Issues: Qualification – Discrimination (National Origin and Gender), Retaliation (Other Protected Right) and Compensation (In-Band Adjustment); Ruling Date: May 17, 2013; Ruling No. 2013-3573; Agency: Virginia Employment Commission; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2013-3573
May 17, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") on whether her December 9, 2012 grievance with the Virginia Employment Commission (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant initiated her December 9, 2012 grievance to challenge the agency's selection process for an IT support position in which she competed unsuccessfully. She also challenges the discrepancy between the successful candidate's salary and her own, as well as her manager's request that she train the successful candidate. She asserts that the agency's actions constitute a misapplication and/or unfair application of policy as well as discrimination and retaliation. The agency head denied the grievant's request for qualification of her grievance for hearing, and she now appeals that decision to EDR.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[1]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, the 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."[3] Adverse employment

[1] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4]

For purposes of this ruling only, we will assume that the grievant's nonselection and claims related to pay could constitute adverse employment actions.[5] It is clear, however, that the grievant's claim that she has been forced to train the selected candidate does not rise to the level of an adverse employment action. Being required to train another employee does not constitute discipline, dismissal, or demotion, and is not otherwise an agency action resulting in a significant change in employment status or a change in the terms, conditions, or benefits of his employment. Accordingly, the grievant's claim relating to training are not qualified for hearing and will not be addressed further in this ruling.

Misapplication and/or Unfair Application of Policy: Selection

Fairly read, the grievance asserts that the agency misapplied and/or unfairly applied policy by preselecting a contract or wage employee for the IT support position. 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 hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position.[6] Further, it is the Commonwealth's policy that hiring and promotions be competitive and based on merit and fitness.[7] As such, an agency may not pre-select the successful candidate for a position without regard to the candidate's merit or suitability, and then merely go through the motions of the selection process.

The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of applicants during a selection process. Thus, a grievance that challenges an agency's action like the selection in this case does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.[8]

Here, the grievant argues that the successful candidate was preselected for the position because he was a wage employee. In support of this contention, the grievant alleges that a high-level IT manager ("Manager L") said she would rather hire a contractor than the grievant for the position, and that the grievant would not have any advancement in the agency.

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[4] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] We note, however, that there is some evidence that the IT support position would be a lateral move rather than a promotion for the grievant and as such would not necessarily have involved an increase in salary.
[6] *See* Department of Human Resource Management ("DHRM") Policy 2.10, *Hiring*.
[7] Va. Code § 2.2-2901 (stating, in part, that "in accordance with the provision of this chapter all appointments and promotions to and tenure in positions in the service of the Commonwealth *shall be* based upon merit and fitness, to be ascertained, as far as possible, by the competitive rating of qualifications by the respective appointing authorities") (emphasis added).
[8] *See Grievance Procedure Manual* § 9 (arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis)."

While these allegations, if true, are concerning, the grievant has not shown that Manager L's alleged bias impacted the selection decision. The IT support position was initially opened for recruitment in July 2012.[9] After the screening process indicated that there were only two qualified applicants (one of whom was the grievant), the hiring manager decided to administratively close the recruitment, in accordance with advice from the agency's Human Resources department. Manager L did not act as a screener or the hiring manager for the position. After consultation between Human Resources and the agency head, the position was reopened and the two applicants were interviewed, with the panel using the same questions for both applicants.[10] Because there were only two applicants, the agency conducted only a single round of interviews. Manager L did not serve on the three-member interview panel. Two panel members worked in IT, and the third was from Human Resources.[11] All interviewers recommended both candidates for hire. The interviewers gave the grievant a rating of 141 or 47%, while the successful candidate received a rating of 153 or 51%. The grievant has presented no evidence to show that Manager L participated in or otherwise influenced the selection decision.

Although the grievant may disagree with the panel's assessment, EDR has reviewed nothing that would suggest the agency's determination was the result of preselection, disregarded the pertinent facts or was otherwise arbitrary or capricious. To the contrary, it appears that the selection was based on a reasoned analysis of the applicants' knowledge, skills and abilities.[12] Agency decision-makers deserve appropriate deference in making such determinations. Therefore, the grievant's claim of misapplication and/or unfair application of policy in the hiring process does not qualify for a hearing.

Misapplication and/or Unfair Application of Policy: Pay

The grievance also challenges the disparity in pay between the grievant and the selected candidate for the IT support position as a misapplication or unfair application of policy. The primary policy implicated by this claim is DHRM Policy 3.05. This policy provides that agencies may provide an in-band adjustment of up to 10% to an employee who has assumed new higher-level duties and responsibilities that are critical to the operations of an agency.[13] In-band

[9] The IT support position was one of two newly-created positions created as a result of an IT modernization project.

[10] The grievant argues that the interview was not "technical." While the grievant is correct that the interview questions did not ask for specific details of systems or programs, the questions nevertheless sought work-related information regarding the candidates' technical knowledge (for example, the key tasks of a system administrator, experience as a programmer/analyst, and experience with scanning software and high-volume scanners), problem-solving abilities, individual career goals and ability to work independently and under pressure. EDR will not second-guess an agency's reasonable determination of the knowledge, skills, and abilities necessary to perform a job.

[11] The grievant appears to assert that the participation of a Human Resources professional is further evidence of preselection, in part because it either resulted in less technical questions being asked or a lack of understanding of her answers. The decision to have a member of Human Resources on the panel was apparently made by the agency's Human Resources Department and therefore does not appear to be in furtherance of any alleged bias of Manager L. Further, while the grievant speculates that a member of the Human Resources department would be unable to understand her answers, she has not presented evidence to suggest that the participation of Human Resources resulted in a disregard of the pertinent facts or was otherwise arbitrary and capricious.

