

Issue: Qualification – Compensation (In-Band Adjustment); Ruling Date: November 26, 2014; Ruling No. 2015-4028; Agency: Department of Corrections; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Department of Corrections
Ruling Number 2015-4028
November 26, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her September 3, 2014 grievance with the Department of Corrections (“agency”) qualifies for a hearing. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as an Executive Secretary. In August 2014, the grievant was advised by her supervisor that she would be required to assume additional job duties as the result of another employee’s departure. On September 3, 2014, the grievant initiated a grievance asserting that she should not have been required to assume these duties without also receiving adequate training and additional pay.¹ After proceeding through the management steps, the grievance was not qualified for hearing by the agency head. The grievant now appeals that determination.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.³ In this case, the grievant appears to allege that the agency has misapplied or unfairly applied compensation policy.

¹ During the course of the management resolution steps, the grievant also raised concerns regarding being “targeted and harassed” by her supervisor. As claims may not be added during the course of a grievance, these additional claims will not be addressed in this ruling. *See Grievance Procedure Manual* § 2.4. However, to the extent this alleged conduct continues or recurs, this ruling does not preclude the grievant from initiating a new grievance regarding that conduct.

² *See* Va. Code § 2.2-3004(B).

³ Va. Code §§ 2.2-3004(A), (C).

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. 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 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

Lack of Training

In this case, the grievant alleges that she was not provided sufficient training for her new duties. It appears, however, that the grievant was first offered training on August 22, 2014, but that the grievant did not participate in the training at that time. Further, on September 5, 2014, the grievant received approximately 30 minutes of training, and she has also received some assistance from her predecessor. Under these circumstances, we cannot conclude that any lack of training constituted an adverse employment action. Accordingly, the grievant’s claims regarding training are not qualified for hearing.

Compensation

The grievant also alleges that she should have received additional compensation for the additional duties she has been assigned. 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.

The primary policies implicated by this claim are DHRM Policy 3.05, *Compensation*, and Department of Corrections Operating Procedure 120.1, *Compensation*. These policies provide that agencies may provide an in-band adjustment up to 10% to an employee who has assumed new higher-level duties and responsibilities that are critical to the operations of an agency.⁷ In-band adjustments and other 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.⁸

In assessing whether to grant pay actions, an agency must consider, for each proposed adjustment, each of the following thirteen pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills,

⁴ See *Grievance Procedure Manual* § 4.1(b).

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 DHRM Policy 3.05, *Compensation*DOC Operating Procedure 120.1, *Compensation*, § IV(F)(2).

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

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.⁹ 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. Thus, DHRM Policy 3.05 and the agency's Operating Procedure 120.1 appear to reflect the intent to invest in agency management broad discretion for making individual pay decisions and the corresponding accountability in light of each of the 13 enumerated pay factors. The grievant's current job duties and the need for internal salary alignment are just two of the 13 different factors an agency must consider in making the difficult determinations of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.

Even though agencies are afforded great flexibility in making pay decisions, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted 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.¹⁰

In this case, it appears that the agency has exercised appropriate discretion under policy in determining the compensation of the grievant's position. Although it appears that the grievant's newly assigned duties were previously performed by an employee in a higher pay sub-band, that employee performed other duties in addition to the ones given to the grievant. The newly assigned duties primarily involve preparing materials for three boards and/or committees which each meet six times a year, along with other limited ongoing responsibilities. The grievant has not shown that the agency's refusal to grant her a pay increase violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policy. The grievant has also presented no evidence that the agency's denial of a pay increase was inconsistent with other decisions made by the agency or that the new duties were substantial enough to find that the agency was arbitrary or capricious in refusing to grant her an increase in pay. For these reasons, this grievance does not qualify for hearing.

EDR's qualification rulings are final and nonappealable.¹¹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁹ DHRM Policy 3.05, *Compensation*; DOC Operating Procedure 120.1, *Compensation*, § IV(C).

¹⁰ 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.

¹¹ Va. Code § 2.2-1202.1(5).