

Issues: Qualification – Compensation (temporary pay and in-band adjustment), Performance (other), and Management Actions (assignment of duties); Ruling Date: January 17, 2019; Ruling No. 2019-4818; Agency: Virginia Community College System; 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 Virginia Community College System
Ruling Number 2019-4818
January 17, 2019

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management on whether her October 1, 2018 grievance with the Virginia Community College System (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed as an Administrative and Office Specialist III (“AOS III”) at one of the agency’s community colleges. The grievant filed a grievance with the agency on October 1, 2018, raising “concerns of equity and fairness” about her treatment by agency management.¹ In particular, the grievant alleges she was assigned additional duties in 2017 that were outside the scope of her position, knowledge, and/or abilities, and that the agency did not provide her with compensation or training that would allow her to perform these tasks; that she did not receive an in-band adjustment for obtaining an additional professional certification; and that she did not receive her 2017 annual performance evaluation.² As relief, the grievant requested a “Role/Title change to align with [her] new responsibilities,” an in-band adjustment for receiving the professional certification, and a “base salary increase.” After proceeding through the management steps, the grievance was not qualified for a hearing by the president of the community college. The grievant now appeals that determination to EEDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.³

¹ While the grievant claims that she has concerns about “equity and fairness,” she has further stated to EEDR that she does not believe she has been treated differently because of her race, nor has she identified any other protected status on which the management actions cited in the grievance may have been based.

² During the management steps, the grievant also raised an issue with the agency related to an alleged breach of confidentiality. The agency has indicated that it addressed this matter when it learned of the grievant’s concern. Because additional management actions or omissions cannot be added to a grievance after it is filed, however, this ruling will not address this issue. *Grievance Procedure Manual* § 2.4. The grievant may file another grievance, if timely, to challenge additional management actions or omissions, if she wishes to do so. Any such grievance must comply with the initiation requirements of the grievance procedure, as set forth in Section 2.4 of the *Grievance Procedure Manual*.

³ See *Grievance Procedure Manual* § 4.1.

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ Claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied or whether a performance evaluation was arbitrary and/or capricious.⁵

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

Assignment of Duties

In her grievance, the grievant essentially alleges that the agency has improperly assigned her additional job duties due to staffing vacancies, that it has continued to expect her to perform these tasks after hiring new staff, and that the agency did not provide her with necessary training to carry out the added responsibilities given to her. EEDR's review of the grievance record indicates that, in 2017, the agency was impacted by both organizational changes and staff turnover that resulted in the assignment of additional responsibilities to the grievant and other employees. During this time, the grievant was tasked with carrying out added duties in the areas of procurement and accounts payable, at least some of which have now been permanently assigned to her.

Based on the grievant's concerns, the agency reviewed the grievant's Employee Work Profile ("EWP"), made revisions to ensure it accurately reflects her current job duties, and determined that she is appropriately classified as an AOS III.⁹ Significantly, the grievant has indicated that she does not necessarily dispute the agency's decision that she should remain classified as an AOS III, and instead appears to contend that she has been "forced" to take on additional duties without adequate training or support from management. Having thoroughly reviewed the information provided by the parties on this issue, EEDR finds that the grievant has not identified a mandatory policy provision that would prevent the agency from making a decision to assign additional tasks under the circumstances presented in this case, nor has EEDR identified any such policy. To the contrary, the grievance statutes and procedure reserve to

⁴ Va. Code § 2.2-3004(B).

⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (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).

⁹ The agency has apparently made further updates to the grievant's EWP since she filed the grievance, though it appears to be substantially the same as the revised EWP she has already received in terms of the duties assigned to the grievant. These additional changes do not yet appear to be effective. Assuming the agency intends to provide this updated EWP, it should be given to the grievant as soon as possible.

management the exclusive right to manage the affairs and operations of state government, including the methods, means and personnel by which work activities are to be carried out.¹⁰

At the same time, however, the grievant's concerns about the impact of these changes to her job are understandable. For example, it would not be a recommended management practice to assign an employee additional responsibilities, fail to provide training or support that would allow the employee to perform those tasks satisfactorily, and negatively evaluate the employee's performance as a result. The agency has informed the grievant that it intends to provide her with training and other assistance as needed. EEDR encourages the parties to work together and ensure the grievant is provided a full and fair opportunity to perform successfully in her position.

