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QUALIFICATION RULING

In the matter of the Department of Forensic Science
Ruling Number 2021-5212
March 8, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her December 29, 2020, grievance with Department of Forensic Science (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

In October 2020, the grievant requested an in-band salary adjustment. According to the grievant, management declined to increase her salary at that time, reasoning that funds were not available for an in-band adjustment because a vacant office manager position at the grievant’s work location could not be filled due to a hiring freeze.¹ After the grievant received her annual performance evaluation in November 2020, she appealed the evaluation and again asked for an in-band adjustment. By that time, the hiring and compensation freeze was lifted and the office manager position had been filled; the grievant therefore believed that her request for a salary increase should be considered again.²

On December 3, 2020, management again informed the grievant that an in-band adjustment was unwarranted, this time explaining that the grievant was the second-highest paid agency employee in her role and that she had not assumed other duties outside the scope of her role justifying additional pay. The grievant raised the issue for a third time on December 21 when she inquired about a review of pay equity at the agency. On December 28, management informed the grievant that there was no pay-equity-related basis for increasing her salary at that time.

On December 29, 2020, the grievant filed a grievance challenging the agency’s denial of her requests for an in-band adjustment. Following the management resolution steps, the agency

¹ Beginning in April 2020, a hiring and compensation freeze was put in place for the Commonwealth’s agencies due to the unknown financial impacts of the COVID-19 pandemic.

² The grievance record contains documents about the grievant’s appeal of her annual performance evaluation, but her grievance only challenges the agency’s decisions regarding her salary.

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.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ 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.⁵ The grievant has not alleged discrimination, retaliation, or discipline; therefore, her claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action because she asserts issues with her compensation.

The grievant argues, in effect, that management has misapplied or unfairly applied policy by declining to approve an in-band adjustment for her, citing several factors that she alleges justify a salary increase. In particular, the grievant contends that she has taken on additional business-purchasing duties, that she is the most experienced employee in her role, and that she has not received a merit-based salary increase in a number of years. She further asserts that the agency received funding to fill several new positions at the same time that it denied her request for a pay increase and that the salary of a less-experienced employee with similar education is only slightly less than hers. In addition, the grievant learned during the management steps that two of her previous pay actions in 2006 and 2011 were calculated differently than she understood at the time. 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

³ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

⁴ See Va. Code § 2.2-3004(B).

⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ See *Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

to provide potential salary growth and career progression within a Pay Band or to resolve specific salary issues.”⁹ 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.¹⁰ 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.¹¹ 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.¹²

There appears to be no dispute in this case that the grievant is a competent and valued employee. She has worked for the agency for many years and, by all accounts, effectively performs her job responsibilities to the agency’s satisfaction. Having reviewed the information in the grievance record, however, EDR finds insufficient evidence to demonstrate that the agency’s failure to approve the grievant’s request for an in-band adjustment violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policies. Indeed, it appears the agency fully considered the applicable factors in reaching a decision that no pay action was necessary for the grievant in this case. For example, the agency has provided pay information confirming that, among employees in her role, the grievant receives the second-highest salary. The only employee paid more than the grievant receives a salary differential based on the area of the Commonwealth in which they work. Though we understand the grievant’s concern that a recently-hired employee is paid only slightly less than her, DHRM policy does not mandate that new or more junior employees be paid at a substantially lower rate than existing or more senior employees, or that the salaries of existing employees be increased to match or exceed that of newer hires.

Considering the totality of the circumstances, an analysis of many of the individual pay factors—for example, job duties and responsibilities, work experience and education, and internal salary alignment—with respect to employees in the grievant’s role does not support a conclusion that the agency’s existing salary structure violates any specific policy requirement. As stated above, DHRM Policy 3.05 is intended to grant the agency flexibility to address issues such as changes in an employee’s job duties, performance, internal salary alignment, and retention.¹³ 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. The grievant argues that certain pay factors support her request for an in-band adjustment, but the agency’s position that its consideration of the relevant pay factors does not substantiate the need for a salary increase

⁹ DHRM Policy 3.05, *Compensation*, at 11-12.

¹⁰ See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

¹¹ DHRM Policy 3.05, *Compensation*, at 4.

¹² 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 (and authorities cited therein).

¹³ See DHRM Policy 3.05, *Compensation*.

is also valid. An employee's work performance and experience 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.¹⁴ In cases like this one, where a mandatory entitlement to a pay increase does not exist, agencies are given great discretion to weigh the relevant factors. For these reasons, EDR cannot find that the agency's denial of the grievant's request for an in-band adjustment was improper or otherwise arbitrary or capricious.

Regarding the grievant's concerns about previous salary actions in 2006 and 2011, she argues that her pay was adjusted less than she believed at the time, with the result that she has not received the full benefit of those pay decisions. In 2006, the grievant claims she should have received a \$3,000 in-band adjustment for retention purposes. The grievant signed a salary offer in 2006 that reflects an actual pay increase of \$2,770. Similarly, the grievant argues that, when she transferred to her current position in 2011, the agency agreed to match the salary she was receiving in her former position. The grievant signed a salary offer in 2011 that indicates her salary actually decreased by \$82 annually. The agency contends that these salary actions were consistent with policy and reflected a consideration of relevant pay factors and other circumstances at the time.

The grievant's frustration at discovering what she feels were inaccurate or misleading adjustments to her salary is understandable. However, the events in question occurred 15 and 10 years ago, respectively. Beyond the grievant's recollection about what management communicated to her at the time, EDR has received no information about these actions other than the signed salary offers themselves. Based on a review of the available evidence, it appears that the grievant received accurate pay information in writing and signed the salary offer letters to indicate her acceptance. It may be true that these documents were different from what the grievant expected based on her discussions with management about these pay actions. Nonetheless, the grievant has not provided evidence that demonstrates these salary actions were a misapplication or unfair application of policy. Accordingly, and although we are sympathetic to the grievant's concern, the evidence before EDR does not raise a question whether the agency's 2006 and 2011 pay actions were improper or otherwise arbitrary or capricious.

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.¹⁵ Because the grievance does not raise a sufficient question whether the agency misapplied or unfairly applied compensation policy, the grievance does not qualify for a hearing on those grounds.

EDR's qualification rulings are final and nonappealable.¹⁶

¹⁴ *Id.* This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. For example, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination, or some other improper motive.

¹⁵ *Grievance Procedure Manual* § 4.1.

¹⁶ *See* Va. Code § 2.2-1202.1(5).

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