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QUALIFICATION RULING

In the matter of the Department of Transportation
Ruling Number 2023-5477
December 2, 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 September 8, 2022 grievance with the Department of Transportation (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

In July 2022, a 5 percent salary increase was granted to state employees as a result of a recent budget action by the General Assembly. On August 25, the agency implemented a market adjustment for specific jobs and employees, including the grievant. The market adjustment took into account the 5 percent pay increase. For example, if an employee were to receive a total market adjustment pay increase of 8 percent, the legislature’s 5 percent pay increase would be subtracted from that total, resulting in a net 3 percent pay increase. After the August 25 market adjustment, the grievant had a new annual salary of \$77,523. The grievant alleges that because the market adjustment was implemented well after the July pay increase, rather than before, he was effectively “cheated” out of a more substantial 5 percent increase that would have been granted by the legislature. The grievant also states that a new team member with the same job title started at a \$78,000 salary, compared to the grievant’s starting salary of \$73,465. The grievant argues that if his salary were proportionate to the new employee’s salary, he would have been making \$81,399 after the combined market adjustment and 5-percent pay increase. The grievant questions why a new employee, who the grievant views as inexperienced, would receive a higher starting salary than the grievant’s new salary. As relief, the grievant seeks a salary correction to account for both the salary increase and market adjustment being implemented at the same time. 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

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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 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 The grievant has not asserted a claim of discrimination or retaliation. Consequently, the grievance will be reviewed as to whether policy has been misapplied or unfairly applied.

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 his compensation.

The grievant argues that management has misapplied or unfairly applied compensation policy by implementing the market adjustment after the legislature's 5-percent pay increase. The grievant believes that if he had been granted the market adjustment before the legislature's pay increase and if he were receiving a salary comparable to a new employee in his same role (about \$78,000), then he would be making a total of \$81,399 as opposed to his current salary of \$77,523. 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.

The grievant's primary claim, that the market adjustment should have been applied at or before the legislature's pay increase, does not raise a sufficient question to qualify for a hearing. Having reviewed the evidence in the grievance record, EDR finds insufficient evidence to demonstrate that the agency's actions violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. DHRM Policy 3.05, *Compensation*, states that agencies have the responsibility to conduct market adjustments "on a periodic basis as needed."⁷ The agency has also explained that management

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

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 *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 2; see also at 7, 22 (further emphasizing that current market practices can be considered when determining salaries for employees in various fields).

applies market adjustments when (1) they identify that the market data has shifted by 5 percent or more and (2) the agency has the budget approvals and funding available to grant market adjustments. As to the August 25 adjustment, the agency did not have any budget set nor approval to implement any adjustments prior to that date. The agency states that they consider a wide variety of factors when they plan a market adjustment for the new fiscal year, and the adjustments are normally done between September and December. Finally, the agency has maintained throughout the management step process that the legislature's pay increase was taken into account when the market adjustment was implemented. For these reasons, EDR cannot find that the agency's decision to implement the market adjustment after the legislature's pay increase was due to policy being misapplied, unfairly applied, or otherwise arbitrary or capricious. Accordingly, the grievance does not raise a sufficient question as to the market adjustment implementation to a qualify for a hearing.

Similarly, the grievant's argument against the new employee receiving a higher starting salary does not raise a sufficient question to qualify for a hearing. DHRM Policy 3.05 allows for "flexible" starting pay guidelines to attract a "highly skilled, competent workforce."⁸ Like all pay practices, salary questions like those at issue in the grievance 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 implications; (12) long term impact; and (13) current salary.¹⁰ 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

According to the agency, the determination to give the newer employee a higher starting salary than the grievant was due to the new employee's "32 years of directly relevant experience with multiple organizations." The new employee's salary is "directly in line with a now-retired employee ... [with] 32+ years of experience." Finally, the agency stated that the new employee's role is difficult to fill and there was a small applicant pool. These factors that led to the new employee's \$78,000 salary are within the scope of the agency's discretion granted by policy to consider the relevant pay factors in determining starting pay. Therefore, EDR cannot find that the agency's decision to offer the new employee a higher starting salary was improper or otherwise arbitrary or capricious. Accordingly, there is no sufficient question raised as to whether the pay discrepancy could constitute a misapplication or unfair application of policy so as to qualify for a hearing.

⁸ DHRM Policy 3.05, *Compensation* at 2.

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

¹⁰ See DHRM Policy 3.05, *Compensation*, at 19-24.

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).

CONCLUSION

Because the grievance does not raise a sufficient question as to whether the agency misapplied or unfairly applied compensation policy, EDR finds that the facts presented in the grievance record do not constitute a claim that qualifies for a hearing under the grievance procedure.¹²

EDR's qualification rulings are final and nonappealable.¹³

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¹² *Grievance Procedure Manual* § 4.1.

¹³ See Va. Code § 2.2-1202.1(5).