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QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2020-4978
October 31, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”)¹ on whether her July 19, 2019 grievance with the Department of State Police (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

Prior to the events at issue in this grievance, the grievant was employed by another state agency. At her previous agency, the grievant engaged in grievance activity. After receiving notice that her position at her previous agency was being abolished, she was laid off. While she was on a leave without pay-layoff from her previous agency, the grievant exercised her preferential hiring rights under DHRM Policy 1.30, *Layoff*, and applied for a position with the agency. She was offered a position in the same Role and Pay Band as her previous position; however, the agency offered the grievant a salary that was approximately 12 percent less than her salary at her previous agency. The grievant accepted the position and began working at the agency on May 25, 2018.

In March 2019, the grievant became aware of potential issues with the agency’s decision to hire her at a reduced salary as compared with her compensation at her previous agency and requested a review of her salary to correct the alleged issues. On June 25, 2019, the agency notified the grievant that it believed its decision was appropriate and would not adjust her salary. The grievant filed a grievance on July 19, 2019, arguing that the agency had (1) misapplied and/or unfairly applied state policy relating to layoff benefits and compensation by not maintaining her salary at her previous agency when she was hired; (2) retaliated against her because of her grievance activity at her previous agency; and (3) engaged in discrimination by treating her differently than a similarly situated employee of a different race. As relief, the grievant requested “correction of [her] salary” to what she was paid at her previous agency (with

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.

any intervening salary increases also adjusted proportionally), back pay from her date of hire, and an opportunity to negotiate for an additional salary increase. Following the management resolution steps, the agency head 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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.⁴

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ 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."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 she asserts issues with her compensation.

Misapplication/Unfair Application of Policy

The grievant argues, in effect, that the agency misapplied and/or unfairly applied policy by offering her a reduced salary as compared with her compensation at her previous agency. In particular, the grievant asserts that she "received a demotion" and "was not given the opportunity to negotiate" her salary when she was hired; that her salary at her previous agency was within the hiring range advertised for the position; that the agency did not "accurately and fairly" consider the relevant pay factors when making its salary offer to her; and that she was treated differently than at least one other similarly situated employee who transferred to the agency under similar circumstances. 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.

² See *Grievance Procedure Manual* §§ 4.1 (a), (b).

³ See Va. Code § 2.2-3004(B).

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (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)

The intent of DHRM Policy 1.30, *Layoff*, is to allow “agencies to implement reductions in the work force according to uniform criteria when it becomes necessary to reduce the number of employees or to reconfigure the work force”⁸ Policy 1.30 mandates that each agency identify employees for layoff in a manner consistent with business needs and comply with the policy’s provisions, including those placement opportunities both before and after the layoff has become effective.⁹ Once an employee has been placed on leave without pay-layoff, she may use a Preferential Hiring Card to “to exercise preferential employment rights to a vacant classified position in another agency that is in the same Role as the employee’s former position.”¹⁰ When an employee is offered a position with another agency, her salary “will be established according to the non-competitive Voluntary Transfer or non-competitive Voluntary Demotion Pay Practice [pursuant to DHRM Policy 3.05, *Compensation*], as appropriate, based on the position.”¹¹ In this case, the agency offered the grievant a position in the same Role and Pay Band as her position at her previous agency, so it was considered a non-competitive Voluntary Transfer under Policy 3.05.

Policy 3.05 provides that, for a non-competitive Voluntary Transfer, “the employee’s salary is negotiable between the minimum of the assigned Salary Range up to 10% above the current salary,” although the increase “may not exceed the assigned Salary Range.”¹² While the general intent of Policies 1.30 and 3.05 may be to maintain an employee’s former salary when they are offered a position under these circumstances, Policy 3.05 also specifically provides that, “[i]n some situations, the negotiated salary may be less than the employee’s current salary.”¹³ Policy 3.05 further reflects the intent to invest agency management with broad discretion for making individual pay decisions and corresponding accountability in light of each 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.¹⁴ 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.¹⁵

⁸ DHRM Policy 1.30, *Layoff*, at 1.

⁹ *See id.* at 6-18.

