Issues: Qualification – Benefits (FMLA) and Compensation (Salary Dispute); Ruling Date: December 31, 2013; Ruling No. 2014-3752; Agency: Virginia Employment Commission; Outcome: Qualified (in part); Not Qualified (in part).

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

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2014-3752
December 31, 2013

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 September 13, 2013 grievance with the Virginia Employment Commission (the "agency") qualifies for a hearing. For the reasons set forth below, this grievance is qualified for hearing in part.

FACTS

In his September 13, 2013 grievance, the grievant challenged the agency's determination that he was not eligible to receive a 2% salary increase for state employees, which became effective on July 25, 2013. The agency blocked the salary increase for the grievant because he received two Performance Improvement Plans during the 2013 evaluation cycle. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals to EDR.

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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Claims relating solely to the establishment and revision of salaries, wages, and general benefits 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, or whether state or agency policy may have been misapplied or unfairly applied.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a threshold question is

[1] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b) and (c).
[4] *See Grievance Procedure Manual* § 4.1(b).

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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] In this case, there is a sufficient question as to whether the denial of the salary increase to the grievant was an adverse employment action.[7]

Denial of Salary Increase

The Virginia General Assembly approved a 2% salary increase for "[a]ll classified and other salaried employees . . . who were employed in salaried positions as of April 24, 2013 and who received a rating of 'Contributor' or 'Extraordinary Contributor' on their last performance evaluation," to take effect on July 25, 2013. The grievant was eligible for the salary increase based on these criteria. The applicable policy guidance further recognizes, however, that those employees whose performance had changed significantly since their 2012 performance evaluation could be denied the salary increase based on their most-recently documented performance status. Individual agencies were "responsible for ensuring that sufficient documentation," in the form of interim evaluations, probationary progress review forms, or notices of sub-standard performance, existed "to support . . . unsatisfactory performance for employees" who were denied the salary increase. The grievant received two Performance Improvement Plans to address unsatisfactory work performance on April 19 and June 11, 2013, after his 2012 performance evaluation. These Performance Improvement Plans identified substandard performance only in the area of Case Management of delinquent case files. Based on these Performance Improvement Plans, the agency denied the salary increase to the grievant.

The grievant argues that his work performance during the relevant time period was satisfactory and that the agency should not have blocked the salary increase. Specifically, the grievant asserts that he continued to perform his job responsibilities and demonstrated increased effort to address the issues noted in the Performance Improvement Plans. While the grievant agrees that a number of cases assigned to him were delinquent and that he was unable to complete all the tasks assigned in the Performance Improvement Plan, he argues that he nevertheless "did not neglect his duties" and "continued to excel" in a way that should have been satisfactory.

The applicable policy guidance explained that agencies could block the salary increase for those employees whose performance had changed significantly such that their 2012 evaluation did not accurately reflect their current level of performance. Based on our reading of

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] *See* Fierros v. Tex. Dep't of Health, 274 F.3d 187, 194 (5th Cir. 2001) (holding that "the denial of a pay increase" may be an adverse employment action); Kienzle v. GM, LLC, 903 F.Supp. 2d 532, 548 (E.D. Mich. 2012) ("Deprivation of increased compensation qualifies as an adverse employment action."); Lovell v. BBNT Solutions, LLC, 295 F.Supp. 2d 611, 626-27 (E.D. Va. 2003) ([T]he denial of a pay increase may constitute an adverse employment action . . . .").

the policy guidance, it appears the intent was to permit agencies to block the salary increase for employees who performance was at a "Contributor" level or greater on their 2012 evaluation, but had declined to "Below Contributor" level since the evaluation was completed, provided there was documentation to support the unsatisfactory performance.[8]

