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## QUALIFICATION RULING

In the matter of the Virginia Department of Transportation  
Ruling Number 2024-5593  
September 29, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her May 17, 2023 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

### FACTS

The grievant is employed as a Supply Program Manager for the agency. On or about April 21, 2023, she interviewed for the Fuel Coordinator position. The panel ultimately determined that while both the grievant and another candidate met the requirements as to two evaluation criteria, the other candidate also exceeded the requirements in two other criteria, and for that reason, they selected that other candidate as the finalist.

On May 17, 2023, the grievant initiated a grievance alleging that the denial of the Fuel Coordinator position was due to age discrimination, while also alleging that her current pay is not comparable to others in her department who have been with the agency for less time than she has. In support of her age discrimination claim, the grievant primarily argues that the agency hired a candidate who was provided training for the position ahead of the job selection process,<sup>1</sup> and that compared to that successful candidate, she has been with the agency for “a few months longer” and “in [her] department 5 years longer than she has.” Regarding her salary issue, the grievant has brought multiple arguments, most of which revolve around how her salary has stagnantly evolved over time compared to her coworker who was selected for the Fuel Coordinator position, who has had a higher salary than the grievant since 2019 despite working there for a shorter period of time.

Pursuant to the grievant’s age discrimination claim, the agency had their Civil Rights division conduct an investigation. On May 22, 2023, the District Civil Rights Manager issued an official determination finding no discrimination. As to the salary issue, the agency states that the grievant’s salary was 104% of market for her position, which led the agency to determine that there was insufficient evidence of improper pay. The first-step respondent did state that the agency

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<sup>1</sup> It appears that the successful candidate received additional training or experience during a period when the grievant was on extended leave.

would evaluate the grievant's salary for an in-band adjustment in the Fall of 2023. Following the remaining management resolution steps and the Civil Rights investigation, the agency head determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of agency policy had occurred or evidence supporting the grievant's allegations of age discrimination. The agency head also determined that there was insufficient evidence supporting the grievant's salary claims. As a result, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

### DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>2</sup> Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve an "adverse employment action."<sup>3</sup> 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."<sup>4</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>5</sup> For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action, in that it appears the position she interviewed for would have been a promotion.

#### *Age Discrimination*

The grievant's primary allegation is that she was not selected for the Fuel Coordinator position as a form of age discrimination. DHRM Policy 2.05, *Equal Employment Opportunity*, requires that "all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, veteran status, political affiliation, genetics, or disability." For a claim of discrimination on any of these grounds to qualify for a hearing, the grievance must present facts that raise a sufficient question as to whether the issues describe an adverse employment action that has resulted from prohibited discrimination.<sup>6</sup> However, if the agency provides a legitimate, nondiscriminatory business reason for the acts or omissions grieved, the grievance will not be qualified for a hearing absent sufficient evidence that the agency's proffered justification was a pretext for discrimination.<sup>7</sup>

The grievant appears to allege that the agency's selection process was discriminatory based on age, noting that she is at the age of retirement and was not selected for the position. As discussed above, the selection panel determined that the grievant should not be recommended for hiring

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<sup>2</sup> Va. Code § 2.2-3004(C); *see Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> *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)).

<sup>5</sup> *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").

<sup>6</sup> *See Strothers v. City of Laurel*, 895 F.3d 317, 327-28 (4th Cir. 2018).

<sup>7</sup> *See id.*; *see, e.g.*, EDR Ruling No. 2017-4549.

based on its assessment of each of the four interview evaluation criteria versus those of the chosen candidate. Further, the agency had its Civil Rights Division review the matter, with the District Civil Rights Manager determining that the final selection was made with no evidence of age discrimination. It should also be noted that the grievant has since acknowledged that no evidence of age discrimination during the hiring process was found, and in her most recent letter to EDR, appears to now shift her focus primarily to the issue of her pay. Given all of this, EDR has been unable to identify any evidence that raises a sufficient question as to whether the agency's justification for its decisions was mere pretext for discrimination. Even though the grievant may reasonably disagree with the agency's assessment of the candidates and its selection decision, this in itself does not raise a sufficient question as to whether age discrimination motivated the agency's actions in this case. Consequently, EDR cannot qualify the grievance for a hearing on the grounds of discrimination.

