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## **QUALIFICATION RULING**

In the matter of the Department of Corrections  
Ruling Number 2021-5213  
March 30, 2021

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his October 8, 2020, grievance with Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

### FACTS

In approximately December 2019, the grievant participated in a competitive recruitment process for a Cognitive Counselor position at one of the agency’s institutions. The grievant was selected for the position and received a 5% salary increase. The grievant became aware in September 2020 that another Cognitive Counselor received a 10% pay increase when they were promoted to that position. The grievant requested salary data from the agency, which indicated that employees in other positions at his institution also received salary increases of 10% when they were promoted into their roles. According to the grievant, other Cognitive Counselors have confirmed that they, too, received 10% pay increases in connection with their promotions.

The grievant filed a grievance on October 8, 2020, alleging that the agency had misapplied or unfairly applied compensation policy by approving a lesser salary increase for him as compared with other employees under similar circumstances. The grievant further claims that the agency’s salary decision constitutes discrimination based on his age. As relief, the grievant seeks an additional 5% salary increase retroactive to the date he was promoted to Cognitive Counselor. 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.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the

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<sup>1</sup> See *Grievance Procedure Manual* §§ 4.1 (a), (b).

affairs and operations of state government.<sup>2</sup> 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.<sup>3</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>4</sup> 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."<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>6</sup> For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action because she asserts issues with his compensation.

The grievant argues, in effect, that management has misapplied or unfairly applied compensation policy by offering him a salary increase of 5% while other Cognitive Counselors have received 10% increases. The grievant also notes that employees at his institution who have been promoted (either as Cognitive Counselors or in other positions) received pay increases of approximately 10% on average. The grievant argues that his past and current work performance, along with his prior relevant work experience with another employer, support his argument that he should receive an additional 5% salary increase equal to what others received when they were promoted. 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 addition, the grievant contends that the agency has engaged in discriminatory pay practices based on his age because he, a 51-year-old, received a lesser salary increase than a younger employee who was also promoted to Cognitive Counselor.

#### *Misapplication/Unfair Application of Policy*

DHRM Policy 3.05, *Compensation*, authorizes salary negotiations when an employee is promoted to a different position in a higher Pay Band through a competitive selection process.<sup>7</sup> When an employee is promoted, "the promotional increase is negotiable from the minimum of the new Salary Range."<sup>8</sup> Like all pay practices, salary negotiations in connection with a promotion 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

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<sup>2</sup> See Va. Code § 2.2-3004(B).

<sup>3</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> DHRM Policy 3.05, *Compensation*, at 3, 23.

<sup>8</sup> *Id.* at 3.

pay decisions.<sup>9</sup> 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.<sup>10</sup> According to the policy, “[a]gencies may approve promotional increases above the hiring range minimum and below the hiring range maximum as long as the resulting salary is within the new Pay Band and the action is supported by the Pay Factors.”<sup>11</sup> 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.<sup>12</sup>

There appears to be no dispute in this case that the grievant is a competent and valued employee. He has worked for the agency for many years and, by all accounts, effectively performs his job responsibilities to the agency’s satisfaction. The grievant has identified what appears to be a disparity in pay practices, both for employees in his role and at his institution generally. The salary data offered by the grievant indicates that the average promotional salary increase for these employees has been approximately 10% over the course of several years. The agency’s decision to approve only a 5% increase for the grievant, on its surface, is inconsistent with this typical practice.

Having reviewed the information in the grievance record, however, EDR finds insufficient evidence to demonstrate that the agency’s decision to approve a 5% salary increase as part of the grievant’s promotion to Cognitive Counselor 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 further pay action beyond the original 5% was necessary for the grievant in this case. The agency has provided pay information confirming that, among employees in his working title agency-wide, the grievant receives the second-highest salary. The only employee paid more than the grievant has several years of additional experience working for the agency as compared with the grievant. Moreover, the grievant’s current salary (with the 5% increase) exceeds the amount paid to several other employees with more years of service than the grievant. As a result, the agency alleges that approving a 10% salary increase for the grievant would make him the highest-paid Cognitive Counselor even though he is not the most senior or experienced employee in that role, and thus it would create an internal salary alignment issue.

