Issue: Qualification – Compensation (In-band adjustment); Ruling Date: December 29, 2015; Ruling No.2016-4275; Agency: Department of Social Services; 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 Social Services
Ruling Number 2016-4275
December 29, 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 July 10, 2015 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Licensing Administrator. In early 2015, the agency conducted an internal Compression Study of salaries for certain employees, including the grievant and other employees who work as Licensing Administrators. The goal of the Compression Study was to "align salaries to the fullest extent possible agency-wide based on similar duties and using applicable pay factors." Based on the results of the Compression Study, the agency's Human Resources Office determined that an in-band salary adjustment was not warranted for the grievant. The grievant initiated a grievance on or about July 10, 2015, alleging that the Compression Study was "flawed" and "based on findings and recommendations that were arbitrary and capricious" because he had more "state service" and experience as a Licensing Administrator than those employees who were given salary adjustments. 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

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] 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"[2] 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."[3] Thus, typically, a threshold question is

[1] *See* Va. Code § 2.2-3004(B).
[2] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[3] *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."[4] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[5] 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.

In this case, the grievant effectively argues that management has misapplied and/or unfairly applied policy in determining that an in-band salary adjustment was not warranted for him based on the results of the Compression Study. Specifically, the grievant contends that the agency's decision not to increase his salary was flawed because his length of service and years of experience exceed those of the employees whose salaries were increased. He further alleges that there are inconsistences in the agency's assessment of his past work experience as compared with that of other agency employees whose previous employment was similar to his own. 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."[6] Under DHRM policy, an upward increase from zero to ten percent is available "to align an employee's salary more closely with those of other employees' within the same agency who have comparable levels of training and experience, similar duties and responsibilities, similar performance and expertise, competencies, and/or knowledge and skills."[7] 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.[8]

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

[4] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[5] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[6] DHRM Policy 3.05, *Compensation*.
[7] *Id.*
[8] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

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.[9]

The agency's stated goal in conducting the Compression Study at issue here was to correct disparities in salary based on employees' relevant work experience. In other words, the Compression Study was intended to identify which, if any, of the Licensing Administrators with greater years of work experience had lower salaries than Licensing Administrators with fewer years of work experience. To determine each employee's past relevant work experience, the agency reviewed the job duties listed on his or her current Employee Work Profile ("EWP") and compared them with the job duties for each position that was listed on his or her most recent application for employment with the agency. For each comparable job duty from a former position, the agency assigned a percentage credit proportional to its relative importance on the employee's current EWP. For example, if a particular core responsibility makes up twenty percent of an employee's job duties on his or her current EWP and consists of four types of tasks, each task would be counted as five percent of his or her total job duties. In this way, the agency assessed each former position and determined its total relatedness to the employee's current position, calculated in percentage points. Each former position was classified as Directly Related, Closely Related, Indirectly Related, or Not Related, with corresponding weights applied to the total length of employment in that position. By adding together the weighted years of employment from all former positions, the agency identified each Licensing Administrator's total years of relevant work experience, as calculated based on the relatedness assessment as described above.

After all of the employees' years of relevant experience were calculated, the agency determined which of the Licensing Administrators were more experienced, but compensated at the same or a lower rate than other Licensing Administrators with fewer years of experience. Only the Licensing Administrators that were determined to be in this position received in-band adjustments. For example, if one employee had twenty-five years of relevant work experience but was paid less than another employee with ten years of relevant work experience, the more experienced employee would be given an in-band adjustment to correct the disparity. The other Licensing Administrators for whom there was no salary compression issue did not receive an in-band adjustment. This plan to correct identified issues with internal salary alignment based on the Licensing Administrators' past relevant work experience appears to be consistent with the stated purpose of the Compression Study.

Significantly, the agency's determination of each employee's past relevant work experience was not based on his or her overall qualifications for the job or knowledge, skills, and abilities. Instead, the agency only compared specific job duties from past positions to the employees' current duties as outlined on their EWPs in the manner described above. For this

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[9] 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.

reason, the grievant's contention that he is more qualified than other Licensing Administrators who received in-band adjustments is not persuasive in this case. EDR has reviewed no evidence to suggest that the agency assessed or otherwise considered the grievant's, or any other Licensing Administrators', overall qualifications. Likewise, whether the grievant or the other Licensing Administrators' former positions were in the same field as their current position does not appear to have been of primary importance in determining how closely related those former positions were to the their current position. Based on the information provided to EDR by the agency, the amount of relevant past work experience as determined by the job duties of former positions was the only factor considered in deciding whether any particular employee should receive an in-band adjustment.

Initially, the agency determined that the grievant was ranked second out of all the Licensing Administrators in terms of relevant work experience. The grievant also had the highest salary of all the Licensing Administrators. As a result, he was not deemed eligible for an in-band adjustment because he did not fit the criteria that would justify a salary increase (i.e., greater experience and a lower salary than other less-experienced Licensing Administrators). Although the grievant asserts that the agency's assessment of his past work experience was not consistent with the analysis of the other Licensing Administrators' employment history, EDR has reviewed nothing to indicate that the agency's consideration of the grievant's work history was flawed or inconsistent with its process under the study. To the contrary, the agency has indicated that it assessed the Licensing Administrators' work experience based on their written employment applications, and the evidence presented by the grievant does not raise a question as to whether this assessment was defective in some way as it was originally conducted. However, the agency did allow the grievant to submit additional information about his past employment during the management resolution steps and recalculated his relevant work experience using that information. The results of this reevaluation showed that the grievant had the most years of relevant experience and the highest salary of the Licensing Administrators. Because there was no disparity in the grievant's compensation as compared with his work experience based on the results of this second assessment, the agency again determined that no salary increase was justified for the grievant.[10]

As stated above, DHRM Policy 3.05, *Compensation*, is intended to grant agencies the flexibility to address issues such as changes in an employee's job duties, the application of new job-related skills, internal alignment, and retention.[11] 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 his request for an in-band adjustment, the agency's position that its consideration of the pay factors, and particularly its consideration of relevant work experience

[10] Had the grievant initially been identified as the most experienced and highest compensated of the Licensing Administrators, it may have been possible that other employees could have received lesser in-band adjustments to preserve internal alignment between the grievant's salary and other Licensing Administrators with fewer years of experience. However, it is not for EDR to decide in this ruling whether the agency's reassessment of the grievant's relevant work experience could or should have resulted in changes to the salaries of other employees, but only whether the agency misapplied and/or unfairly applied policy as it relates specifically to the grievant.

[11] DHRM Policy 3.05, *Compensation*.

and the need for internal salary alignment, does not substantiate the need for a salary increase is also valid. Based on the information that has been submitted to EDR, it appears the agency conducted an extensive review of the relevant pay factors as they related to each of the Licensing Administrators in making the difficult determination of whether, when, and to what extent in-band adjustments were granted.[12]

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 decision not to approve an in-band adjustment for the grievant in conjunction with the Compression Study was improper or otherwise arbitrary or capricious. Likewise, EDR has reviewed nothing to indicate that the agency's decision not to approve an in-band adjustment for the grievant was inconsistent with its treatment of other similarly situated employees with comparable relevant work experience. 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 based solely on an employee's length of experience or qualifications. Accordingly, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.[13]

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[12] *See id.*
[13] Va. Code § 2.2-1202.1(5).