[12] For example, one interviewer described the successful candidate's understanding of the job duties as "good" while describing the grievant's understanding as "basic." That same interviewer noted that the grievant "did not show during the responses the extent of her experiences as documented on her application."

[13] DHRM Policy 3.05, *Compensation.*

adjustments and other 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 their pay decisions.[14]

In assessing whether to grant pay actions, an agency must consider, for each proposed adjustment, each of the following thirteen 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.[15] Some of these factors relate to employee-related issues, and some to agency-related business and fiscal issues, but the agency has the duty and the broad discretion to weigh each factor. Thus, DHRM Policy 3.05 reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each of the 13 enumerated pay factors. 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.

Even though agencies are afforded great flexibility in making pay decisions, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted 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.[16]

The agency states that the grievant's current salary is in part the product of her starting salary, that she has received alignments and adjustments in accordance with state policy, and that her salary exceeds that of several co-workers and is consistent with statewide data for comparable positions. The agency further notes that the grievant received two 10% increases in calendar year 2012. The grievant argues, in effect, that the successful candidate for the IT support position should be considered a comparable position to hers and she should be granted an in-band adjustment on that basis.

The agency concedes that the IT support position has duties similar to those of the grievant's position, but that the time spent on those duties differs between the two positions. However, assuming that the IT support position and the grievant's position are appropriately compared for salary purposes, internal salary alignment is only one factor that an agency must consider in determining whether an in-band adjustment is warranted. Further, the grievant has not presented any evidence that would suggest that the agency has awarded in-band adjustments on the basis of this single factor in similar situations; nor has she presented evidence that, with the exception of the successful candidate for the IT support position, her pay is not in alignment with that of other comparable employees. Although the grievant's frustration with the disparity is understandable, under these circumstances EDR cannot say that the agency's failure to award

[14] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.
[15] DHRM Policy 3.05, *Compensation*.
[16] *See, e.g.*, EDR Ruling 2008-1879.

the grievant an in-band adjustment on the basis of a single, more highly paid comparator is plainly inconsistent with other similar decisions or otherwise arbitrary and capricious.[17]

Discrimination

For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[18]

Here, the grievant asserts that she was discriminated based on her "gender, national origin and race and wage inequality." As an initial matter, and in contrast to the other grounds identified by the grievant, "wage inequality" is not a protected status.[19] With respect to the grievant's claims regarding her gender, national origin and race, she has failed to raise a sufficient question that she was denied the IT support position or is being paid less than the successful candidate under circumstances that create an inference of unlawful discrimination. As previously noted, the successful candidate was rated more highly than the grievant following the panel interview. The interview panel was diverse in race and gender: two of the three interviewers were female, one was African-American, and two were white. The grievant has presented no evidence calling into question the interviewers' perceptions of the respective candidates' qualifications and suitability for the position. In regard to the grievant's claim of discrimination in salary, she has failed to present evidence which would call into question the agency's stated reasons for its decision (such as the selected candidate's salary in his previous employment).

While the grievant may disagree with the agency's decisions, this disagreement does not render those decisions discriminatory. Moreover, the simple fact that the person selected or compensated differently may have been of a different race, gender or national origin than the grievant does not, without more, indicate pretext sufficient to overcome the agency's legitimate non-discriminatory reasons for its action. Here, the grievant has not provided evidence that the agency failed to select her or pay her at a particular level because of her protected class. A mere allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer. Accordingly, the grievant's claims of discrimination are not qualified for hearing.

[17] Nothing in this ruling is meant to indicate that the grievant could not have been awarded or may not still be deserving of an upward adjustment based on the duties she performs. Indeed, analysis of the pay factors and policy provisions might justify such pay actions if the agency chooses to take it. This ruling finds only that the grievant has failed to show sufficient evidence that the agency misapplied or unfairly applied policy or otherwise abused the discretion granted under DHRM Policy 3.05.

[18] *See* Hutchinson v. Inova Health System, Inc., 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

[19] *See* Commonwealth of Virginia Executive Order No. 6, *Equal Opportunity* (2010); DHRM Policy 2.05, *Equal Employment Opportunity*; *Grievance Procedure Manual* §4.1(b).

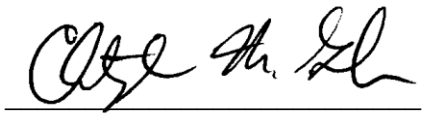
Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[20] (2) the employee suffered an adverse employment action[21]; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[22] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[23]

The grievant alleges that the agency retaliated against her for raising concerns about pay inequity. Attempting to address workplace concerns with management is protected conduct.[24] However, the grievance does not raise a sufficient question as to whether a causal link exists between the grievant's protected activity and her non-selection and pay. She has not shown any evidence which would suggest that the hiring panel considered her previous complaints in rating her less favorably than the selected candidate. Moreover, she has not shown that her pay has been negatively impacted by her previous complaints. Because the grievance does not raise a sufficient question as to the elements of a claim of retaliation, this claim does not qualify for a hearing.

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of her grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.[25]



Christopher M. Grab
Director
Office of Employment Dispute Resolution

[20] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).
[21] As noted in EDR Ruling Nos. 2013-3446, 2013-3447, although for the past six years EDR has used the "materially adverse action" standard for retaliation claims, we are returning to the "adverse employment action" standard for the assessment of all claims, including retaliation, as to whether they qualify for hearing. *See* Va. Code § 2.2-3004(A).
[22] *See, e.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).
[23] *See* Texas Dep't of Cmty Affairs v. Burdine, 450 U.S. 248, 255, n. 10 (1981).
[24] *See* Va. Code § 2.2-3000.
[25] Va. Code § 2.2-1202.1(5).