### *Grievant's Salary*

Notwithstanding the issue of age discrimination, the grievant argues that the agency misapplied and/or unfairly applied state and agency policy by not providing a salary comparable to other agency employees. The grievant asserts this claim in her appeal for a hearing by primarily comparing herself to the employee who was the successful candidate for the Fuel Coordinator position, arguing that she herself has been at the agency and the department longer than the successful candidate, started out in a higher Pay Band than the successful candidate, and has over time received fewer pay raises than the successful candidate. 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 . . . ."<sup>8</sup> In addition, Policy 3.05 also allows for "flexible" starting-pay guidelines to attract a "highly skilled, competent workforce."<sup>9</sup> Like all pay practices, salary questions like those at issue in this 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.<sup>10</sup> 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.<sup>11</sup> Because agencies are afforded great flexibility in making pay decisions, EDR has repeatedly held that

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<sup>8</sup> DHRM Policy 3.05, *Compensation*, at 5.

<sup>9</sup> DHRM Policy 3.05, *Compensation*, at 2.

<sup>10</sup> See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

<sup>11</sup> See DHRM Policy 3.05, *Compensation*, at 19-24.

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.<sup>12</sup>

While the grievant does not explicitly identify any of the enumerated Pay Factors, certain factors are indeed relevant. Comparing salaries among similarly situated employees, considering market and budget availability, internal salary alignment, and tenure at the agency (work experience) are all relevant factors that the grievant has implied in her grievance. In addition to the grievant arguing that she makes less than a comparator who has not been at the agency for as long as her, she also argues that her salary over the years has been increased less in comparison to her coworker who received the Fuel Coordinator position. Specifically, she states that from 2017 through 2022, she has been granted a total salary increase of \$7,517, compared to her coworker's five-year range of \$16,574. She also states that in 2019, her coworker's salary jumped above her own by approximately \$3,200 after she was granted an approximate 12% increase. She adds that her coworker began in a Pay Band 3 position, whereas the grievant began in a Pay Band 4 position.

In response, the agency first notes that the grievant is the only one in her District who holds her position. The agency also states that the grievant makes 104% of the market amount for her position. Finally, notwithstanding the agency's stance that there was no misapplication of policy as to the grievant's salary, the agency's first-step respondent determined that the grievant would be reevaluated for an in-band adjustment in the Fall of 2023.

There appears to be no dispute in this case that the grievant is a competent and valued employee. Having reviewed the information in the grievance record, however, EDR finds insufficient evidence to demonstrate that the agency's failure to approve the grievant's request for an in-band adjustment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. While the grievant disputes her salary in comparison to her coworker who became the Fuel Coordinator, that coworker's salary is no longer a valid comparator as she is in a different role. Further, the coworker's salary progression over the last five years in comparison to the grievant's does not raise a sufficient question as to a misapplication of policy. Indeed, the fact that the coworker was promoted into a higher pay band position during those five years could partially explain some of the salary difference.<sup>13</sup> Though we understand the grievant's salary-related concerns, she has not offered evidence that the agency's assessment of her compensation at the present time is inconsistent with DHRM Policy 3.05 or otherwise improper.

Although the grievant may reasonably disagree with her own salary, EDR can find nothing to indicate that the grievant is so clearly entitled to a pay increase based on the available information. Much deference is granted to agencies when considering salary increases and the enumerated Pay Factors. In cases like this one, where a mandatory entitlement to a pay increase does not exist, agencies have great discretion to weigh the relevant factors. For these reasons, EDR cannot find that the agency's assessment of the grievant's salary in this case was improper or

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<sup>12</sup> 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).

<sup>13</sup> It is reasonable for the grievant to question her colleague's increase in salary when she was promoted into the same role as the grievant held. According to the grievant, this advancement occurred in 2019. To the extent the grievant's salary was inconsistent with a similarly situated coworker at that time, the grievant could have filed a grievance at that time to address her concerns.

otherwise arbitrary or capricious. Accordingly, the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy and does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.<sup>14</sup>

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<sup>14</sup> Va. Code § 2.2-1202.1(5).