



EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA
Department Of Human Resource Management
Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2022-5301
November 30, 2021

The grievant seeks a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) as to whether his July 29, 2021 grievance with the Department of State Police (the “agency”) qualifies for hearing. For the reasons set forth below, the grievance is not qualified for hearing.

FACTS

The grievant, a Master Trooper for the agency, initiated a grievance on or about July 29, 2021 to challenge the agency’s determination of his pay. He alleges that his annual salary is lower than the salaries of two other agency employees who hold the same rank as the grievant, have the same years of service to the agency, work in the same geographic area, and perform the same job functions.¹ All three employees work within the Northern Virginia Pay Area (“NOVA Pay Area”), where DHRM policy recognizes that “market conditions require the use of expanded pay ranges” as compared with other regions of the state.²

According to the agency’s Salary Administration Plan, the “Northern Virginia Salary Structure for all sworn classifications is 24.95 [percent].” The grievant asserts that the agency applies this policy by simply increasing the base pay of employees who transfer into the NOVA Pay Area by that percentage (the “NOVA Pay Increase”). The result, the grievant argues, is arbitrary pay disparities that arise when employees transferring into the NOVA Pay Area later in their careers effectively receive the NOVA Pay Increase on top of all their previous salary increases. By contrast, employees who have worked in Northern Virginia for many years do not receive an additional 24.95 percent on each pay increase. The grievant contends that the agency’s practices in this regard violate DHRM Policy 3.05, *Compensation*, which requires agencies to determine salaries in consideration of 13 Pay Factors.³

¹ The grievant claims that his job responsibilities, training, and certifications may actually exceed those of the other two employees.

² DHRM Policy 3.05, *Compensation*, at 22; see also *DHRM Policy Interpretation, Northern Virginia (FP) Expanded Ranges*, June 25, 2003.

³ DHRM Policy 3.05, *Compensation*, at 2, 22 (identifying the Pay Factors as agency business need; duties and responsibilities; performance; work experience and education; knowledge, skills, abilities, and competencies; training,

For example, in 2017, state law provided for a lump-sum base-salary increase for sworn officers in the amount of \$6,793.⁴ The grievant and his two named comparators each received this increase. However, the two comparators transferred into the NOVA Pay Area following the lump-sum increase, and accordingly the agency increased their base pay – including the 2017 lump sum – by 24.95 percent. By contrast, the agency applied the NOVA Pay Increase to the grievant’s salary only in 1997, when he first began working in Northern Virginia. Therefore, the grievant’s absolute base salary is now lower than those who transferred into his work area only recently. In his grievance, he seeks a salary adjustment to match or exceed his comparators.⁵

During the management steps, the agency declined to grant relief, maintaining that its application of the NOVA Pay Increase was consistent with both DHRM and agency policy. The agency head determined that the grievance did not qualify for a hearing, and the grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁶ 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”⁷ unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must 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 applicable policy’s intent.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁸ Typically, then, 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.”⁹ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.¹⁰

certification, and licensure; internal salary alignment; market availability; salary reference data; total compensation; budget implications; long-term impact; and current salary).

⁴ See generally EDR Ruling No. 2018-4680.

⁵ See DHRM Policy 3.05, *Compensation*, at 7 (permitting an in-band adjustment “to align an employee’s salary more closely with those of other employees[] within the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, competencies, and/or knowledge and skills”). The grievant also seeks back pay to 2017 and “[a]n order that the [agency] comply with applicable law and policy.”

⁶ See Va. Code § 2.2-3004(B).

⁷ *Id.* §§ 2.2-3004(A), 2.2-3004(C).

⁸ See *Grievance Procedure Manual* § 4.1(b).

⁹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹⁰ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

For purposes of this ruling, we assume that the grievant has alleged an adverse employment action in that he asserts issues with his compensation. Specifically, the grievant's current base salary is \$106,537, whereas two comparator employees¹¹ who relocated to Northern Virginia in 2018 and 2021, respectively, have base salaries approximately \$2,172 higher than that of the grievant.¹² The record presents no dispute that this disparity resulted from earlier salary increases on top of which the grievant's comparators received the NOVA Pay Increase, but the grievant did not.

The grievant argues that the agency's practices with respect to the NOVA Pay Increase violate both DHRM Policy 3.05, *Compensation*, and the agency's own stated pay policies. He contends that the NOVA Pay Increase, as applied, is an arbitrary practice that does not reflect the Pay Area or Pay Factor considerations mandated by Policy 3.05. Moreover, while the grievant recognizes that agency policy aligns by its terms with Policy 3.05 in not providing for a geographic "differential,"¹³ he contends that in practice the NOVA Pay Increase operates identically to an automatic differential and appears to replace the more nuanced considerations mandated by both state and agency compensation policies. The agency denies it treats the NOVA Pay Increase as a differential and generally asserts its compliance with Policy 3.05.