The grievant disagrees with the agency’s conclusion that internal salary alignment justifies a lower pay increase for his promotion to Cognitive Counselor, noting that he received a competitive salary offer approximately 15 years ago that resulted in his salary being greater than others in his role. He argues that, if salary alignment is currently a concern, it is related to the past competitive salary offer and has been an issue since then. Although we understand the grievant’s

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<sup>9</sup> See DHRM Human Resource Management Manual, Ch. 8, *Pay Practices*.

<sup>10</sup> See DHRM Policy 3.05, *Compensation*, at 19-24.

<sup>11</sup> *Id.* at 3.

<sup>12</sup> 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).

concerns, the agency is responsible for reviewing individual pay actions to ensure that they are consistent with DHRM Policy 3.05, both in relation to the affected employee and the agency as a whole. For example, 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.

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, work experience, training, and internal salary alignment.<sup>13</sup> 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. Accordingly, a typical practice of approving 10% salary increases when promoting employees does not necessarily mean that a decision to depart from that practice for an individual employee is inconsistent with policy if it based on a reasonable assessment of applicable factors.

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. The grievant argues that certain pay factors support his request for a pay increase, but the agency's position that its consideration of the relevant pay factors does not substantiate the need for a salary increase in excess of 5% is also valid. An employee's work performance, training, 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 salary increases should be granted in individual cases and throughout the agency.<sup>14</sup> 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 decision to approve a 5% salary increase for the grievant as part of his promotion to Cognitive Counselor was improper or otherwise arbitrary or capricious.

### *Discrimination*

The grievant further questions whether the agency's decision to approve a 5% pay increase in conjunction with his promotion to Cognitive Counselor, as opposed to a 10% increase, was based on his age. In support of this position, the grievant has noted that at least one younger Cognitive Counselor received a 10% increase when they were promoted. Grievances that may be qualified for a hearing include actions that occurred due 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.<sup>15</sup> 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

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<sup>13</sup> See DHRM Policy 3.05, *Compensation*.

<sup>14</sup> *Id.* This is not to say that the agency's discretion in determining which employees should receive salary increases is without limitations. For example, an agency could not deny a salary increase on the basis of unlawful retaliation, discrimination, or some other improper motive.

<sup>15</sup> See, e.g., Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.<sup>16</sup>

EDR has thoroughly reviewed the information provided by the parties and finds that the grievance does not raise a sufficient question as to whether the agency's decision to approve a lower salary increase for the grievant was based on a discriminatory reason. As discussed above, the agency's assessment of the grievant's salary was based on a reasonable consideration of the applicable pay factors, and EDR has found no reason to dispute that decision. EDR has been unable to identify any evidence, and the grievant cites to none, that raises a sufficient question whether the agency's justification for that decision was mere pretext.<sup>17</sup> Consequently, the grievance 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.<sup>18</sup> Because the grievance does not raise a sufficient question whether the agency misapplied or unfairly applied compensation policy or engaged in discrimination based on the grievant's age, the grievance does not qualify for a hearing on those grounds.

EDR's qualification rulings are final and nonappealable.<sup>19</sup>

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<sup>16</sup> See *EEOC v. Sears Roebuck & Co.*, 243 F.3d 846, 852 (4th Cir. 2001) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 519 (1993)).

<sup>17</sup> See, e.g., *Bennett v. Permanente*, 931 F. Supp. 2d 697, 705 (D. Md. 2013) ("An employer's reliance on factors that are analytically distinct from age in reaching the adverse decision rules out age as its but-for cause.").

<sup>18</sup> *Grievance Procedure Manual* § 4.1.

<sup>19</sup> See Va. Code § 2.2-1202.1(5).