

Issue: Qualification – Compensation (salary dispute); Ruling Date: March 2, 2018;  
Ruling No. 2018-4680; Agency: Department of State Police; 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 State Police  
Ruling Number 2018-4680  
March 2, 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 his November 18, 2017 grievance with the Department of State Police (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In its 2017 session, the Virginia General Assembly approved two pay actions that are relevant to the matters at issue in this ruling: (1) a lump-sum base salary adjustment for all sworn officers employed by the agency (the “Lump-Sum Adjustment” or “LSA”); and (2) a 3% base salary adjustment for all state employees.<sup>1</sup> Both of these pay actions took effect on July 10, 2017.<sup>2</sup> “All classified and other salaried employees . . . who were employed in salaried positions as of April 10, 2017, and who received a rating of ‘Contributor’ or ‘Extraordinary Contributor’ on their last performance evaluation or more recent interim evaluation” were eligible to receive the 3% salary increase.<sup>3</sup> There was no performance-based eligibility component for the LSA.<sup>4</sup> There appears to be no dispute that the grievant was eligible to receive the LSA and the 3% salary increase.

The grievant is employed by the agency as a Trooper in the Northern Virginia area. Due to market conditions, the salaries of state employees who work in Northern Virginia are calculated using an alternate Pay Band (the “NOVA Pay Band”). Sworn employees of the agency who work in Northern Virginia are compensated using the NOVA Pay band, and receive a 24.95% greater base pay as compared with employees in the same Role who work in other areas of the Commonwealth. When the LSA and the 3% salary increase were applied to the grievant’s salary, the agency applied the pay actions by: (1) starting with the grievant’s base pay (under the NOVA Pay Band); (2) adding the LSA for law enforcement employees; and (3) calculating the 3% salary increase from the total of the grievant’s base pay (under the NOVA Pay Band) and the LSA.

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<sup>1</sup> See DHRM FAQs – Compensation Changes Authorized by Chapter 836, 2017 Acts of Assembly, <http://www.dhrm.virginia.gov/docs/default-source/compensationdocuments/17-18-comp-memo-faqs.pdf>.

<sup>2</sup> *Id.* DHRM guidance also specifies that the LSA was to be “provided before the general 3% adjustment.” *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

The grievant filed a grievance with the agency on November 18, 2017, alleging that it had “miscalculated” his salary because of the manner in which it applied the salary increases for him. More specifically, the grievant argues that the agency should have applied the pay actions in a different order: (1) by starting with the base pay for employees statewide, rather than using the NOVA Pay Band; (2) adding the LSA; (3) calculating the 3% salary increase; and (4) applying the 24.95% base pay increase under NOVA Pay Band to the total. In essence, the grievant argues that the agency should have calculated the NOVA Pay Band percentage as a separate differential at the end of the salary adjustment process, rather than considering it as a part of his base pay to which the LSA and the 3% salary increase were added. In support of his position, the grievant asserts that the order in which the agency actually applied the LSA and the 3% salary increase has created salary alignment issues for employees. As an example, the grievant argues that an employee who is otherwise comparable to the grievant, works in another part of the state, and is reassigned to Northern Virginia would be compensated at a higher rate than the grievant solely because of the order in which the pay actions would be applied for that employee (i.e., by adding the NOVA Pay Band percentage after the other increases). The grievant argues that applying the LSA and salary increase in the order he describes would eliminate the salary alignment issue for himself and other employees who work in Northern Virginia.

After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head.<sup>5</sup> The grievant now appeals that determination to EEDR.

### DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>6</sup> 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”<sup>7</sup> 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.”<sup>8</sup> 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

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<sup>5</sup> During the resolution steps, several step-respondents stated that the management action challenged by the grievant “does not qualify as being grievable.” Section 2.4 of the *Grievance Procedure Manual* states that an employee with access to the grievance procedure may generally grieve “any management actions or omissions,” subject to certain initiation requirements. Management step-respondents must provide a written response addressing “the issues and the relief requested” in a grievance. *Grievance Procedure Manual* §§ 3.1, 3.2, 3.3. Only the agency head and EEDR address the question of whether a grievance qualifies for a hearing. *Id.* §§ 4.2, 4.3. Although the grievance does not qualify for a hearing for the reasons discussed in this ruling, a conclusory statement that a particular management action is “not grievable” may not be an acceptable response to a grievance during the management resolution steps. Furthermore, the statements by the step-respondents are not accurate. The issues raised in this grievance are appropriate subjects of a grievance.