Like other pay practices, in-band adjustments are intended to provide management with both great flexibility and a high degree of accountability for justifying their pay decisions.¹⁴ While Policy 3.05 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 as well as corresponding accountability in light of each of the 13 Pay Factors.¹⁵ Thus, Policy 3.05 establishes a mandatory framework for pay practices that nevertheless affords agencies a large degree of discretion in making compensation decisions most appropriate for their specific needs. Accordingly, EDR has repeatedly held that qualification for a hearing on such issues 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 was otherwise arbitrary or capricious.¹⁶

Here, the available evidence appears to support the grievant's claim that the agency compensates employees transferring into Northern Virginia by simply applying a straight 24.95-percent increase to their existing base salary. The record contains no indication that the agency engaged in individualized consideration of the 13 Pay Factors when determining appropriate

¹¹ The grievance record reflects that the three employees began their service with the agency on the same date and have the same length of service, progressed to the same Role and Work Title (Master Trooper) on the same date, and are assigned to the same Pay Band and Sub-Band. Because the agency has not raised other distinguishing factors or otherwise disputed whether the grievant and his two coworkers are similarly situated, we assume for purposes of this ruling that the three employees are effective comparators.

¹² According to the most current information provided by the agency, the comparators' base salaries are \$108,709 and \$108,710.

¹³ DHRM Policy 3.05, *Compensation*, defines "differentials" generally as "[b]ase pay adjustments to make salaries more competitive with the market."

¹⁴ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

¹⁵ See DHRM Policy 3.05, *Compensation*, at 2, 22.

¹⁶ See *Grievance Procedure Manual* § 9 (defining an "arbitrary or capricious" decision as one made "[i]n disregard of the facts or without a reasoned basis"); see also, e.g., EDR Ruling No. 2008-1879.

salaries for the grievant's transferring comparators.¹⁷ More importantly, the agency has offered no justification for paying the grievant a lower salary than his comparators, apart from the dates they respectively began working in Northern Virginia. On the evidence presented, we do not perceive a logical connection between compensation level and regional start dates – in contrast with the Pay Factors' relationship to appropriate compensation.

Nevertheless, the facts in this case do not raise a sufficient question that qualifies for resolution at a hearing. While agencies must ensure that similarly situated employees are treated consistently, Policy 3.05 does not require agencies to match comparators' salaries exactly or to make in-band adjustments whenever a disparity exists.¹⁸ We agree that, to the extent the agency does not consider relevant Pay Factors when employees transfer into or out of Northern Virginia, such an approach would not be consistent with Policy 3.05. But we cannot say that this record presents a sufficient question whether the grievant's salary has been determined "in disregard of the facts or without a reasoned basis." The agency has apparently chosen to account for market conditions in Northern Virginia by adding a one-time set percentage to the base salaries of all employees entering that Pay Area from elsewhere in the state – consistent with its practice since at least 1997, when the grievant received the NOVA Pay Increase. While we acknowledge that this approach could well lead to arbitrary or capricious outcomes if the agency fails to consider relevant Pay Factors, as a matter of policy, the two-percent difference in employee salaries at issue here is within a normal deviation range and too slight to demonstrate misalignment that would violate state policy. EDR consulted with DHRM's Policy Administration team to confirm that this conclusion is consistent with DHRM's official interpretation of state policy.¹⁹

In sum, the grievant may reasonably be frustrated that the agency has chosen an approach that awards higher compensation to his comparators, and the record raises substantial uncertainty as to whether the agency determined those comparators' salaries in a manner consistent with Policy 3.05. Ultimately, however, the issue to be determined in this ruling is not whether other employees' compensation is justified, or whether the facts would support equivalent pay between the grievant and his comparators. Instead, the issue is whether the agency has misapplied policy by declining to grant the grievant an in-band adjustment to achieve equivalent salaries among comparators. Because we find nothing in state or agency policy that might require that result under the circumstances, as determined by DHRM's Policy Administration team, we cannot conclude that this grievance qualifies for a hearing.

EDR's qualification rulings are final and nonappealable.²⁰

¹⁷ The agency's third-step respondent expressed the view that the "requirement that the salary of those hired or transferred into a NOVA covered area be 'compared' to the NOVA Salary Scale and thirteen pay factors does not require any action above comparison." We would clarify that, under Policy 3.05, meaningful consideration of a relevant Pay Factor would likely entail at least some analysis of whether the factor weighs in favor of a proposed salary figure, or against it, under the circumstances. Moreover, in both competitive and non-competitive transfer situations, agencies must document their consideration of the Pay Factors that influence the salaries offered. DHRM Policy 3.05, *Compensation*, at 3-4. Here, with respect to the grievant's two identified comparators, EDR is not aware of any record of the Pay Factors the agency considered in offering each of them higher salaries than the grievant when they transferred to Northern Virginia, or whether any such consideration would have accounted for resulting salary disparities among similarly situated employees.

¹⁸ See, e.g., EDR Ruling No. 2019-4946.

¹⁹ See Va. Code § 2.2-1201(A)(14) ("The Director of [DHRM] shall have the final authority to establish and interpret personnel policies and procedures and shall have the authority to ensure full compliance with such policies.").

²⁰ See Va. Code § 2.2-1202.1(5).

November 30, 2021
Ruling No. 2022-5301
Page 5

Christopher M. Grab
Director
Office of Employment Dispute Resolution