¹⁰ *Id.* at 17.

¹¹ *Id.* at 18. Policy 1.30 further provides that, “To be offered a position, the applicant . . . must be *minimally qualified* for the vacancy.” *Id.* at 17. Here, there appears to be no dispute that the grievant was minimally qualified because she was offered the position. Competitive recruitment may occur in certain circumstances involving employees with preferential hiring rights, although that did not occur here. *See id.*

¹² DHRM Policy 3.05, *Compensation*, at 9 (rev. June 1, 2018). Policy 3.05 has been amended since the events at issue in this case. This ruling will refer to the version of Policy 3.05 that was in effect at the time the grievant began working for the agency.

¹³ DHRM Policy 3.05, *Compensation*, at 9.

¹⁴ *Id.* at 4, 8-9.

¹⁵ *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.

Here, the agency informed the grievant that its salary decision was based on the job duties and responsibilities of the position,¹⁶ the grievant's experience and education, and internal salary alignment, among other pay factors. In support of her position, the grievant alleges that the agency improperly assessed her experience and education, as well as her status on leave without pay-layoff, when deciding what salary to offer her. For example, the agency's Pay Action Worksheet ("PAW") states that the grievant was "unemployed," and accordingly notes that the position would be a "promotion." The agency appears to have acknowledged the grievant's concerns about the PAW and made recommendations to ensure that her personnel record accurately reflects the nature of her recruitment through a non-competitive Voluntary Transfer pursuant to Policy 1.30.¹⁷ The agency ultimately determined, however, that there was no basis to change her pay because its consideration of the applicable pay factors at the time she was hired resulted in an appropriate salary offer.

Having reviewed the information provided by the parties, EDR finds that there is insufficient evidence to demonstrate that the agency's action violated a specific mandatory policy provision or was outside the scope of the discretion granted by the applicable compensation policies. Indeed, Policy 3.05 specifically contemplates that a non-competitive Voluntary Transfer may result in the employee being offered a reduced salary, even if the employee's most recent salary is within the hiring range advertised for the position. Moreover, agencies are not required to negotiate upward from an initial salary offer, though it may be a good practice to do so in some cases. While the grievant may be raising legitimate concerns about her compensation, it appears the agency appropriately considered the applicable pay factors when making its decision in this case. In summary, EDR has not reviewed information to demonstrate that the agency disregarded any relevant information about her experience and education, or otherwise erred in its consideration of the relevant pay factors, such that its salary offer was arbitrary or capricious.

With regard to the agency's treatment of similarly situated employees, the evidence in the grievance record does not demonstrate that other comparator employees were sufficiently similarly situated to the grievant such that the agency's consideration of the relevant pay factors could be found inconsistent here. The grievant argues that an individual of a different race transferred to the same position as hers in connection with a layoff in 2008 and retained their former salary. Even assuming the grievant's allegation is true, the time lapse of 10 years between these two events is so great that EDR cannot conclude the grievant and the comparator employee were similarly situated for purposes of consistently applying Policies 1.30 and 3.05 to the facts of this case. Most importantly, the agency has indicated that, at the time the grievant was offered the position, two other agency employees worked in the same Role. One of these employees had greater experience than the grievant and received a greater salary; the other employee had a shorter tenure in the Role than the grievant and received a lower salary. Under these circumstances, EDR has no basis to conclude that the grievant was treated differently than other similarly situated employees.

¹⁶ Though the position the grievant was offered at the agency was in the same Role and Pay Band as her former position at her previous agency, the agency has explained that its job duties were different in scope.

¹⁷ It appears that, at least initially, some agency employees who were involved in the grievant's hiring process were not aware of her leave without pay-layoff status. Once the grievant brought her concerns about her salary to management's attention, the agency reviewed her hiring documentation and made efforts to correct any issues. The grievant does not appear to allege that her personnel record does not show she was hired through a non-competitive Voluntary Transfer while she was on leave without pay-layoff.

