Qualification – Compensation (In-Band Adjustment); Ruling Date: April 15, 2014; Ruling No. 2014-3807; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2014-3807
April 15, 2014

The grievant has requested a ruling on whether his July 8, 2013 grievance with the Virginia Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) finds that this grievance does not qualify for a hearing.

FACTS

The grievant initiated his July 8, 2013 grievance to challenge his working title classification of "Division Administrator" and denial of a pay adjustment based upon the results of a Compensation Study conducted by the agency. He asserts that the agency's actions constitute a misapplication and/or unfair application of policy as well as discrimination against him on the basis of his gender, age, and race. The agency head denied the grievant's request for qualification of his grievance for hearing, and he now appeals that decision to EDR.

DISCUSSION

By statute and under the grievance procedure, complaints relating solely to issues such as to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"[1] 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."[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 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 claims regarding his working title and

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[1] Va. Code § 2.2-3004(C).
[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

classification for purposes of the compensation study could constitute adverse employment actions, insofar as they relate to his compensation.

Misapplication and/or Unfair Application of Policy

The grievant asserts that the agency misapplied and/or unfairly applied policy by the change to his working title to "Division Administrator" rather than "Division Administrator HR & Training." He states that this distinction is significant because the agency utilized this working title to identify his position as belonging to a particular group for purposes of the Compensation Study, and as a result, he was denied an in-band adjustment he would have otherwise received. Thus, the grievant also asserts that his subsequent classification into a specific compensation group ("Program D") for purposes of the study constituted a misapplication of policy.

Throughout 2012 and 2013, the agency implemented a Compensation Study in order to ensure proper alignment of the salaries of agency employees with current market salaries for comparable positions. To this end, the agency indicates that it utilized working titles, among other factors, to bundle employees into compensation "groups" for purposes of this study. The groups were composed of jobs with similar characteristics such as, for example, complexity and accountability. Prior to the beginning of the study, the grievant's working title had been "Division Administrator HR," however, as part of the study's evaluative process, the grievant's working title was changed to "Division Administrator."

The agency asserts that the grievant has not been performing human resources functions since his 2010 transfer to a specialized, off-site agency project. Agency personnel represented to the grievant that the project would be of a temporary nature, and the grievant would be returned to a similar role in the agency at the project's end. Over three years have passed since this transfer occurred, and the project remains ongoing. The grievant essentially claims that because his assignment is temporary, his duties pursuant to the specialized project should not have been considered in the agency's determination of his working title or compensation group. The agency has not taken a position on whether the grievant's assignment should be considered temporary or permanent. However, the agency indicates that for purposes of the Compensation Study, it considered the nature of all employees' permanent assignments in assigning compensation groups.

Agency policy limits the nature of temporary assignments to a period of one year. This policy further specifies that after 365 days, a temporary transfer becomes permanent. It is undisputed that the grievant has been working on the specialized, off-site project for over three years. After reviewing all relevant information provided, EDR must conclude that the nature of the grievant's current work assignment was appropriately considered as permanent, at least for purposes of the Compensation Study.

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. With respect to the grievant's assertion that the agency misapplied policy by changing his working title, EDR has found no mandatory policy provision that the agency has violated, and the grievant has cited to none. The agency simply removed the "HR" designation from the grievant's working title, leaving him as a "Division Administrator" in the same salary range ("payband"), with the same role title.

The grievant further argues that the agency misapplied policy by arbitrarily assigning him to an inappropriate compensation group. He alleges that he should have been placed into the compensation group for Division Administrator HR and Training rather than Program D. The grievant alleges that, had he been grouped with the other employee in the Division Administrator HR & Training group, he would have received a ten percent salary adjustment, as his salary is below the designated market reference point for that group. However, as part of Program D, the grievant's salary exceeds that established market reference point, and therefore, he received no in-band adjustment.

In response, the agency indicates that it located the group that was the best fit for the actual job duties performed by the grievant, as his position is unique to the agency. The agency indicates that it did not assign the grievant to a group with the other employee classified as Division Administrator HR & Training because the grievant had not managed human resource functions since 2010 and his job functions are primarily related to Information Technology ("IT") rather than Human Resources. The grievant also has a different reporting chain than the employee classified within the HR & Training group. The grievant disputes the agency's assertions, arguing that while the nature of his job duties vary from day to day, he performs activities which constitute human resource functions, such as training program development and delivery, change management, organizational development, and employee communications. However, the agency indicates that any such activities are based upon the grievant's IT responsibilities rather than any duties related to Human Resources.

The primary policy implicated by the grievant's claim regarding the Compensation Study is DHRM Policy 3.05 *Compensation*.[5] This policy provides that agencies may provide an in-band adjustment of up to 10% to an employee on the basis of change in duties, professional or skill development, retention, and internal alignment.[6] In-band 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.[7] 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 thirteen enumerated pay factors.[8]

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

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[5] The agency's "Pay Practice Administration Guidelines for Classified Employees" mirrors DHRM Policy 3.05.
[6] DHRM Policy 3.05, *Compensation.*
[7] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[8] *See* DHRM Policy 3.05, *Compensation*.

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.[9]

Here, the grievant alleges that the agency has misapplied policy in implementing the Compensation Study with respect to his position, as he was inappropriately classified as part of the Program D compensation group. The agency asserts that it located the group that was the best fit for the actual job duties performed by the grievant. In fact, Program D contained primarily employees with the working title of "Division Administrator," and in the same payband as the grievant. Thus, in many respects it is understandable for the agency to have placed him in that group. In addition, we cannot find that the agency's assessment that the grievant's current duties do not involve human resources functions such that he should not be slotted into a human resources compensation group violated policy or was otherwise arbitrary or capricious. Although the grievant's role title is still currently listed in a human resources career group, EDR has not reviewed anything to reasonably suggest that the grievant should be properly considered to be currently performing a human resources role.[10] While we cannot disagree that Program D is not a perfect fit for the grievant, after taking all of the above analysis into account, it appears to have been a reasonable conclusion given the breadth of career groups covered by that compensation group and the grievant's working title. The agency assessed his current job functions, while still respecting the grievant's pay band level, in reaching its conclusions. In short, it appears the agency made reasonable conclusions as to a unique situation.

