

Issue: Qualification – Compensation (salary dispute); Ruling Date: April 17, 2015;
Ruling No. 2015-4128; Agency: Department of Behavioral Health and Developmental
Services; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2015-4128
April 17, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his December 4, 2014 grievance with the Department of Behavioral Health and Developmental Services (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 Security Officer III at one of the agency’s facilities. On or about December 4, 2014, he filed a grievance asserting that the agency pays him a lower salary than other employees who work in Security Officer III positions at his facility. He asserts that “it is unfair” for him to be compensated at a lower rate than other security officers and that “it is discrimination when [he is] the lowest paid officer” among a group of employees who “all do the same job.” 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 EDR.

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 a hearing”² 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.”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

¹ See Va. Code § 2.2-3004(B).

² *Id.* §§ 2.2-3004(A), 2.2-3004(C).

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

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 he asserts issues with his compensation.

Misapplication/Unfair Application of Policy

The grievant appears to argue, in effect, that management has misapplied and/or unfairly applied policy by hiring two new security officers at a higher salary than the grievant. 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.

The primary policy implicated in this grievance is DHRM Policy 3.05, *Compensation*. 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 their pay decisions.⁶ DHRM Policy 3.05, *Compensation*, 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. 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 for every pay practice decision it makes.

While we understand the grievant’s concern that employees with a shorter length of employment at his facility may be compensated at higher rates of pay, DHRM policy 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 salaries of existing employees be increased to match or exceed 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 security officers 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 based on consideration of the thirteen pay factors.⁷ The need for internal salary alignment is just one of the 13 different factors an agency must consider in making the difficult

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).

⁶ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

⁷ See DHRM Policy 3.05, *Compensation*; DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

determinations of whether, when, and to what extent salary adjustments should be made in individual cases and throughout the agency.⁸

Here, the agency has provided EDR with salary information about the grievant and the other security officers at his facility. Based on EDR's review, it appears that one of these employees was originally hired at the same salary as the grievant, but was later promoted to a Security Officer IV position and received as salary increase in conjunction with that promotion. The other security officers have either significantly greater length of employment with the agency or more years of overall state service than the grievant, and at least one security officer has prior relevant work experience and was offered a greater starting salary than the grievant because of this additional qualification for the position. Agency decision-makers deserve appropriate deference in making determinations of this nature 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 are arbitrary or capricious. Although the grievant may disagree with the agency's conclusions, EDR has reviewed nothing that would suggest the agency's pay practices with regard to security officer at the grievant's facility have disregarded the pertinent facts or are otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Discrimination

The grievant further asserts that the agency has engaged in discrimination by compensating him at a lower salary than other security officers at his facility. Grievances that may be qualified for a hearing include actions related to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.⁹ In order for such a grievance to qualify for a hearing, there must be more than a mere allegation of discrimination – 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 a hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹⁰

In this case, there are no facts to indicate that the grievant is paid less than other security officers at his facility for a discriminatory reason. Indeed, although the grievant claims that the agency has engaged in discrimination, he has not identified any protected status on which he believes the agency's allegedly discriminatory actions were based. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – there must be facts that

⁸ This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. For example, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination, or some other improper motive.

⁹ See *Grievance Procedure Manual* § 4.1(b); see also Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

¹⁰ See *Hutchinson v. INOVA Health Sys., Inc.*, C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).

raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here, and the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.¹¹



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¹¹ Va. Code § 2.2-1202.1(5).