

Issue: Qualification – Compensation (in-band adjustment); Ruling Date: May 7, 2018; Ruling No. 2018-4710; Agency: Virginia Department of Health; Outcome: Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2018-4710
May 7, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether her October 15, 2017 grievance with the Virginia Department of Health (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as a Public Health Nurse (“PHN”). On or about October 15, 2017, she initiated a grievance challenging the agency’s denial of an in-band adjustment to her salary. The grievant claims that she earns less than other nurses with the same duties and responsibilities, and states that her salary does not reflect her knowledge, skills, and experience. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head declined, and the grievant now appeals that determination to EEDR.

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, complaints relating solely to the establishment and revision of salaries, wages, and general benefits “shall not proceed to hearing”² unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. In this case, the grievant essentially claims that management has misapplied and/or unfairly applied policy and procedure by hiring less experienced nurses at a higher salary than the grievant and failing to provide the grievant with an adjustment to her salary to correct the disparity.

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. Further, the grievance procedure

¹ See Va. Code § 2.2-3004(B).

² *Id.* § 2.2-3004(A), (C).

generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”³ 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.”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 only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues with her compensation.

In-band adjustments are governed by DHRM Policy 3.05, *Compensation*. This policy allows agencies to grant an employee an in-band adjustment, which is a “non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues.”⁶ An upward in-band salary adjustment of zero to ten percent during a fiscal year is available under DHRM policy.⁷ Like all pay practices, in-band adjustments 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.⁸ While DHRM Policy 3.05, *Compensation*, reflects the intent that similarly situated employees should be comparably compensated it also reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of thirteen 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.⁹ Because agencies are afforded great flexibility in making pay decisions, EEDR 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.¹⁰

Having reviewed the grievance information provided by the parties, EEDR finds that there is insufficient evidence to demonstrate that the grievant’s salary as compared to other agency employees in her workgroup violates a specific mandatory policy provision or is outside the scope of the discretion granted to the agency by the applicable compensation policies. While we understand the grievant’s concern that employees with fewer years of service to the agency may be being paid at the same or higher rates of pay as the grievant, DHRM Policy 3.05 does not mandate that new or more junior employees be paid at a rate lower than the rate paid to existing or more senior employees, or that the rate of existing employees be increased to match or exceed

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁶ DHRM Policy 3.05, *Compensation*.

⁷ *Id.*

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

⁹ DHRM Policy 3.05, *Compensation*.

¹⁰ 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.

that of newer hires. The grievant has not identified, nor are we aware of, any specific policy requirement violated by the agency's existing salary structure. Likewise, compensating arguably less-experienced nurses at a higher salary than the grievant, though understandably viewed by the grievant as unfair, does not amount on its own to a disregard of the intent of the applicable policies, which allow management flexibility in making individual pay decisions in light of its consideration of the 13 pay factors.¹¹ The need for internal salary alignment is just one of the 13 different factors an agency must consider in making the difficult determinations of whether, when and to what extent in-band adjustments should be granted in individual cases and throughout the agency.¹²

Here, the agency has provided information indicating that all PHNs in the grievant's workgroup are within a comparable salary range. The agency's step-respondents pointed out that while the grievant's salary is below that of newer staff members, those newer employees have more education than the grievant and argues that the grievant's experience prior to 2015 was much more limited in scope than her current role. Agency decision-makers deserve appropriate deference in making these determinations and EEDR will not second-guess management's decisions regarding the administration of its procedures, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.

The question in this case is not whether the applicable policy might support an in-band adjustment to the grievant's salary. Indeed, the facts might support such a pay action. The question is whether the applicable policy mandates that the grievant receive a salary increase such that the agency's failure to provide an increase disregards the facts or is otherwise arbitrary or capricious. Although the grievant may disagree with the agency's conclusions, EEDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. Therefore, the grievant's claim of misapplication and/or unfair application of policy as outlined in her October 15, 2017 grievance does not qualify for a hearing.

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EEDR's qualification rulings are final and nonappealable.¹³



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¹¹ See *id.*; DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

¹² This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. In particular, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination or some other improper motive. Here, the grievant has not alleged that the agency's refusal to adjust her salary was retaliatory, discriminatory or based on some other improper motive.

¹³ Va. Code § 2.2-1202.1(5).