In summary, and although the grievant disagrees with the agency's assessment of how best to distribute her workload and assign tasks, EEDR finds that her grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding the assignment of tasks to employees, or was otherwise arbitrary or capricious. It appears instead that the agency's classification of the grievant's position and the assignment of her duties is consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for hearing on this basis.

Compensation

The grievant further argues that she should have received a salary increase in conjunction with the agency's decision to assign her additional duties and/or update her EWP. In addition, she contends that several other agency employees received additional pay when they took on added responsibilities in 2017, while she did not.

Agency pay practices are governed by DHRM Policy 3.05, *Compensation*, and 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

¹⁰ Va. Code § 2.2-3004(B).

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.

There appears to be no dispute indicated in the grievance record that the grievant is a competent and valued employee. However, having reviewed the information provided by the parties, EEDR finds that there is insufficient evidence to demonstrate that the agency's decision not to award additional pay to the grievant violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. The agency has explained that employees may receive additional pay on a temporary basis for performing substantial added responsibilities in supervision, management, or coordination of programs due to staffing vacancies. The agency determined that the grievant has not taken on additional duties at a level that would justify either temporary pay or an in-band adjustment, and that changing expectations for administrative support staff throughout her institution have impacted the specific tasks assigned to her. EEDR has reviewed nothing to suggest that the agency failed to fully consider the applicable factors in reaching a decision that no pay action was necessary for the grievant in this case. Furthermore, the comparator employees cited by the grievant do not appear to be sufficiently similarly situated to her such that the agency's consideration of the relevant pay factors could be considered inconsistent here. In short, there appears to have been a reasonable basis for the agency to consider the grievant's situation differently from that of other impacted agency employees.

As stated above, DHRM Policy 3.05, *Compensation*, is intended to grant the agencies the flexibility to address issues such as changes in an employee's job duties, the application of new job-related skills, and retention.¹³ The policy is not intended to entitle employees to across-the-board salary increases or limit the agency's discretion to evaluate whether an individual pay action is warranted. While the grievant could argue that certain pay factors might support a decision to award her additional compensation, the agency's position that its consideration of the pay factors does not substantiate the need for a salary increase is also valid. Factors such as an employee's duties and responsibilities, work performance, and experience represent just several of the many different factors an agency must consider in making the difficult determination of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.¹⁴ 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. Therefore, based on the totality of the circumstances, EEDR cannot find that the agency's decision here was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Other Issues

With regard to the grievant's assertions regarding her professional certification and 2017 performance evaluation, EEDR has further recognized that, even if a grievance challenges a management action that might qualify for a hearing, there are some cases where qualification is inappropriate. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

¹³ See DHRM Policy 3.05, *Compensation*.

¹⁴ *Id.*

During the management steps, the agency approved a 3% salary increase for the grievant based on her additional professional certification and completed her 2017 performance evaluation. At a hearing on these issues, a hearing officer would have the authority to “order the agency to reapply the policy from the point at which it became tainted,” or, if “written policy require[d] a particular result without the exercise of agency discretion,” the hearing officer could “order the agency to implement those particular policy mandates.”¹⁵ In this case, then, the potential relief available to the grievant would be an order that the agency should approve a salary increase for the grievant and complete her performance evaluation, if the agency had not followed policy with regard to those actions prior to the initiation of the grievance. As a result, a hearing officer would be unable to provide the grievant with any additional relief beyond that which has already been granted to her by the agency with respect to these specific claims (salary increase for professional certification; receipt of performance evaluation). EEDR does not generally grant qualification for a grievance hearing to determine whether an agency properly applied state and/or agency policy where, as here, the agency has cured the alleged error, if any. These issues are, therefore, not qualified for a hearing and will not proceed further.

Mediation

Finally, although this grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EEDR’s Workplace Mediation Program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant’s agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. The parties may contact EEDR at 888-232-3842 for more information about EEDR’s Workplace Mediation Program. To request mediation, an employee can contact the agency’s workplace mediation coordinator.

EEDR’s qualification rulings are final and nonappealable.¹⁶



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¹⁵ *Rules for Conducting Grievance Hearings* § VI(C)(1).

¹⁶ Va. Code § 2.2-1202.1(5).