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QUALIFICATION RULING

In the matter of Norfolk State University
Ruling Number 2020-5092
August 4, 2020

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 March 3, 2020, grievance with Norfolk State University (the "university" or "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant began working for the university in a full-time position in April 2016. She is currently employed as an assistant director in one of the university's offices.[1] On or about September 25, 2017, the university changed the grievant's position to a different Role in the same Pay Band. The grievant subsequently received a 10 percent in-band adjustment to her salary effective February 25, 2018.[2] Due to a vacancy in the director position for her office, the grievant served as the interim director between October 2018 and October 2019. During that time, the grievant received temporary pay at the rate of approximately 9.5 percent of her base salary.[3] On July 1, 2019, the grievant received an approximately 5-percent increase to her base salary that was approved for classified state employees by the General Assembly. The university hired a new director for the grievant's office in November 2019. The grievant alleges that she has discussed continuing concerns about her compensation with the director since the director was hired, and that she learned her most recent request for a salary increase had been denied on February 4, 2020.[4]

On March 3, 2020, the grievant initiated a grievance with the university, alleging that she has not received "suitable nor comparable compensation" from the university since at least June 1, 2017. The grievant specifically alleges that the university failed to compensate her for

[1] Although the grievant's job duties and Role have changed, she appears to have retained the title of assistant director for her office throughout her employment with the university.
[2] The in-band adjustment was approved in December 2018 and the grievant was paid retroactive to February 25, 2018.
[3] It appears that the temporary pay given to the grievant was approved retroactively for several different periods of time that made up the approximately one year that she served as her office's interim director.
[4] According to the university, the director does not recall having a conversation about the grievant's salary with the grievant on that day.

overtime hours she worked between June 1, 2017, and March 31, 2018, failed to pay her the "budgeted salaries" for her position each year since her Role changed on September 25, 2017, and did not approve appropriate temporary pay when served as her office's interim director. The grievant also generally argues that she is not fairly compensated as compared with other similarly situated employees in her office. As relief, the grievant requested overtime compensation for the hours for which she had not been paid, a salary increase to the amount that is currently budgeted for her position by the university, retroactive pay for her budgeted salary from September 25, 2017, recalculation of the 2019 statewide 5-percent salary increase based on her budgeted salary, and additional temporary pay for serving as her office's interim director in 2018 and 2019.

During the management steps, the university agreed to pay the grievant for the overtime hours she worked between June 1, 2017 and March 31, 2018. The remaining issues relating to in-band adjustments, temporary pay, and the grievant's compensation in general were not resolved. Following the management resolution steps, the university president determined that the grievance record did not contain evidence demonstrating that a misapplication or unfair application of policy had occurred and declined to qualify the grievance for a hearing. 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.[5] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[6] 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.[7]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[8] 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."[9] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[10] For purposes of this ruling only, EDR assumes that the grievant has alleged an adverse employment action in that she asserts issues with her compensation.

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[5] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[6] *See* Va. Code § 2.2-3004(B).
[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[8] *See Grievance Procedure Manual* § 4.1(b).
[9] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[10] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

University's Application of Compensation Policy

The grievant argues that the university has misapplied and/or unfairly applied policy by not providing fair or appropriate compensation since September 2017. In particular, she alleges that the university has not paid her the budgeted salary for her position since that time and that she should have received additional temporary pay while serving as the interim director. To address these alleged errors, the grievant has requested a retroactive salary increase to the budgeted amount for her position from September 2017 to the present.[11] In response, the university asserts that the grievant is fairly compensated based on its consideration of the relevant pay factors, and further notes that her salary increased by approximately 26 percent between September 2017 and October 2019. 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.

