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QUALIFICATION RULING

In the matter of Old Dominion University
Ruling Number 2020-5005
December 13, 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 Old Dominion 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 is employed by the University as a Law Enforcement Officer II. She asserts in her grievance that certain other University employees in her role with less state service have higher salaries. Accordingly, she requested a salary review and fair compensation. During the resolution steps, the University’s Human Resources department conducted a salary review of the grievant’s position. The review determined that the grievant’s salary was appropriate and no pay increase was warranted. The grievant has continued her grievance through the remaining resolution steps and now seeks qualification of her grievance for hearing.

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

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 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).

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.”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 she asserts issues with her compensation.

The grievant argues, in effect, that management has misapplied and/or unfairly applied policy by declining to approve an in-band adjustment to increase her salary. 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 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 implications; (12) long term impact; and (13) current salary.⁹ 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

In support of her position, the grievant claims that certain employees in her role at the University had fewer years of state service and higher salaries as compared to her. The grievant’s position at the time of initiating her grievance was understandable, as she was referencing publicly-available salary database information. However, subsequent pay actions, including for the grievant herself, have occurred in the intervening months. Accordingly, EDR is unable to find any University employee in the grievant’s Role with fewer years of state service who has a

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*, at 7.

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

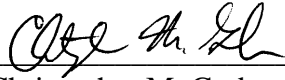
⁹ See DHRM Policy 3.05, *Compensation*, at 2, 22.

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.

higher salary than the grievant, except for one. This one employee also had numerous years of relevant experience prior to joining the University. Accordingly, EDR finds that there is insufficient evidence to demonstrate that the University's refusal to approve a salary increase violated a specific mandatory policy provision or was outside the scope of the discretion granted to the University by the applicable compensation policies. Furthermore, it appears the University fully considered the applicable factors in reaching the decision that no pay action was necessary for the grievant in this case.

As stated above, DHRM Policy 3.05 is intended to grant the agencies the flexibility to address issues such as internal salary alignment, changes in an employee's job duties, the application of new job-related skills, and retention.¹¹ The policy is not intended to entitle employees to across-the-board salary increases or limit the University's discretion to evaluate whether an individual pay action is warranted. While the grievant could argue that certain pay factors might support her request for an in-band adjustment, 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 experience as well as internal salary alignment represent just two of the many different factors the University 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 University.¹² In cases like this one, where a mandatory entitlement to a pay increase does not exist, the University has great discretion to weigh the relevant factors. Therefore, based on the totality of the circumstances, EDR cannot find that the University's denial of the grievant's request for an in-band adjustment was improper or otherwise arbitrary or capricious. 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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¹¹ See DHRM Policy 3.05, *Compensation*, at 7.

¹² *Id.* at 22.

¹³ See Va. Code § 2.2-1202.1(5).