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ADMINISTRATIVE REVIEW

In the matter of the Department of State Police
Ruling Number 2024-5591
August 16, 2023

The Department of State Police (the “agency”) has requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) administratively review the hearing officer’s decision in Case Number 11915. For the reasons discussed below, EDR will not disturb the hearing officer’s decision.

BACKGROUND

The relevant facts in Case Number 11915, as found by the hearing officer, are as follows:¹

The [agency] employs Grievant as a Law Enforcement Officer III at one of its locations. He typically received extraordinary contributor ratings on his annual performance evaluations. Grievant has been employed by the Agency for over 25 years.

In September 2000, the Commonwealth of Virginia transitioned from compensation based on pay grades to pay bands as part of a crosswalk. Agencies were allowed to have pay sub-bands within pay bands. Some agencies such as the Virginia State Police adopted pay sub-bands and referred to those bands as pay grades.

On May 2, 2001, Grievant received a memorandum from the Agency Head indicating:

Effective May 10, 2001, you will be relieved of your present duties, promoted to the position of Surveillance Agent, (Law Enforcement Officer III)

¹ Decision of Hearing Officer, Case No. 11915 (“Hearing Decision”), June 30, 2023, at 2-6 (footnotes omitted).

The position was a Pay Grade 14. At that time, Pay Grade 14 included Senior Special Agents, Sergeants, and Special Agent Accountants. Surveillance Agent was Grievant's rank and classification. The position of Surveillance Agent "provides technical support expertise that is necessary to conduct various undercover and surveillance activities for the Department of State Police" Grievant's duties as a Surveillance Agent were different from and required more specialized skills than the duties of a Special Agent.

Grievant was given a new position number as a Surveillance Agent and that number has not changed to date.

The position of Surveillance Agent was not eligible for career progression since the salary was already at the Senior Special Agent level.

A Special Agent was a Pay Grade 13. A Senior Trooper and Master Trooper were also Pay Grade 13. A Special Agent – Accountant, Senior Special Agent, and Sergeant were Pay Grade 14.

Grievant's Employee Work Profile effective November 1, 2003, November 1, 2004, November 1, 2005, November 1, 2006, November 1, 2007, November 2, 2008, November 1, 2009, October 25, 2010, November 1, 2011, October 25, 2012, October 25, 2013, October 25, 2014, October 25, 2015, October 25, 2016, October 25, 2017, October 25, 2018, October 25, 2019, October 25, 2020, October 25, 2021, and October 25, 2022 showed his Role, Title and Code as Law Enforcement Officer III, 69073. His Work Title was State Police Surveillance Agent. His position was in Pay Band 5.

Surveillance Agents and Special Agent Accountants were not in career progression meaning they could not be promoted to the position of Senior Special Agent. To obtain career progression, Surveillance Agents had to be placed in the Special Agent classification. If a Surveillance Agent like Grievant were placed in the Special Agent classification, the Surveillance Agent's salary would be reduced by ten percent to place him in the same compensation sub-band as the Special Agent. The ten percent salary reduction would then be added back to the Special Agent's base salary as a "special rate" of pay to account for the employee's special skills. If the Special Agent with the 10 percent special pay were to be promoted, transfer, or otherwise leave the specialty pay position, the employee would lose the ten percent special pay. In other words, the salary of a Surveillance Agent adopting career progression would remain unchanged, but 10 percent of that salary would be considered specialty pay which could be eliminated if the employee's position changed.

On October 22, 2010, all Surveillance Agents and Special Agent Accountants were given the option to enter the career progression program.

Surveillance Agents choosing to be eligible for career progression were to sign and acknowledge that:

My official State Police rank/title will remain the same (Special Agent); Surveillance Agent will be my working title/rank. *** I acknowledge that management reserves and has the right to reassign me, at any time, to my permanent title/rank. *** Upon reassignment from the Surveillance Special Agent position to my permanent rank/title and position, this special rate of pay will be terminated.

On October 22, 2010, Grievant elected the option:

I wish to remain in my current Surveillance Special Agent classification and realize that by doing so I will not be eligible for promotion in the Career Progression Program.

On July 10, 2022, the Agency implemented a new Salary Administration Plan. The New Salary Administration Plan was part of the Agency's process to eliminate pay compression among sworn employees. The Agency calculated the average pay compression by rank. For Special Agents that percentage was 4.7. For Senior Agents the percentage was zero.