DHRM Policy 3.05, *Compensation*, 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."[12] During the events at issue in this case, an upward in-band salary adjustment of up to 10 percent during a fiscal year was available under DHRM policy.[13] 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.[14] Although DHRM Policy 3.05 reflects the intent that similarly situated employees should be comparably compensated, it also invests agency management with broad discretion to make individual pay decisions in light of 13 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.[15] 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

[11] Typically, a grievance must be filed "within 30 calendar days of the date the employee knew or should have known of the management action or omission being grieved." *Grievance Procedure Manual* § 2.2. It appears that some of the challenged management actions relate to decisions about the grievant's compensation that occurred more than 30 calendar days before she initiated the grievance. However, an agency must "raise the issue of timeliness at any point through the agency head's qualification decision." *Id.* In this case, the university did not notify the grievant of any alleged issues with timeliness prior to the agency head's qualification decision, and therefore those matters have been waived. Nonetheless, a hearing officer only has the authority to order a pay adjustment dating from "the beginning of the 30 calendar day statutory period preceding the initiation of the grievance" in cases where the evidence shows that a certain type or level of compensation is mandated by written policy. *Rules for Conducting Grievance Hearings* § VI(C)(1). This ruling will address the grievant's claims accordingly.

[12] DHRM Policy 3.05, *Compensation*, at 11-12. DHRM Policy 3.05 has been amended since many of the events at issue in this case. This ruling will refer to the version of DHRM Policy 3.05 that was in effect at the time of the challenged pay actions.

[13] *Id*. at 11-13.

[14] *See* DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

[15] DHRM Policy 3.05, *Compensation*, at 4.

determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[16]

The grievant received an in-band adjustment of 10 percent effective February 25, 2018. At that time, 10 percent was the maximum amount for an in-band adjustment under DHRM Policy 3.05 in the absence of approval from DHRM for an "exceptional in-band increase[]."[17] Having reviewed the evidence in the grievance record, EDR finds no basis to conclude that the university's decision in 2018 was either inconsistent with policy or an arbitrary analysis of the applicable pay factors. Indeed, the university approved the maximum discretionary amount that was available at the time.

DHRM Policy 3.05 likewise governs agency decisions regarding temporary pay.[18] Temporary pay is available for employees who are "assigned different duties at the same or higher level of responsibility on an interim basis . . . ."[19] As with in-band adjustments, agencies must consider the applicable pay factors when making decisions regarding temporary pay.[20] When the grievant became eligible for temporary pay in 2018, an employee could receive temporary pay of up to 15 percent of their base salary for performing "the duties of a different Role in a higher Pay Band." Performing "the duties of the same or different Role in the same Pay Band" allowed for temporary pay of up to 10 percent above the employee's base salary.[21] The grievant received temporary pay of approximately 9.5 percent of her base salary between October 2018 and October 2019 for serving as her office's interim director while the director position was vacant. The grievant may reasonably believe that she should have received additional temporary pay because the former director's salary was substantially greater than the temporary pay that she received. However, EDR has not reviewed evidence to demonstrate that the university's decision regarding the appropriate temporary pay approved for the grievant was inconsistent with policy or disregarded any applicable pay factors.

As to the grievant's arguments regarding the "budgeted salary" for her position between 2017 and 2019, EDR further finds no basis to determine that the university's compensation decisions were inappropriate. The university reserves a specific amount of funding per year for each of its positions. The salary budgeted by the university represents the maximum amount that may be paid to an employee in a particular position. That the university allocated certain funding for the grievant's position from 2017 through 2019 did not create an obligation to pay her that amount; to the contrary, such a practice would be inconsistent with DHRM Policy 3.05, which requires agencies to make compensation decisions based on a consideration of the pay factors described above. As to the grievant's current salary, the same reasoning would apply to her claim that she should receive an increase to the maximum budgeted amount. Although the grievant may be raising legitimate concerns about her compensation, it appears that the university has fully considered the applicable pay factors when making decisions related to her salary. Finally, EDR notes that the university recently hired a third-party vendor to conduct a university-wide

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[16] *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.
[17] DHRM Policy 3.05, *Compensation*, at 12.
[18] *Id.* at 10-11.
[19] *Id.* at 10.
[20] *Id.*
[21] *Id.* at 10-11.

compensation study. The vendor's evaluation did not identify any necessary pay adjustments for the grievant or other employees in the grievant's office.