In conclusion, although the grievant could argue that certain pay factors and/or policy provisions support her position that the agency should have offered to maintain her salary from her previous agency, the agency's position that its consideration of the pay factors did not support such an offer is also valid. An employee's job duties, experience, and education represent just several of the many different factors an agency must consider in making difficult salary determinations in individual cases and throughout the agency.¹⁸ In cases like this one, where a mandatory salary entitlement does not exist, agencies are given great discretion to weigh the relevant pay factors. Therefore, based on the totality of the circumstances, EDR cannot find that the agency's salary offer was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

In addition, the grievant contends that the agency offered her a reduced salary as compared with her compensation at her previous agency to retaliate against her based on her grievance activity at her previous agency. For a claim of retaliation to qualify for hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹⁹ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.²⁰ Ultimately, to support a finding of retaliation, EDR must find that the evidence raises a sufficient question whether the protected activity was a but-for cause of the alleged adverse action by the employer.²¹

Here, the grievant engaged in protected activity at her previous agency by filing a grievance about matters related to her employment and, as discussed above, EDR considers the grievant's claims regarding her compensation as a raising a sufficient question as to whether she experienced an adverse employment action for purposes of this ruling. The grievant has not, however, presented evidence to establish a causal connection between her grievance activity at the previous agency and the agency's salary offer. Indeed, the agency asserts that it was not aware of her prior grievance activity at least until she filed her grievance.²² Regardless of this

¹⁸ See DHRM Policy 3.05, *Compensation*, at 4.

¹⁹ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

²⁰ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

²¹ See *id.* (citing *Univ. Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2534 (2013)).

²² The agency's assertions regarding its knowledge of the grievant's protected activity at her previous agency is not entirely credible. For example, the agency stated to EDR that it was unaware of her grievance activity until this ruling was pending. The grievance itself, however, plainly states that the grievant believes the agency improperly offered her a reduced salary based, at least in part, on retaliation for her grievance activity at her previous agency. Nonetheless, there is no information in the grievance record to show that any agency employees were aware of the grievant's protected activity before she initiated the grievance on July 19, 2019.

assertion, EDR has reviewed nothing to indicate that any agency employees involved in the decision about her salary were aware of her grievance activity before she accepted the agency's offer of employment. EDR cannot conclude under the facts presented here that the agency's salary offer was based on her exercise of protected activity at her previous agency.

Moreover, even if EDR were to infer a causal connection between the grievant's protected activity and the allegedly retaliatory salary offer, the agency has provided legitimate, nonretaliatory business reasons for its decision. As discussed above, Policies 1.30 and 3.05 do not require agencies to maintain the salary of an employee on leave without pay-layoff who is offered placement with another agency in the same Role and Pay Band. The agency has presented information showing that it considered the applicable pay factors in deciding what salary to offer the grievant. EDR has thoroughly reviewed the grievance record and finds that there is nothing to demonstrate the agency's exercise of discretion was merely a pretext for retaliation. Furthermore, there are no facts that would indicate the grievant's protected activity was the but-for cause of the agency's actions. Accordingly, EDR concludes that the grievance does not raise a sufficient question as to whether retaliation has occurred, and does not qualify for a hearing on this basis.

Discrimination

Finally, the grievant alleges that the agency's salary offer was discriminatory on the basis that at least one employee of a different race was treated differently. Grievances that may be qualified for a hearing include actions related to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity or expression, age, political affiliation, genetics, disability, or veteran status.²³ For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, 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. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.²⁴

In this case, there are no facts to indicate that the agency's salary offer was based on a discriminatory motive. Indeed, as discussed more fully above, EDR finds that the agency has identified legitimate, nondiscriminatory business reasons for that decision based on its consideration of the relevant pay factors under Policy 3.05, and there is no basis to conclude those reasons were a pretext for discrimination. While the grievant may disagree with the agency's decision, a grievance must present more than a mere allegation of discrimination to qualify for a hearing – 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. Accordingly, the grievance does not qualify for a hearing on this basis.

²³ See *Grievance Procedure Manual* § 4.1(b); see also Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

²⁴ See *Hutchinson v. INOVA Health Sys., Inc.*, Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

EDR's qualification rulings are final and nonappealable.²⁵



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²⁵ See Va. Code § 2.2-1202.1(5).