The Agency created a Statewide Pay Area Sworn Pay Step Scale effective for pay actions occurring on or after July 25, 2022. The Agency created a similar pay scale for Northern Virginia. An employee's pay depended on years of service and position. Under this Implementation Chart, a Master Trooper was to be paid approximately 8.5 percent more than a Senior Trooper. A Special Agent was to be paid approximately 1.4 percent more than a Master Trooper. A Senior Special Agent was to be paid approximately 8.5 percent more than a Special Agent. A Sergeant, Supervisory Special Agent, and Trooper Pilot was to be paid approximately 1.4 percent more than a Senior Special Agent.

The Chart eliminated the pay sub-bands in favor of ranks within the pay bands and years of service consistent with the Agency's goals. These included a sworn step pay scale allowing employees to plot their pay throughout their career and maximize compensation for each of the non-supervisory ranks.

Following the Implementation Chart, Grievant remained a Pay Band 5. He received an 11.21% pay raise based on his years of service and rank.

Grievant was placed in the Special Agent pay category. The new Implementation Chart includes the positions of Special Agent and Senior Special Agent. The ranks of Surveillance Agent and Special Agent Accountant no longer appeared.

With the revision of the Salary Administration Plan, Grievant is eligible to be promoted to Senior Special Agent with a ten percent compensation increase based on longevity. On July 20, 2022, Grievant received an email from the Agency advising that he was eligible for career progression to the rank of Senior Special Agent. He had to meet the Agency's weight requirements to be elevated in rank.

On August 18, 2022, Grievant reviewed his personnel file and determined that since 2001 his position number, rank (law enforcement officer III – 69073, and job title (State Police Surveillance Agent) had not changed.

An Occupational Family is a broad grouping of jobs that share similar vocational characteristics. A Career Group is a sub-group of an Occupational Family. A Career Group identifies a specific occupational field common to the labor market. A Role describes a broad group of occupationally related positions that represent different levels of work or career progression.

DHRM's website shows Law Enforcement is an Occupational Family in Public Safety. Law Enforcement Officer III is a Practitioner Role with the Role Code of 69073 in Pay Band 5. . . .²

On or about August 28, 2022, the grievant initiated a grievance challenging the agency's Salary Administration Plan as applied to him. Following the management resolution steps, the grievant sought qualification for a hearing, which EDR granted,³ and a hearing was held on March 17, 2023.⁴ In a decision dated June 30, 2023, the hearing officer concluded that the agency had unfairly applied its Salary Administration Plan to the grievant by "treat[ing] Grievant as a Special Agent and not as a Senior Special Agent."⁵ Accordingly, the hearing officer directed the agency "to recalculate Grievant's revised salary . . . with the assumption that Grievant should be compensated as if he were a Senior Special Agent."⁶ The agency now appeals the hearing decision to EDR.

DISCUSSION

By statute, EDR has the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."⁷ If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the hearing officer correct the noncompliance.⁸ The

² The remainder of the facts found by the hearing officer included a chart showing various class titles within Law Enforcement Officer III and their respective class codes and pay grades. Hearing Decision at 5-6.

³ EDR Ruling No. 2023-5467.

⁴ See Hearing Decision at 1.

⁵ *Id.* at 7.

⁶ *Id.* at 10.

⁷ Va. Code §§ 2.2-1202.1(2), (3), (5).

⁸ See *Grievance Procedure Manual* § 6.4(3).

Director of DHRM also has the sole authority to make a final determination on whether the hearing decision comports with policy.⁹ The DHRM Director has directed that EDR conduct this administrative review for appropriate application of policy.

In its request for administrative review, the agency challenges the hearing officer's finding that the grievant had previously held a rank of "Surveillance Agent" that, for compensation purposes, was most comparable to the rank of Senior Special Agent. The agency further argues that the grievant did not experience an adverse employment action and therefore suggests that the grievance should not have proceeded to an administrative hearing in the first place.