In conclusion, EDR has thoroughly reviewed the evidence in the grievance record and found no basis to support the grievant's arguments that an additional in-band adjustment is mandated under DHRM Policy 3.05 or that the university misapplied or unfairly applied policy as to the grievant's salary. As discussed above, DHRM Policy 3.05 is intended to grant agencies the flexibility to address issues such as internal salary alignment, changes in an employee's job duties, work experience, and education, among other things.[22] 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. Although the grievant could argue that certain pay factors might support her request for additional compensation, the university's position that its consideration of the pay factors does not substantiate the need for a salary increase is also valid. An employee's work performance, experience, and education represent just several of the many 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.[23] 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, EDR cannot find that the university's conclusion that the grievant's compensation is appropriate was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Alleged Unequal Compensation Practices

In addition, the grievant argues that she is unfairly compensated as compared with a male colleague in her office who works in a similar Role in the same Pay Band.[24] In essence, the grievant contends that internal salary alignment—a pay factor "that takes into consideration the proximity of one employee's salary to the salaries of others who have comparable levels" of training, experience, duties, and performance[25]—and her level of education, among other things, justify a salary increase to account for the alleged disparity.

This assertion amounts to a claim of wage discrimination based on sex, for example, under the Equal Pay Act ("EPA").[26] To establish such a claim, a grievant must present evidence that raises a question whether: (1) the employer has paid different wages to employees of the opposite sex; (2) the employees performed equal work on jobs that require equal skill, effort, and

[22] *See* DHRM Policy 3.05, *Compensation*.
[23] *Id*.
[24] The grievant also appears to allege that two employees with greater salaries than her own were on extended administrative leave, during which time they continued to receive their salaries. It is unclear whether these matters relate to the grievant's employment. *See Grievance Procedure Manual* § 2.4 (stating that management actions that are the subject of a grievance must "[p]ertain[] directly and personally to the employee's own employment"). Nonetheless, the university has explained that the employees in question were placed on administrative leave with pay while certain personnel matters were resolved. Both employees later left their positions with the university. EDR has identified no error in these actions, and they further appear to have no connection to or impact on the university's assessment of the grievant's compensation.
[25] DHRM Policy 3.05, *Compensation*, at 3.
[26] 29 U.S.C. § 206(d).

responsibility; and (3) the jobs are performed under similar working conditions.[27] Here, the comparator employee is paid approximately 30 percent more than the grievant, works in the same office as the grievant, and reports to the same supervisor as the grievant. These facts reasonably satisfy the first and third elements. The central question is thus whether the grievant and the comparator hold jobs that require equal skill, effort, and responsibility.

The Code of Federal Regulations explains that the second element's equal-work standard requires the jobs in question to be "substantially equal."[28] The Fourth Circuit Court of Appeals has interpreted "substantially equal" in this context to mean that the plaintiff and the comparator must hold jobs that are "virtually identical," not merely comparable.[29] The Eastern District of Virginia has further held that two jobs are identical for purposes of the EPA when "the opposite sex comparators performed substantially similar work, received identical classification, and had comparable work experience."[30]

When a grievant presents evidence that satisfies the three elements of an EPA claim, an agency may defend against the claim by demonstrating that the disparity in the grievant's and the comparator's compensation is the result of one of four enumerated affirmative defenses.[31] These defenses include successfully attributing the disparity to (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.[32]

EDR has thoroughly reviewed the grievant's arguments, as well as the information submitted by the parties regarding the similarity of the grievant's and the comparator's jobs, and determined that the facts do not show they are "substantially equal" for purposes of the EPA. Although the two jobs are in the same Pay Band, they are classified differently and have different job titles: the grievant's job is an instruction manager position as the assistant director of a program, whereas the comparator's job is a technical instruction position as the director of a program. Both the grievant and the comparator are managers, but the grievant supervises one position and the comparator supervises three positions. The grievant's job responsibilities include development, delivery, and evaluation of online training services, as well as management of the university's online training program for students. The comparator's duties, on the other hand, consist of technology support, collaboration with stakeholders, and project management.

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[27] *See* Spencer v. Va. State Univ., 919 F.3d 199, 203 (4th Cir. 2019); *see, e.g.*, Watson v. Va. Dep't of Agric. & Consumer Servs., 2020 U.S. Dist. LEXIS 44253, at *16-17 (E.D. Va. Mar. 12, 2020).

[28] 29 CFR § 1620.13(a).

