

Issues: Qualification – Compensation (position classification and temporary/acting pay);
Ruling Date: December 8, 2014; Ruling No. 2015-4031; Agency: Department of
State Police; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2015-4031
December 8, 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 his October 1, 2014 grievance with the Department of State Police (the “agency”) qualifies for a hearing. For the reasons set forth below, this grievance is not qualified for a hearing.

FACTS

The grievant is employed by the agency as a Law Enforcement Officer III. Prior to August 2014, his work title was Senior Special Agent. Between June and August 2014, he successfully competed for a lateral transfer to a temporary position as a Task Force Coordinator, which is also classified in the Law Enforcement Officer III Role. The agency’s recruitment advertisement for the Task Force Coordinator position stated that it was a temporary reassignment, that the “successful candidate must commit to this assignment for at least one year,” and that “[t]he salary of the Special Agent selected for this position will be increased by 10%” for the duration of the reassignment.

The grievant accepted the reassignment to the Task Force Coordinator position effective August 25, 2014. Upon accepting the temporary position, the grievant was informed by the agency that he would receive a salary increase of less than the advertised 10%. According to the agency, granting the advertised 10% salary increase to the grievant would have caused his total pay to exceed the maximum salary authorized by DHRM policy for his Pay Band.

The grievant filed a grievance on or about October 1, 2014, challenging the agency’s failure to award him the advertised 10% salary increase for the duration of his reassignment to the Task Force Coordinator position. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination 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

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

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 The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

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 For purposes of this ruling only, we will assume that the agency's alleged failure to provide the grievant with the advertised 10% salary increase in conjunction with his reassignment to the Task Force Coordinator position constitutes an adverse employment action.⁷

Temporary Pay

The primary policy implicated by the grievant's claims regarding the salary issues raised in the grievance is DHRM Policy 3.05, *Compensation* (the "Compensation Policy"), which provides that

[a]gencies may provide temporary pay to an employee who is assigned different duties on an interim basis, or because of the need for additional assignments associated with a special time-limited project, or for acting in a higher-level position in the same or different Role in the same or a higher Pay Band, or for military pay supplements.

² See Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

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 *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 (E.D. Va. 2003) ("[T]he denial of a pay increase may constitute an adverse employment action . . .").

Temporary pay is a non-competitive management-initiated practice paid at the discretion of the agency.

....

When temporary pay is granted for assuming the duties of the same or different Role in the same Pay Band, agency management may grant 0-10% above the employee's current salary as long as the offer does not exceed the maximum of the assigned Salary Range.⁸

The grievant was employed as a Senior Special Agent prior to his reassignment to the Task Force Coordinator position. Both positions are classified in the Law Enforcement Officer III Role. The grievant would, therefore, have been eligible for a salary increase of up to 10%, as was advertised in the agency's posting for the Task Force Coordinator position. The Law Enforcement Officer III Role is in Pay Band 5. The grievant's total salary in Pay Band 5 cannot, by policy, be greater than \$91,896.00.⁹ If the grievant had been awarded the 10% salary increase advertised by the agency, his salary would have exceeded that amount. As a result, the agency was prohibited by the Compensation Policy from providing the grievant with the full advertised amount in temporary pay. The agency did, however, increase the grievant's salary to the maximum amount authorized for a Pay Band 5 position, consistent with the provisions of the Compensation Policy regarding temporary pay.

The grievant further argues that the agency has inconsistently applied the Compensation Policy to him as compared with other similarly situated employees. Specifically, he claims that the agency approved a salary increase for another employee in excess of the maximum amount for Pay Band 5. Having reviewed the information provided by the parties, it does not appear that the grievant and the comparator employee are sufficiently similarly situated such that the agency's action here could be considered inconsistent. In 2011, the General Assembly approved a 5% salary increase for state employees to offset a 5% increase in employee contributions to the Virginia Retirement System.¹⁰ This salary increase was not, however, accompanied by an increase in the maximum salary for each Pay Band.¹¹ As a result, DHRM approved a special, one-time exception that allowed employees whose salary was at or near the top of their Pay Band to exceed the maximum and receive the 5% salary increase to offset their increased retirement contributions. The comparator employee cited by the grievant was one of the employees who was approved for this special exception to the Pay Band maximum. The agency has confirmed that none of its employees have received a salary increase as the result of a reassignment or

⁸ DHRM Policy 3.05, *Compensation*.

⁹ A listing of the salary ranges for individual Pay Bands, effective as of July 25, 2013, is available at <http://www.dhrm.virginia.gov/docs/default-source/compensationdocuments/salarystructure072513.pdf?sfvrsn=2>.

¹⁰ 2011 Va. Acts 2123; H.B. 1500, 2011 Gen. Assem., Reg. Sess., at 433-34 (Va. 2011).

¹¹ *See id.* While the General Assembly approved a Pay Band adjustment in 2013 to account for the 5% salary increase from 2011, it appears that some state employees may still have salaries that exceed their Pay Bands as a result of DHRM's special exception to the Pay Band maximum in 2011. H.B. 1500, 2013 Gen. Assem., Reg. Sess., at 458-60 (Va. 2013).

promotion to a Task Force Coordinator position, or any other position, in excess of the maximum salaries for individual Pay Bands.

While the grievant's concerns are understandable, he has not raised a question as to whether the agency's decision that it could not award the grievant the advertised 10% salary increase in conjunction with his assignment to the Task Force Coordinator position was a misapplication and/or unfair application of policy, was inconsistent with its treatment of other similarly situated employees, or was otherwise arbitrary or capricious. To the contrary, it appears that the agency awarded the grievant the maximum salary increase permitted by the Compensation Policy in conjunction with his reassignment to the Task Force Coordinator position and that this action was executed properly under the discretion granted by that policy. Accordingly, this grievance does not qualify for hearing.¹²

EDR's qualification rulings are final and nonappealable.¹³



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¹² This ruling only determines that the grievance does not qualify for a hearing under the grievance statutes. It does not address whether there may be some other legal or equitable remedy available to the grievant in relation to his claim.

¹³ See Va. Code § 2.2-1202.1(5).