

Issue: Qualification – Compensation (In-band adjustment); Ruling Date: January 26, 2018; Ruling No. 2018-4667; Agency: Department of Behavioral Health and Developmental Services; 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 Behavioral Health and Developmental Services
Ruling Number 2018-4667
January 26, 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 her July 18, 2017 grievance with 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 AND PROCEDURAL BACKGROUND

The grievant is employed by the agency as a Policy Review Specialist. On May 22, 2017, the grievant initiated a grievance with the agency, alleging that it had failed to approve a salary increase she initially requested in 2016 and that agency management had engaged in “retaliatory actions” after she contacted her human resources office “regarding the status of [her] salary alignment request.” In the grievance, the grievant cited a series of actions that occurred in 2016 as support for her argument that the agency had created an ongoing “hostile environment.” Upon receiving the grievance, the agency administratively closed it for failure to comply with Sections 2.2 and 2.4 of the *Grievance Procedure Manual*, on the basis that the grievance was not timely filed because no management action occurred within the thirty calendar days preceding May 22, 2017. The grievant appealed the agency’s administrative closure of the grievance to EEDR.

On June 30, 2017, in EDR Ruling Number 2017-4569, this Office determined that the grievant’s claims regarding her request for a salary alignment were timely for the thirty calendar days preceding the initiation of the May 22, 2017 grievance.¹ The ruling further stated that the grievant’s claim of retaliatory harassment was not timely because she had not alleged any management action related to the allegedly harassing conduct occurred within the thirty calendar days before she initiated the grievance.² Rather than proceed with the May 22 grievance, the grievant initiated a second grievance with the agency on July 18, 2017, again challenging the agency’s alleged failure to approve a salary alignment request in 2016 and using nearly-identical language to the May 22 grievance. The grievant has taken no further action with regard to the May 22 grievance since EEDR’s compliance ruling was issued. Accordingly, EEDR will deem

¹ EDR Ruling No. 2017-4569. In such cases, EEDR applies the “paycheck rule.” EDR Ruling No. 2010-2441 (and authorities cited therein).

² EDR Ruling No. 2017-4569.

the July 18 grievance to be a continuation of the May 22 grievance, and consider the May 22 grievance concluded.

In her July 18, 2017 grievance, the grievant argues that she requested a salary alignment from her former supervisor in March 2016, and the former supervisor approved her request at that time. The grievant asserts that her former supervisor later provided varying responses as to why the salary increase had not been approved.³ While this grievance was pending, agency management approved a salary increase of 8% for the grievant that was effective as of September 10, 2017. After the grievance advanced through the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals the determination to EEDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ 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”⁵ 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.”⁶ 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.”⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁸ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues with her compensation.

Here, the grievant essentially argues that agency management has misapplied and/or unfairly applied policy by failing to implement an in-band adjustment for her after she initially requested a salary increase from her supervisor in 2016. 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.

³ The grievant also claims she did not receive her 2016 annual performance evaluation from her former supervisor. This issue was also cited in the May 22 grievance as an example of the former supervisor’s allegedly harassing behavior. As EEDR determined in EEDR Ruling Number 2017-4569, that issue was not timely grieved and could not proceed. Accordingly, it will not be discussed further in this ruling.

⁴ See Va. Code § 2.2-3004(B).

⁵ *Id.* §§ 2.2-3004(A), 2.2-3004(C).

⁶ See *Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted)

In-band adjustments are governed by DHRM Policy 3.05, *Compensation*. This policy allows agencies to grant an employee an in-band adjustment, which is a “non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues.”⁹ An upward in-band salary adjustment of zero to ten percent during a fiscal year is available under DHRM policy.¹⁰ Like all pay practices, in-band adjustments 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.¹¹ While DHRM Policy 3.05, *Compensation*, 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 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. Because agencies are afforded great flexibility in making pay decisions, EEDR has repeatedly held that qualification 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 otherwise arbitrary or capricious.¹²

In support of her position, the grievant claims that her supervisor verbally approved her request for salary increase on March 3, 2016. When the salary increase was not subsequently implemented, the grievant followed up with her supervisor and the agency’s human resources office multiple times throughout 2016 and 2017 about the status of the pay action. During this time, the grievant alleges that management provided different, and sometimes conflicting, explanations about the status of her request. EEDR’s review of the grievance record indicates that the agency chose to delay implementing the in-band adjustment for the grievant due to an ongoing organizational restructuring that included changes to existing employees’ duties, the hiring of new employees, and pay actions for other employees. The grievant appears to assert that the agency’s failure to implement the salary increase in 2016 was improper, and that its justification for the delay is inadequate.

While the grievant’s frustration with what she perceives to be a lack of transparency and/or follow-through on the agency’s part is understandable, EEDR finds that there is insufficient evidence to demonstrate that the agency’s actions here violated a specific mandatory policy provision or were outside the scope of the discretion granted to the agency by the applicable compensation policies. During the management resolution steps, the agency explained to the grievant that the implementation of a salary increase requires not only a recommendation from the impacted employee’s supervisor through the chain of command, but also review by the

⁹ DHRM Policy 3.05, *Compensation*.

¹⁰ *Id.*

¹¹ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

¹² See *Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made “[i]n disregard of the facts or without a reasoned basis”); see also, e.g., EDR Ruling No. 2008-1879.

agency's human resources office for compliance with policy and final approval by the agency head. In this case, these required steps were not completed until August 28, 2017, at which time the agency approved an 8% salary increase for the grievant, to be effective on September 10, 2017. Moreover, the agency's stated reasons for delaying implementation of the grievant's in-band adjustment—an ongoing organizational restructuring effort—appear to be reasonable under the circumstances, as changes to other employees' pay and job duties could have impacted the agency's consideration of the relevant pay factors in determining what level of in-band adjustment was warranted for the grievant.

As stated above, DHRM Policy 3.05, *Compensation*, is intended to grant agencies the flexibility to address issues such as changes in an employee's job duties, work performance, and internal salary alignment.¹³ The policy is not intended to entitle employees to across-the-board salary increases or limit the agency's discretion to evaluate whether and/or when an individual pay action is warranted. In cases like this one, where a mandatory entitlement to a pay increase does not exist, the agency is given great discretion to weigh the relevant factors and determine the appropriate time to implement a warranted pay action. Therefore, based on the totality of the circumstances, EEDR cannot find that the agency's delay in approving the grievant's requested in-band adjustment was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.¹⁴



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

¹³ See DHRM Policy 3.05, *Compensation*.

¹⁴ Va. Code § 2.2-1202.1(5).