The grievant received an overall "Contributor" rating on his 2012 evaluation, but it was noted on the evaluation that his performance in the "Case Management" core responsibility, which specifically relates to the completion of delinquent cases, was at a "Below Contributor" level. All other areas of performance were at the "Contributor" level or higher. It would appear, therefore, that unsatisfactory performance in completing delinquent cases at the grievant's level of performance overall and as to this core responsibility was insufficient, by itself, to result in an overall "Below Contributor" rating on the grievant's annual performance evaluation. The only performance issue addressed in the Performance Improvement Plans is the grievant's inability to timely complete a sufficient number of delinquent cases. The agency's prior treatment of "Below Contributor" level performance in this area does not appear to support the agency's contention that the grievant's performance had actually become so unsatisfactory that it would have been considered to be at the level of an overall "Below Contributor." After reviewing the information presented by the parties, we are unable to determine how the grievant's performance became worse after he received his 2012 evaluation such that he was no longer performing at the level of a "Contributor" and would have been ineligible to receive the salary increase.

Accordingly, this grievance raises a sufficient question as to whether the agency's denial of the salary increase to the grievant was a proper application of the policy guidance relating to the performance-based criteria for the 2% salary increase.[9] At the hearing, the grievant will have the burden of proving that the agency misapplied and/or unfairly applied policy and/or law in denying the salary increase. If the hearing officer finds that it did, he may only order the agency to reapply the policy at the point at which it became tainted.[10] This qualification ruling in no way determines that the agency's actions with respect to the grievant were a misapplication and/or unfair application of policy or were otherwise improper, but merely reflects that further exploration of the facts by a hearing officer is warranted.

Medical Issues

The grievant further argues that he was suffering from a serious medical condition that "impacted [his] time and abilities" when the Performance Improvement Plans were issued and that the agency failed to take this fact into account. DHRM Policy 4.20, *Family and Medical*

[8] The policy guidance would also appear to have allowed an agency to approve the raise for an employee who received an overall "Below Contributor" rating on his/her 2012 evaluation but demonstrated marked improvement since.

[9] The grievance may also be interpreted as a challenge to the content of the Performance Improvement Plans. It is not timely to challenge the Performance Improvement Plans themselves, however, because they were both issued more than thirty calendar days before the grievance was initiated. *See Grievance Procedure Manual* § 2.2. Only the grievant's claim regarding the denial of the salary increase is qualified for a hearing. To the extent that it is relevant, the grievant may present information about the Performance Improvement Plans as background evidence.

[10] *Rules for Conducting Grievance Hearings* § VI(C)(1).

Leave, states that "[i]t is the policy of the Commonwealth to fully comply with the [Family and Medical Leave Act ("FMLA")]."[11] The FMLA "prohibits an employer from discriminating or retaliating against an employee . . . for having exercised . . . FMLA rights," and specifically provides that "employers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions."[12] While the grievant seems to argue that the agency should have considered his medical condition when it issued the Performance Improvement Plans or when the salary increase was blocked, he did not verbally notify his supervisor of his condition until August, and submitted a Request for Family and Medical Leave dated October 1, 2013. Between March and July 2013, when the grievant received the Performance Improvement Plans that resulted in his being denied the salary increase, he was absent from work for a total of 18 hours and did not require any modifications or accommodations to his work schedule or job responsibilities for medical reasons. Based on the information submitted by the grievant, it does not appear that his medical condition had a significant effect on his ability to perform his job between March and July 2013. Accordingly, we do not find that the agency misapplied or unfairly applied state and/or agency policy with respect to its consideration of the grievant's medical condition and/or FMLA status as they relate to the denial of the salary increase. This issue does not qualify for a hearing.

CONCLUSION

The grievant's September 13, 2013 grievance is qualified for hearing to the extent described above. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing using the Grievance Form B.[13]

EDR's qualification rulings are final and nonappealable.[14]

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[11] DHRM Policy 4.20, *Family and Medical Leave*.
[12] 29 CFR § 825.220(c); *see also* 29 U.S.C. § 2615.
[13] In the alternative, if the agency were to now provide the raise to the grievant retroactive to July 25, 2013, there would likely be no further relief available for a hearing officer to award, thus removing the need to proceed with a hearing.
[14] *See* Va. Code § 2.2-1202.1(5).