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QUALIFICATION RULING

In the matter of the Virginia Department of Juvenile Justice
Ruling Number 2019-4946
August 2, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether his January 23, 2019 grievance with the Virginia Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an assistant superintendent for the agency, classified in the role of Security Manager II. On or about January 23, 2019, the grievant initiated a grievance seeking an in-band salary adjustment of 10 percent. In support, for example, the grievant cited over 30 years of experience including increased supervisory responsibilities, evolving roles, and high performance evaluations. To further justify his request for a salary adjustment, the grievant alleged that his own salary was approximately three percent less than that of another employee with the same role and title, even though this comparator employee had less than 10 years of relevant work experience. The agency offered to adjust the grievant's salary by three percent but otherwise denied relief.[2] The agency also declined to qualify the grievance for a hearing. The grievant has appealed the latter determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] Since the grievance was initially filed, the agency has implemented salary adjustments such that, as of the date of this ruling, the grievant's salary is approximately equal to that of the other employee with the same role and title.

[3] *See* Va. Code § 2.2-3004(B).

general benefits "shall not proceed to a hearing"[4] 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."[5] Typically, then, a threshold question is whether the grievant has suffered an 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues related to 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, even though his relative salary does not reflect his much greater years of experience. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the facts in the grievance record must 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."[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 Policy 3.05 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 13 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.[10] 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

[4] *Id.* §§ 2.2-3004(A), 2.2-3004(C).
[5] *See Grievance Procedure Manual* § 4.1(b)
[6] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[8] DHRM Policy 3.05, *Compensation*.
[9] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.
[10] *See* DHRM Policy 3.05, *Compensation*. DHRM Policy 3.05 has been amended effective July 1, 2019. While this grievance arose under the former version of this policy, the analysis and result is the same under both versions.

agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[11]

Here, the grievant argues that he should have received an in-band adjustment based on several pay factors. For example, the grievant notes that, following the agency's transition from a corrections-based to a community-based approach, his duties have involved supervising employees in a variety of roles. The professional skills he has developed include training staff hired into new positions, team-building, effective communication, due process, time-keeping, scheduling, and progressive discipline. He cites performance-based achievements relating to facility budgets, facility certification, and decreasing mandatory overtime. He brings over 30 years of progressive experience to bear on his role, and he views the agency's salaries as misaligned based on the employee who earns approximately the same salary he does, with the same role and title, despite having less than 10 years' experience.

However, while the grievant may reasonably argue that certain pay factors such as work experience, duties, and performance support his request for an in-band adjustment, the agency's position that its consideration of the pay factors does not substantiate an adjustment above three percent is also valid. DHRM policy does not mandate that employees with longer work experience be paid at a rate higher than the rate paid to employees with a shorter tenure; experience and education is just one of the 13 pay factors an agency must consider in making the difficult determinations of whether, when, and to what extent salary adjustments should be made in individual cases and throughout the agency. Thus, compensating arguably less-experienced employees at a higher salary than the grievant does not, on its own, amount to a disregard of the intent of the applicable policies, which allow management flexibility in making individual pay decisions based on consideration of the 13 pay factors.[12] Agency decision-makers deserve appropriate deference in making these determinations, and EDR will not second-guess management's decisions regarding the administration of its procedures, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.

Thus, the question in this case is not whether the applicable policy might support an in-band adjustment to the grievant's salary greater than three percent. Indeed, the facts might support such a pay action. But the question instead is whether the applicable policy mandates that the grievant receive a salary increase such that the agency's failure to provide an increase disregards the facts or is otherwise arbitrary or capricious. Here, the agency has provided EDR with salary information about the grievant, its other assistant superintendents, and how it considered the pay factors in determining their salaries. Although the grievant may disagree with the agency's conclusions, EDR has reviewed nothing that would suggest that the agency's determination disregarded the pertinent facts, unfairly considered any of the 13 pay factors, or was otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

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[11] *See Grievance Procedure Manual* § 9 (defining an "arbitrary or capricious" decision as one made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling No. 2008-1879.

[12] *See* DHRM Policy 3.05; DHRM Human Resource Management Manual, Ch. 8.

Noncompliance with the Grievance Procedure

In addition to his in-band adjustment request, the grievant raised multiple objections during the management resolution steps to the effect that the agency failed to comply with the grievance procedure. Among other issues, the grievant alleged significant problems at the second step:

> The Second Step of the Grievance occurred 26 days after I initiated it and it last[ed] less than 2 minutes . . . . It is my understanding that the second-step meeting is a fact finding meeting and should include open discussion of the grievance issues to promote understanding of the other party's position and possible resolution of the workplace issues (this did not happen). The parties can present information relevant to the grievance at this meeting (this did not happen). I was not able to call witnesses . . . . I was not able to have a selected individual for supporter and counselor . . . .[13]

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[14] That process assures that the parties first communicate with each other about the noncompliance and resolve any compliance problems voluntarily, without EDR's involvement. Specifically, the party claiming noncompliance must notify the other party of any noncompliance in writing and allow five workdays for the opposing party to correct it.[15] If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from EDR, which may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue. However, by proceeding with the grievance after becoming aware of a procedural violation, a party generally forfeits the right to challenge the noncompliance at a later time.[16]

For purposes of this qualification ruling, EDR finds that the grievant has waived any challenges to previous noncompliance by seeking qualification.[17] However, the conclusion of a grievance does not prevent the parties from voluntarily pursuing ongoing discussion of outstanding workplace issues. To the extent that the grievant was deprived of the opportunity for an open discussion during the grievance process and still seeks to meet for that purpose, the parties are encouraged to explore further steps to resolve outstanding issues and improve the employment relationship. While EDR will not mandate any particular approach, we offer a broad range of workplace dispute resolution tools to assist as appropriate. For more information, please call 888-232-3842.

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[13] Grievant's memorandum in response to the agency's third-step response. The grievant's understanding of the purpose of the second-step meeting, as described above, is correct. *See Grievance Procedure Manual* § 3.2 ("The purpose of the second-step meeting is fact finding and should include open discussion of the grievance issues to promote understanding of the other party's position and possible resolution of the workplace issues.") While the agency's third step-respondent offered to meet with the grievant after issuing her written response, the grievant declined to accept this meeting to cure the alleged noncompliance.

[14] *Id.* § 6.3.

[15] *See id*.

[16] *Id.*

[17] While the grievant raised multiple complaints to the agency alleging noncompliance with the grievance procedures, EDR has no indication that the grievant has sought a ruling from EDR on any noncompliance he alleged during the management steps. Instead, he opted to seek qualification of his grievance issues for a hearing.

EDR's qualification rulings are final and nonappealable.[18]

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[18] *See* Va. Code § 2.2-1202.1(5).