<sup>6</sup> See Va. Code § 2.2-3004(B).

<sup>7</sup> *Id.* §§ 2.2-3004(A), 2.2-3004(C).

<sup>8</sup> See *Grievance Procedure Manual* § 4.1(b).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>9</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>10</sup> 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.

Here, the grievant argues that agency management has misapplied and/or unfairly applied state compensation policy based on the manner in which it implemented the LSA and the 3% salary increase for employees who are paid using the alternate NOVA Pay Band. 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 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 pay decisions.<sup>11</sup> DHRM Policy 3.05, *Compensation*, describes the manner in which differentials and other pay actions are applied for employees who work in eligible positions.<sup>12</sup> A differential is generally defined as a “[b]ase pay adjustment[] to make salaries more competitive with the market.”<sup>13</sup> Significantly, the 24.95% percentage increase applied under the NOVA Pay Band is not considered as a differential under state policy. Instead, Northern Virginia is considered a separate Pay Area, and the NOVA Pay Band consists of “expanded pay ranges” to account for “market conditions” within that Pay Area.<sup>14</sup> In other words, the NOVA Pay Band percentage is not calculated as distinct from the grievant’s base pay – rather, it is part of the grievant’s base pay due to the Pay Area in which he works.

The Salary Structure maintained by DHRM reflects this distinction between positions in the Northern Virginia Pay Area and employees in other areas of the state, showing that there are different salary ranges for employees in Northern Virginia as compared with other areas of the Commonwealth.<sup>15</sup> In addition, DHRM’s Human Resource Management Manual explicitly states the following:

The salaries of individual employees in northern Virginia are recorded in [the Personnel Management Information System] in the same way as are the salaries

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<sup>9</sup> Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

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

<sup>11</sup> See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*, <http://www.dhrm.virginia.gov/docs/default-source/hr/manuals/hrmanual.pdf>.

<sup>12</sup> See DHRM Policy 3.05, *Compensation*.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> DHRM Salary Structure – Effective July 10, 2017, <http://www.dhrm.virginia.gov/docs/default-source/compensationdocuments/salary-structure-07102017.pdf>.

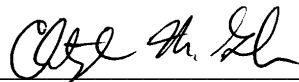
of employees in other areas of the state. There is not a separate portion of a northern Virginia employee's salary that is identifiable as a differential.<sup>16</sup>

Before the grievant initiated his grievance, and also during the management resolution steps, the agency explained to the grievant that pay actions at issue in this case could not be applied in the manner he suggested because the NOVA Pay Band percentage was part of his base pay. The agency's explanation appears to be consistent with the intent of the policy provisions discussed above. Moreover, the grievant has not identified, nor is EEDR aware of, any specific policy requirement that may have been violated by the agency's manner of implementing of the LSA and the 3% salary increase. To the contrary, the pay actions disputed by the grievant were calculated and applied by DHRM to ensure consistency with the General Assembly's action across the state workforce.

At the same time, the grievant's concern about the salary inequities that could be created by this situation is understandable. There is a potential for this system to create inequities by employees transferring in and out of the Northern Virginia region depending on salary history and timing of past pay actions. However, state policy provides the tools by which management can address these issues if they occur. Nothing in this grievance alleges that such inequities have actually occurred; only that the potential exists for them to occur. On its own, a salary alignment issue such as the one at issue in this ruling does not amount to a disregard of the intent of the applicable compensation policies, which allow management flexibility in making individual pay decisions based on consideration of thirteen different pay factors.<sup>17</sup>

In summary, agency decision-makers deserve appropriate deference in making determinations of this nature. EEDR 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 disagrees with the agency's decision, EEDR has reviewed nothing that would suggest the agency's pay practices have disregarded the pertinent facts or are otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.<sup>18</sup>



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<sup>16</sup> DHRM Human Resource Management Manual, Ch. 9, *Differentials, Supplements and Northern Virginia (FP) Expanded Ranges*, <http://www.dhrm.virginia.gov/docs/default-source/hr/manuals/hrmanual.pdf>.

<sup>17</sup> See DHRM Policy 3.05, *Compensation*; DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*, <http://www.dhrm.virginia.gov/docs/default-source/hr/manuals/hrmanual.pdf>.

<sup>18</sup> Va. Code § 2.2-1202.1(5).