Qualification for Hearing

While not all grievances qualify for a hearing, a grievance "should qualify for a hearing if (i) it claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether an adverse employment action has occurred as a result of . . . unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations . . ." ¹⁰ If an agency head declines to qualify a grievance for a hearing, the employee may appeal that decision to EDR. EDR's qualification rulings upon such an appeal are final.¹¹

In this case, EDR's qualification ruling determined that the available facts raised "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."¹² The alleged results of the agency's actions in this regard were that the grievant "should have received additional compensation" under the most recent Salary Administrative Plan and also that he was assigned to a rank he understood as an effective demotion – both allegations that, if sustained, would likely amount to adverse impacts on the terms, conditions, or benefits of the grievant's employment.¹³ For the reasons articulated at greater length in our qualification ruling, we find no basis to reconsider the conclusions therein. This matter was appropriately appointed to a hearing officer for his consideration of relevant evidence and written findings on the material issues presented by the parties.

Consideration of Evidence

In his decision, the hearing officer found that, beginning in 2001, "Surveillance Agent was Grievant's rank and classification."¹⁴ At the time, the agency administered salaries according to

⁹ Va. Code § 2.2-3006(A); *Murray v. Stokes*, 237 Va. 653, 378 S.E.2d 834 (1989).

¹⁰ *Grievance Procedure Manual* § 4.1(b); *see* Va. Code § 2.2-3004(A).

¹¹ *Grievance Procedure Manual* § 4.3; *see* Va. Code § 2.2-1202.1(5).

¹² EDR Ruling No. 2023-5467, at 5.

¹³ *See id.* at 2; *see generally* *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)); *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)).

¹⁴ Hearing Decision at 2. The hearing decision appears to use the "rank" terminology as essentially interchangeable with "job classification." Although any distinction between one's "rank" and one's Work Title in the agency is not clear from the hearing decision, we find that any error by the hearing officer in this regard would be harmless. *Compare* Grievant's Exs. at 34 (listing Surveillance Agent as a "Classification") *with id.* at 36-38, 40-41 (listing Surveillance

“pay grades.”¹⁵ Surveillance Agents and Senior Special Agents were classified within Pay Grade 14, while Special Agents were classified within Pay Grade 13.¹⁶ The hearing officer found that, in 2010, “the Agency gave Grievant the option for a voluntary demotion to Special Agent with a 10 percent specialty pay” and eligibility for career progression.¹⁷ The grievant rejected this option, instead choosing the agency’s alternative option to “remain in [his] current Surveillance Special Agent classification”¹⁸ According to the hearing decision, the grievant’s employee work profiles from 2003 through 2022 identified his Role as “Law Enforcement Officer III” and his Work Title as “State Police Surveillance Agent.”¹⁹

Based on these findings, the hearing officer then determined that, in revising salaries in 2022, the agency “elected to treat Grievant the same as a Special Agent even though he was not a Special Agent”²⁰ The hearing officer concluded:

The Agency could have followed the past practice of compensating Grievant at the level of a Senior Special Agent but chose instead to compensate him at the level of a Special Agent. The Agency has not presented sufficient reason to alter its prior practice.²¹

The agency primarily challenges the hearing officer’s findings on grounds that he “mistakenly concluded that Grievant held the rank of Surveillance Special Agent when no such rank existed.”²² Contending that the hearing officer “made no findings of fact regarding misapplication of the pay factors or the disregard of any salient facts by the Agency,” the agency maintains that the grievant “*always* held the **rank** of Special Agent with the *assignment* of Surveillance Agent.”²³ As such, the agency objects that the hearing officer has no basis or authority to order the agency to “make Grievant a Senior Special Agent.”²⁴

Upon a thorough review of the record, EDR finds evidence to support the hearing officer’s finding that “Surveillance Agent,” rather than Special Agent, was the grievant’s job classification since at least 2003. Documentation from 2001 noting the recruitment and selection of the grievant for his current position consistently describes the position only as “Surveillance Agent,” with no mention of “Special Agent” as an applicable rank or title.²⁵ As the hearing officer noted, the grievant’s employee work profiles from 2003 through 2022 identify his Work Title as “State Police

Agent as a “Rank”). The primary issue raised by the grievance is whether the grievant should have been compensated similarly to Senior Special Agents, rather than to Special Agents, under the agency’s most recent Salary Administration Plan. The hearing officer found that neither “rank” applied to the grievant and proceeded with his analysis. We find no basis to disturb the decision on those grounds.

¹⁵ Hearing Decision at 2.

¹⁶ *Id.* at 2-3.

¹⁷ *Id.* at 9.

¹⁸ *Id.* at 3-4, 7.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 7.

²¹ *Id.* at 8.

²² Request for Administrative Review at 5.

