Issues: Qualification – Compensation (In-Band Adjustment), and Discrimination (Other); Ruling Date: July 14, 2015; Ruling No. 2015-4171; Agency: Office of the State Inspector General; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Office of the State Inspector General
Ruling Number 2015-4171
July 14, 2015

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 April 30, 2015 grievance with the Office of the State Inspector General (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

Prior to April 1, 2015, the grievant obtained two professional certifications. The agency's Salary Administration Plan states that the agency may authorize an in-band adjustment of 1% to 10% for employees who obtain professional certifications that are "relevant to the Agency's operations and mission."[1] On April 1, 2015, the grievant was notified by agency management that he would not receive a salary increase because he is "one of the highest paid employees in [his] role." On or about April 30, 2015, the grievant initiated a grievance alleging "Unfair/Discriminatory Pay Practices" and claiming that the agency failed to properly apply its Salary Administration Plan. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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"[3] 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."[4] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action

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[1] Office of the State Inspector General ("OSIG") Policy 122, *Salary Administration Plan*, § VII(M)(7) (Jan. 1, 2015). The policy has since been superseded by a revised Salary Administration Plan.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[4] *See Grievance Procedure Manual* § 4.1(b).

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, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

Misapplication and/or Unfair Application of Policy

The grievant appears to argue, in effect, that management has misapplied and/or unfairly applied policy by declining to approve an in-band adjustment for him after he obtained two additional professional certifications. 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.

In-band adjustments are governed by DHRM Policy 3.05, *Compensation*. This policy allows agencies to grant an employee an in-band adjustment, which is a "non-competitive pay practice that allows agency management flexibility to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues."[7] For an employee's professional and/or skill development, which is at issue here, an upward salary adjustment from zero to ten percent is available under DHRM policy.[8] Like all pay practices, in-band adjustments 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.[9] 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, EDR 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.[10]

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[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) (citation omitted)
[7] DHRM Policy 3.05, *Compensation*.
[8] *Id.*
[9] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[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.

In this case, the agency has implemented a Salary Administration Plan to complement the provisions of DHRM Policy 3.05, *Compensation*. The agency's Salary Administration Plan states, in relevant part, that the agency may authorize an in-band adjustment "to recognize and respond to . . . [t]he application of new job-related knowledge, skills, and abilities gained through education, certification, and/or licensure."[11] When an employee obtains a professional certification that is "over and above the minimum continuing education or training requirement that is established for the position" and is "relevant to the Agency's operations and mission," he is eligible for an in-band adjustment of 1% to 10%.[12] Based on this language in the Salary Administration Plan, the grievant asserts that the agency misapplied and/or unfairly applied policy in not awarding him an in-band adjustment of 3% after he acquired additional professional certifications. He argues that other employees who obtained the same certifications received an in-band adjustment of 3% and that the agency cannot deny an in-band adjustment based on an employee's acquisition of professional certifications because the Salary Administration Plan mandates a salary increase of 1% to 10% in such cases.

Though the grievant has shown that he acquired new professional certifications and that other agency employees received in-band adjustments for obtaining professional certifications, he has not demonstrated that the agency's refusal to approve his request for an in-band adjustment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. EDR has reviewed evidence about the agency's interpretation of the relevant provisions of the Salary Administration Plan. The agency interprets the Salary Administration Plan to require an evaluation of the pay factors before it authorizes any salary action. If it determines an in-band adjustment is warranted based on that analysis, the agency will then grant an appropriate salary increase within the range stated by the policy.[13] In other words, the agency must always consider whether an in-band adjustment is warranted based on its analysis of the pay factors.

An agency's interpretation of its own policies is generally afforded great deference. EDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference unless the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[14] In reviewing the Salary Administration Plan, we cannot find that the agency has made an erroneous interpretation here. Indeed, we agree with the agency's assessment, which appears to be consistent with the language of DHRM Policy 3.05, *Compensation*. As stated above, the applicable compensation policies are intended to grant the agency flexibility to address issues such as changes in an employee's job duties, the application of new job-related skills, internal alignment, and retention.[15] The policies not intended to entitle

[11] OSIG Policy 122, *Salary Administration Plan*, § VII(M)(1) (Jan. 1, 2015).
[12] *Id.* § VII(M)(7). The agency does not appear to dispute that the certifications obtained by the grievant satisfied the requirements of the policy in order to justify an in-band adjustment.
[13] Here, the agency appears to have approved a 3% in-band adjustment for employees who acquire additional professional certifications and for whom a salary increase is warranted.
[14] *See*, *e.g.*, EDR Ruling Nos. 2008-1956, 2008-1959.
[15] *See* OSIG Policy 122, *Salary Administration Plan*, § VII(M)(1) (Jan. 1, 2015).

employees to across-the-board salary increases or limit the agency's discretion to evaluate whether an individual pay action is warranted.

In addition, it appears the agency fully considered several factors in reaching the decision that no pay action was necessary for the grievant in this case. For example, it appears that only one other individual is employed in the grievant's work unit under the same Role title. Like the grievant, this employee did not receive an in-band adjustment for obtaining the same professional certifications as the grievant. Granting an increase to the grievant and not the other employee in the same Role could have created salary alignment issues and/or been viewed as an inconsistent application of compensation practices. The agency also noted that the grievant is among the highest paid agency employees in his Role and within his work unit. Furthermore, it appears that the employees who did receive in-band adjustments, and who are cited as comparators by the grievant, are employed in the grievant's work unit in Law Enforcement Officer and Audit Services Manager Roles. The duties and job responsibilities of these employees are not the same as those of the grievant. The agency determined that, for employees in these other Roles, an in-band adjustment was warranted based on their acquisition of professional certifications.[16] However, factors such as the nature and type of job duties assigned to the grievant, his current salary, and internal salary alignment, an in-band adjustment was not justified.

While the grievant could argue that certain pay factors might support his request for an in-band adjustment, the agency's position that its consideration of the pay factors does not substantiate the need for a salary increase is also valid. An employee's "training, certification, and licensure" is just one of the thirteen 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.[17] 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, we cannot say that the agency's denial of the grievant's request for an in-band adjustment was improper or otherwise arbitrary or capricious. Though we are sympathetic to the grievant's situation, there is no provision of DHRM or agency policy that requires an agency to approve an in-band adjustment when an employee acquires an additional professional certification. Accordingly, the grievance does not qualify for a hearing on this basis.

Discrimination

The grievant further asserts that the agency has engaged in discrimination by declining to grant him an in-band adjustment. Grievances that may be qualified for a hearing include actions related to discrimination on the grounds of race, sex, color, national origin, religion, sexual

[16] We cannot directly address the agency's decisions about in-band adjustments as they relate to other employees, but only whether the agency properly and fairly applied its compensation policies to the grievant based on all the surrounding facts and circumstances.
[17] DHRM Policy 3.05, *Compensation*.

orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[18] In order for such a grievance to qualify for a hearing, it must present facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for a hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[19]

In this case, there are no facts to indicate that the agency's decision not to approve an in-band adjustment for the grievant had a discriminatory motive. Indeed, although the grievant claims that the agency has engaged in discrimination, he has not identified any protected status on which he believes the agency's allegedly discriminatory actions were based. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here, and the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[20]

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[18] *See Grievance Procedure Manual* § 4.1(b); *see also* Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[19] *See* Hutchinson v. INOVA Health Sys., Inc., C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).
[20] Va. Code § 2.2-1202.1(5).