[29] *Spencer*, 919 F.3d at 203 (citing Wheatley v. Wicomico County, 390 F.3d 328, 333 (4th Cir. 2004).

[30] Reardon v. Herring, 191 F. Supp. 3d 529, 548 (E.D. Va. 2016); *see also* Hinton v. Va. Union Univ., 185 F. Supp. 3d 807, 842 (E.D. Va. 2016) (second element satisfactorily alleged where an employee argued that he and his comparators held the same job title, worked in the same department, and had the same qualifications); Taylor v. Millennium Corp., 2016 U.S. Dist. LEXIS 28174, at *29-30 (E.D. Va. Mar. 4, 2016) (second element satisfactorily alleged where an employee claimed that she and her comparator held jobs that required the same skill, effort, and responsibility, even though they reported to different supervisors and supervised different employees); Earl v. Norfolk State Univ., 2014 U.S. Dist. LEXIS 88652, at *43-44 (E.D. Va. June 26, 2014) (second element satisfactorily alleged where a college professor claimed he and his comparators taught "the same" or "fungible" courses).

[31] *See* EEOC v. Md. Ins. Admin., 879 F.3d 114, 120 (4th Cir. 2018).

[32] 29 U.S.C. § 206(d)(1). An example of factors other than sex include the comparator's education, work experience, and prior compensation. *See also Md. Ins. Admin*, 879 F.3d at 123 ("[A] viable affirmative defense under the EPA requires more than a showing that a factor other than sex *could* explain or *may* explain the salary disparity. Instead, the EPA requires that a factor other than sex *in fact* explains the salary disparity.").

Given the apparent differences in the classification and responsibilities of the grievant's and the comparator's jobs, EDR finds that they do not raise a sufficient question whether the two employees perform "substantially equal" work that could support a wage discrimination claim based on sex under the EPA.

Moreover, even assuming that the grievant were able to establish all three elements for a successful claim of wage discrimination, EDR finds that the university has articulated a basis for the difference in pay based on a factor other than sex.[33] Although the grievant's level of education may be greater than the comparator's,[34] the comparator appears to have substantially more relevant work experience than the grievant. In 2014, the grievant worked in a part-time position with the university providing instructional support, and has worked in her current position with university since 2016. The remainder of her work experience is in information technology support, customer service, and other areas that do not appear to be directly related to her current job.[35] The comparator, on the other hand, has worked in his current position since 2010 and previously worked for the university for approximately six years in another position with responsibility for providing technical instruction support. His remaining work experience is in information technology support and program management, both of which are part of his current job duties as discussed above.

In conclusion, EDR notes that the grievant appears to be a competent and valued employee. However, there is insufficient evidence to demonstrate that the disparity in compensation between the grievant and the comparator can be considered wage discrimination based on the grievant's sex. As a result, the grievant does not qualify for a hearing on this basis.

CONCLUSION

For the reasons discussed above, EDR finds that the facts presented in the grievance record do not constitute a claim that qualifies for a hearing under the grievance procedure.[36] Because the grievance has not raised a sufficient question whether the university misapplied or unfairly applied compensation policy or engaged in wage discrimination based on sex, the grievance does not qualify for a hearing on either of these grounds.[37]

EDR's qualification rulings are final and nonappealable.[38]

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[33] The factors other than sex discussed in this section would also demonstrate a nondiscriminatory basis for the pay disparity if the claim is analyzed under Title VII of the Civil Rights Act. Accordingly, the grievance would not qualify for a hearing on this basis either.

[34] The grievant alleges that she has a master's degree, and the documents provided by the university show that the comparator has a bachelor's degree.

[35] Although the grievant's work experience may not be directly related to her current position, the skills and abilities she gained from her previous employment may allow her to better perform her current job.

[36] *Grievance Procedure Manual* § 4.1.

[37] To the extent this ruling does not address any specific issue raised in the grievance, EDR has thoroughly reviewed the grievance record and determined that the grievance does not raise a sufficient question as to whether the grievant experienced an adverse employment action, whether discrimination, retaliation, or discipline may have improperly influenced any management decision cited in the grievance, or whether the agency may have misapplied and/or unfairly applied state policy that would warrant qualification for a hearing.

[38] *See* Va. Code § 2.2-1202.1(5).

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