Agency decision-makers deserve appropriate deference in making these determinations and EDR 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. Although the grievant may disagree with the agency's conclusions, EDR has reviewed nothing that would suggest the agency's determination disregarded the pertinent facts or was otherwise arbitrary or capricious. To the contrary, it appears that the grievant's classification within the compensation study was based on a reasoned analysis of his job functions. Therefore, the grievant's claim of misapplication and/or unfair application of policy does not qualify for a hearing.

Discrimination

The grievant further asserts that the agency has discriminated against him on the basis of his gender, age, and race. He claims that he is similarly situated to another employee with respect to occupational family, career group, role title, work title, and responsibilities as set forth by their respective Employee Work Profiles. However, he asserts that the other employee, who is younger and female, was classified as "Division Administrator HR & Training" while he was classified as "Division Administrator." He asserts argues that his failure to receive the same classification and pay adjustment constitutes discrimination against him by the agency. In

[9] *See, e.g.,* EDR Ruling 2008-1879.

[10] We are not persuaded that this listing alone should force an opposite conclusion here. Whether the agency should have provided an updated work profile, role, and/or PMIS listing to more accurately represent the grievant's current job functions and role is not what is determinitive in this case.

response, the agency disputes that the grievant is similarly situated to this employee with respect to work responsibilities and working title. He further argues that another employee, who is of a different race and gender, experienced a reduction in duties, yet received an increase in salary pursuant to the Compensation Study, and alleges that this action constituted discrimination against him on the basis of his race by the agency. The agency disputes the grievant's claim and asserts that he produced no credible evidence that would indicate discriminatory practices occurred during the Compensation Study.

Grievances that may be qualified for a hearing include actions related to discrimination.[11] 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.[12]

Here, the agency has provided legitimate reasons for its actions relating to the Compensation Study, as outlined above. The agency asserts that it located the compensation group that was the best fit for the actual job duties performed by the grievant, as his position is unique to the agency. The agency indicates that it did not assign the grievant to a group along with the employee who is classified as "Division Administrator HR & Training," and to which the grievant compares himself, because the grievant's job functions and working title are dissimilar from that employee. Unlike the employee in question, the grievant is not responsible for agency training, does not manage human resource functions, and he has a different reporting chain. The agency asserts that the "Program D" compensation group contains a variety of positions in the same pay band as the grievant, including other Division Administrators and office managers. Even if we assume the facts articulated by the grievant arguably present a prima facie case of discrimination, here, the agency has presented legitimate business reasons for its action. The grievant has not presented sufficient information to show that these reasons constitute a pretext for discrimination.[13]

While the grievant may disagree with the agency's decision in how he was classified for purposes of the Compensation Study, this disagreement does not render those decisions discriminatory. Moreover, the simple fact that the employees to which he compares himself may

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[11] *See Grievance Procedure Manual* § 4.1(b).

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

[13] This result is the same even if the grievant's claim is analyzed under a Title VII disparate impact theory. "To establish a prima facie case of disparate impact discrimination under Title VII, a plaintiff must 'show that the facially neutral employment practice had a significantly discriminatory impact.'" Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 265 (4th Cir. 2005) (quoting Walls v. City of Petersburg, 895 F.2d 188, 191 (4th Cir. 1990)). An employer can avoid a finding of discrimination by demonstrating that the practice has "'a manifest relationship to the employment in question.'" *Id.* (quoting Connecticut v. Teal, 457 U.S. 440, 446-47 (1982)). "Even in such a case, however, the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* The grievant's evidence does not demonstrate statistical disparities sufficient to establish a "significantly discriminatory impact." Accordingly, a disparate impact discrimination claim in this case does not qualify for a hearing.

be younger or of a different gender and race than the grievant does not, without more, indicate pretext sufficient to overcome the agency's legitimate non-discriminatory reasons for its actions. Here, the grievant has not provided evidence that the agency failed to classify him or pay him at a particular level because of any protected class, nor has he presented evidence which would call into question the agency's stated reasons for its decision as outlined above. 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.

Agency Commitment

The grievant states that in November 2010, a member of agency management promised him that "if we get an increase, you will get an increase, if we should be so fortunate …." The grievant argues that this statement has essentially bound the agency to provide him with a pay increase because other agency employees received increases during the salary study and, therefore, he should receive an increase like other employees. We do not read these comments to go so far to have committed the agency to providing a pay increase in a salary study that was likely not even contemplated in 2010. It is much more likely that the agency manager was referring to any salary increases that might be granted by the General Assembly to all qualifying state employees, as has occurred on occasion. The grievant did receive such an increase in 2013, like other qualifying state employees. However, our analysis of this claim does not render the agency's decisions as to the grievant in the salary study unfair or misapplications of policy or even incongruous with the apparent statement of this agency manager. Thus, his grievance does not qualify for a hearing on this basis.[14]

CONCLUSION

For all the foregoing reasons, the grievant's request for qualification of his grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.[15]

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[14] To the extent the grievant is trying to assert a claim based on a contractual theory, the grievance process would not appear to be the proper forum in which to raise such a claim.
[15] Va. Code § 2.2-1202.1(5).