Procedure Manual* § 9 (defining an "arbitrary or capricious" decision as one made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling No. 2008-1879.

In this case, the parties do not appear to dispute that the grievant's working title is "Surveillance Agent," as has been consistently reflected on his Employee Work Profiles since at least 2007. Instead, the dispute is whether individuals in that position are more comparable to Special Agents or Senior Special Agents for compensation purposes. The grievant contends that, when he accepted the position in 2001, the agency considered Surveillance Agents as most comparable to Senior Special Agents, who typically had progressed from the level of Special Agent. However, the agency appears to maintain that the grievant's rank is Special Agent.

In October 2010, it appears that the agency offered Surveillance Agents, including the grievant, an opportunity to become eligible for standardized career progression, which their position never had been previously. To opt in to career progression, the agency advised, a Surveillance Agent "must be placed in the Special Agent classification" with commensurate (lower) pay, and then receive specialty pay for their surveillance expertise so that their total pay would ultimately remain the same. The agency explained that, "[u]nder this concept, the permanent rank of the incumbent remains Special Agent; his/her working title . . . will be . . . Surveillance Special Agent." Surveillance Agents were then asked to indicate whether they wished to be eligible for career progression, with their "official State Police title/rank [to] remain the same (Special Agent)," or whether they wished to decline career progression and "remain in [their] current Surveillance Special Agent classification." According to the grievant, he understood the choice as effectively (1) accept demotion to become eligible for career progression, or (2) reject demotion and career progression to maintain pay grade. The grievant chose the latter option.

During the summer of 2022, the agency apparently implemented multiple salary actions, including a new salary administration plan and the distribution of compression bonuses. According to the grievant, he was deemed ineligible for a compression bonus because the agency compared his salary with Special Agents as a group, who are and have historically been compensated at a lower rate than the grievant. He argues that, if he had been compared instead with Senior Special Agents, who have historically been in the same pay grade as Surveillance Agents, he would have easily qualified for a compression bonus.

Upon a thorough review of all materials submitted by the parties, EDR concludes that the record presents a sufficient question whether the agency misapplied or unfairly applied relevant policies in classifying the grievant at the rank of Special Agent and comparing him with other Special Agents for purposes of compensation adjustment. That is, the parties have presented conflicting information on this issue, which EDR is therefore unable to resolve at this stage. The agency maintains that Surveillance Agents such as the grievant are Special Agents with subject-matter expertise, which gives them a specialized working title and additional compensation; ultimately, however, their permanent rank is Special Agent. The grievant maintains that, when he became a Surveillance Agent, he was neither a Special Agent nor a Senior Special Agent but was treated more akin to a Senior Special Agent because of similar salaries.

We observe that the grievant's Employee Work Profile (EWP) provides some support for both positions. Consistent with the agency's assertions, the grievant's EWPs going back to at least 2007 have identified "Surveillance Agent" as his working title. Both Surveillance Agents and Special Agents work in the Role of Law Enforcement Officer III. On the other hand, a comparison

of the two positions' EWPs demonstrates that the purpose and duties of a Surveillance Agent are extremely specialized relative to those of a Special Agent, with limited overlap. For example, the purpose of the Surveillance Agent position is to "provid[e] technical surveillance and wire intercept assistance to requesting agencies" to support the agency's objective to "conduct various undercover and surveillance activities." As core responsibilities, a Surveillance Agent "[p]erforms specialized surveillance and installs, develops, [and] constructs technical equipment" (30 percent); "[f]iles reports within established guidelines" (20 percent); and "[e]stablishes and maintains technical equipment and accountability for equipment" (20 percent). Of eight core responsibilities listed in the grievant's EWP, six directly involve surveillance activities, management, and maintenance. By contrast, the EWP for Special Agents describes their purpose as "provid[ing] thorough, comprehensive, objective investigations and . . . assistance to local, federal and state enforcement agencies in all matters of mutual interest." The primary responsibility of a Special Agent is to "[c]onduct[] criminal investigations" (70 percent), by gathering evidence, effecting arrest based on probable cause, and communicating with prosecutors. Ultimately, the respective EWPs indicate that the two positions are substantially different, but these documents do not offer clarity on their relative ranks or appropriate compensation comparators.

In addition, the grievant has presented documentation arguably supporting his position that the agency has historically treated his position as more akin to a Senior Special Agent than to a Special Agent. When the grievant became a Surveillance Agent in 2001, it appears that the agency used a pay grade system to compensate its sworn staff. A listing of ranks at that time indicated that Surveillance Agents were assigned to a pay grade of 6 out of 11. Senior Special Agents also were in pay grade 6; Special Agents, by contrast, were in pay grade 5. Shortly after the grievant became a Surveillance Agent, an amendment to the agency's salary administration plan recommended salary adjustments by rank. In that listing of ranks, Surveillance Agent was listed as an independent rank in the same category as Senior Special Agent; Special Agent was a separate rank in a lower-compensation category (pay grade). Other personnel records and correspondence to the grievant since 2001 consistently refer to him as a Surveillance Agent, designated with the abbreviation "SUA" as distinguished from "SA" for Special Agent.

However, the record also contains some evidence that could arguably support the agency's position that the grievant's most appropriate peers are Special Agents. When it allowed Surveillance Agents to opt in to career progression in 2010, its correspondence regarding this change suggested that they were already considered Special Agents. Specifically, the correspondence indicated that "Special Agent" was already the Surveillance Agents' "permanent rank." It also described all Surveillance Agents as "Surveillance Special Agents." On the other hand, the correspondence indicated that those individuals would need to be "placed in the Special Agent classification" in order to be eligible for career progression – suggesting that they were not already classified as Special Agents. Employees opting in to this classification would have their base salary reduced by 10 percent. To opt in, employees were asked to execute an "Acceptance of Surveillance Special Agent Position" document. Yet the document also classified those who did not opt in – including the grievant – as "Surveillance Special Agents." Nevertheless, the "Surveillance Special Agent" designation does not appear elsewhere in the record. Yet beginning in 2019, for reasons not apparent in the record, the grievant's annual performance evaluation narratives referred to him as "SA" rather than "SUA."

In sum, the documents provided by the parties are not consistent as to the grievant's appropriate rank within the agency and also do not suggest how the grievant would appropriately be classified for purposes of compensation analysis. Due to material inconsistencies within the agency's documentation and little affirmative support for assigning the grievant the rank of Special Agent, it can at least plausibly be argued upon the current record that this classification is arbitrary and capricious, with adverse consequences to the grievant's pay. Because EDR is unable to resolve these issues at this stage, we conclude there is a sufficient question whether the agency misapplied or unfairly applied relevant compensation policies by analyzing the grievant's salary only in comparison with Special Agents as a peer group.

Accordingly, this grievance is qualified for a hearing in full. At the hearing, the grievant will have the burden to prove that the agency's personnel and/or compensation actions at issue in the grievance were not consistent with policy, as well as the appropriateness of any relief sought.[9] Within **five workdays** of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear the claims qualified for hearing, using the Grievance Form B. This ruling is not intended to prevent or discourage the parties from resolving the underlying issues outside the context of a hearing.

EDR's qualification rulings are final and nonappealable.[10]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

---

[9] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(C).
[10] *See* Va. Code § 2.2-1202.1(5).