²³ *Id.* (emphasis in original) at 5-6.

²⁴ *Id.* at 5.

²⁵ *See* Grievant’s Exs. at 13-22.

Surveillance Agent.”²⁶ For compensation purposes, according to the agency’s evidence, State Police Surveillance Agents (former Pay Grade 14) were historically evaluated as a classification distinct from both State Police Senior Special Agents (former Pay Grade 14) and State Police Special Agents (former Pay Grade 13).²⁷ However, they were compensated in the same pay grade as Senior Special Agents, and higher than Special Agents.²⁸ The agency’s evidence also appears to indicate that, in 2010, the agency offered its Surveillance Agents an opportunity to opt into eligibility for career progression.²⁹ In order to do so, however, those opting in would need to “be placed in the Special Agent classification” with a reduction in base salary “to place them in the same compensation band as the Special Agent classification.”³⁰ The grievant viewed this option as a voluntary demotion and declined.³¹ Based on this evidence, we cannot find that the hearing officer’s findings constituted an abuse of discretion or were otherwise unreasonable.

Even assuming that the record also contains evidence that could support “Special Agent” as the grievant’s appropriate classification, hearing officers are authorized to make “findings of fact as to the material issues in the case”³² and to determine the grievance based “on the material issues and the grounds in the record for those findings.”³³ Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses’ credibility, and make findings of fact. As long as the hearing officer’s findings are based on evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

EDR agrees that ordering the agency to rescind or revise its salary administration policy would have exceeded the hearing officer’s authority.³⁴ However, we do not interpret the hearing decision to give any such instructions. Rather, the hearing officer concluded:

To apply policy fairly, the Agency must recalculate Grievant’s salary with the assumption that he held the position of a Senior Special Agent prior to July 2022. The Hearing Officer does not have the authority to promote Grievant to the position of Senior Special Agent With respect to compensation, however, the agency has effectively eliminated the position of Surveillance Agent. The position closest to the Surveillance Agent that survived after the imposition of the new Salary Administration Plan is the Senior Special Agent position. This is true because the

²⁶ Agency Exs. at 15, 19, 23, 27, 31, 35, 39, 43, 47, 51, 54, 56, 59, 63, 67, 71, 75, 79, 83, 87.

²⁷ See *id.* at 174-75; see also Grievant’s Exs. at 34.

²⁸ *Id.*; see also Agency Exs. at 2.

²⁹ Agency Exs. at 1-3.

³⁰ *Id.* at 2.

³¹ *Id.* at 2; Grievant’s Exs. at 46, 54; Hearing Recording at 56:00-58:00 (grievant’s testimony that he consulted with DHRM at the time to confirm that opting in would constitute a voluntary demotion).

³² Va. Code § 2.2-3005.1(C).

³³ *Grievance Procedure Manual* § 5.9.

³⁴ *Id.* at 5.9(b); *Rules for Conducting Grievance Hearings* § VI(A) (“the hearing officer has no authority to change [an agency’s] policy, no matter how unclear, imprudent or ineffective they believe it may be”); see also Va. Code § 2.2-3004(B).

Surveillance Agent and Senior Special Agent positions were Pay Grade 14 before the Agency revised its Salary Administration Plan.³⁵

Fairly read, this analysis concludes only that, given the apparent choice to compensate the grievant either as if he were a Special Agent or as if he were a Senior Special Agent, past practice indicates that the Senior Special Agents are the more appropriate comparators. In grievances alleging misapplication of policy, hearing officers “may order the agency to reapply the policy from the point at which it became tainted.”³⁶ Accordingly, the hearing officer ordered the agency to recalculate the grievant’s salary with Senior Special Agents as his relevant comparators – not to change the grievant’s official rank or classification, and not to revise any agency policies. EDR finds no abuse of discretion in the hearing officer’s ordered remedy.

CONCLUSION AND APPEAL RIGHTS

For the reasons set forth above, EDR declines to disturb the hearing officer’s decision. Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing decision becomes a final hearing decision once all timely requests for administrative review have been decided.³⁷ Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.³⁸ Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.³⁹

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³⁵ Hearing Decision at 8.

³⁶ *Rules for Conducting Grievance Hearings* § VI(C)(1).

³⁷ *Grievance Procedure Manual* § 7.2(d).

³⁸ Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

³⁹ *Id.*; see also *Va. Dep’t of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).