Issue: Qualification – Compensation (salary dispute); Ruling Date: August 1, 2018; Ruling No. 2019-4763; Agency: Department of Motor Vehicles; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Motor Vehicles
Ruling Number 2019-4763
August 1, 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 his April 23, 2018 grievance with the Department of Motor Vehicles (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a regional manager for multiple Motor Carrier Services ("MCS") facilities within a geographic area. Employees at MCS facilities who work evening shifts, late shifts, or rotating shifts (i.e., shifts outside of normal business hours) receive a 3% shift pay supplement. MCS employees who work permanent day shifts do not receive the 3% shift pay supplement. When the agency implemented this shift pay system in 2011, it determined that the grievant and two other MCS regional managers were not eligible for the 3% shift pay supplement.

The grievant filed a grievance with the agency on April 23, 2018, alleging that it has misapplied and/or unfairly applied policy by deciding that he is not eligible for the 3% shift pay supplement. For example, the grievant alleges that: (1) his managerial position requires him to routinely work outside of normal business hours; and (2) he previously received a shift pay supplement that was eliminated due to a budget cut and was not restored to him and the two other MCS regional managers when the agency implemented the 3% shift pay supplement in 2011. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.[1]

[1] In his request for a qualification ruling from EEDR, the grievant appears to assert that the agency made an "inappropriate" settlement offer during the management resolution steps that would have allegedly resulted in the removal of the supplement for other MCS employees. The agency contends that it offered the grievant a salary increase to address the compensation issues presented in his grievance, and that this offer would not have included changes to the salaries of any other agency employees. The agency has further indicated that it is investigating other methods of resolving the pay-related concerns that have been raised by the grievant, and that there have, as of yet, been no changes to the grievant's salary or the salaries of other MCS employees in response to these issues. While the agency's offer would not be a subject of this grievance and, therefore, not properly addressed in this ruling, upon

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] 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 a hearing"[3] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. 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, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

In this case, the grievant essentially argues that agency management has misapplied and/or unfairly applied state compensation policy based on the manner in which it has implemented a 3% shift pay supplement for MCS employees. 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.

State pay practices 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 pay decisions.[7] DHRM Policy 3.05, *Compensation*, describes the manner in which supplements and other pay actions are applied for employees who work in eligible positions.[8] A supplement is generally defined as a "non-base-pay payment[] that appl[ies] to specific positions under certain circumstances."[9] Shift pay is a type of supplement that is typically "used when an agency has a demonstrated need based on staffing problems or

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reviewing the information submitted, EEDR finds nothing inappropriate with the agency's offer under the grievance procedure.

[1] *See Grievance Procedure Manual* § 4.1.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*, http://www.dhrm.virginia.gov/docs/default-source/hr/manuals/hrmanual.pdf.
[8] *See* DHRM Policy 3.05, *Compensation*.
[9] *Id.*

market conditions for shifts that do not conform" to normal business hours.[10] Agencies that decide to implement shift pay supplements should document "[t]he rationale for the supplement," "[t]he circumstances under which the supplement will be paid," and "[t]he amount of the supplement."[11]

In this case, the agency notified MCS employees in 2011 of its intention to implement a shift pay supplement for certain employees. The notice to employees clearly states that those who "work rotating shifts, permanent evening, or permanent late shifts are eligible for the" 3% shift pay supplement, while those who "work permanent day shifts are not eligible . . . ." The agency also determined that MCS facility managers would receive the supplement. In support of this position, the agency asserts that MCS facility managers are expected to work shifts and/or perform job tasks outside of normal business hours as a part of their regular job responsibilities.

With regard to the grievant, the agency does not dispute that he may, on occasion, be required to perform some work tasks outside of normal business hours. However, the grievant is also a regional manager for multiple MCS facilities, and it is not unreasonable for the agency to expect an employee at the grievant's level of responsibility to be available as needed in such situations. Moreover, the grievant is not assigned to a permanent evening shift, late shift, or rotating shift, nor is he required to routinely work outside of normal business hours. As such, he does not meet the eligibility criteria set by the agency to receive the 3% shift pay supplement. While the grievant may have received a similar shift pay supplement in the past, it was entirely within management's discretion to determine which MCS employees would be eligible for the supplement when it was implemented in 2011, and two other MCS regional managers also do not receive the supplement. In short, EEDR has not reviewed information to show that the agency's implementation of the supplement violates any mandatory policy provision or that the grievant has been treated differently than other similarly situated employees.

In summary, agency decision-makers deserve appropriate deference in making determinations of this nature. 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 are arbitrary or capricious. Although the grievant disagrees with the agency's decision, EEDR has reviewed nothing that would suggest the agency's pay practices have disregarded the pertinent facts or are otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[12]

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Director

[10] *Id.*
[11] *Id.*
[12] Va. Code § 2.2-1202.1(5).

Office of Equal Employment and Dispute Resolution