Issue: Qualification – Compensation (Inband adjustment); Ruling Date: July 20, 2012; Ruling No. 2012-3373; Agency: Department of Juvenile Justice); Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of Department of Juvenile Justice
Ruling Number 2012-3373
July 20, 2012

The grievant has requested a ruling on whether his April 20, 2012 grievance with the Department of Juvenile Justice (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant works as a Juvenile Correctional Officer at the agency. His functional role title is Security Officer III. The grievant claims that he has been performing the work of a School Sergeant, a position that he alleges is currently vacant, and requests to be compensated monetarily for this position.

The employee work profile for the grievant's Juvenile Correctional Officer position includes the security and supervision of juvenile offenders, implementation of the treatment program, crisis intervention, documentation and record keeping, and control center rotation. The grievant's job duties break down as 45% security and supervision of juvenile offenders, 25% implementation of the treatment program, 15% crisis intervention, 10% documentation and record keeping, and 5% control center rotation. On or about October 4, 2011, the grievant signed his employee work profile. The grievant alleges that he assumed the duties of a School Sergeant on October 20, 2011.

The agency alleges the grievant's duties "have remained the same for the past several years," and that the grievant has not had upward change in duties that would warrant a salary increase. In addition, the agency asserts that the grievant does not have supervisory authority over other Juvenile Correctional Officers, which is a requirement for a Sergeant role. The agency also asserts that the agency's School Sergeant positions were eliminated several years ago due to the agency's realignment and restructuring of security operations.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] 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 hearing"[2] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has not alleged discrimination, retaliation, or discipline. Therefore, the grievant's claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[4] 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 he asserts issues with his compensation.

The primary policy implicated by this claim is Department of Human Resource Management (DHRM) Policy 3.05. This policy provides that agencies may provide an in-band adjustment up to 10% to an employee who has assumed new higher-level duties and responsibilities that are critical to the operations of an agency.[7] In-band adjustments and other pay practices 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]

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[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(C).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, EDR substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[7] DHRM Policy 3.05, *Compensation*, "In-Band Adjustment."
[8] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.

In assessing whether to grant pay actions, an agency must consider, for each proposed adjustment, each of the following thirteen 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] Some of these factors relate to employee-related issues, and some to agency-related business and fiscal issues, but the agency has the duty and the broad discretion to weigh each factor. Thus, DHRM Policy 3.05 appears to reflect the intent to invest in agency management broad discretion for making individual pay decisions and the corresponding accountability in light of each of the 13 enumerated pay factors. The need for internal salary alignment is just one of the 13 different factors an agency must consider in making the difficult determinations of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.

Even though agencies are afforded great flexibility in making pay decisions, agency discretion is not without limitation. Rather, EDR has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted 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 this case, it appears that the agency has exercised appropriate discretion under policy in determining the compensation of the grievant's position. The agency asserts the grievant's duties have remained the same for the past several years. More importantly, the agency asserts that even though the School Sergeant positions have been eliminated for several years, one of the primary responsibilities of that former position had been to directly supervise the juvenile correctional officers assigned to a particular school. It is apparent that the core difference between the job duties of a Juvenile Correctional Officer position and the former School Sergeant position is having the authority to supervise all of the juvenile correctional officers within a school and to resolve higher level problems (i.e. those problems that cannot be resolved at the subordinate level). The agency asserts the grievant does not have the authority to supervise other juvenile correctional officers.

The grievant alleges that he received post orders to supervise staff on a daily basis and has been given the same authority as a Sergeant by the agency's assistant superintendent. However, the grievant also admits that he was instructed by the agency's assistant superintendent that if he had "any trouble with any officer not following instructions to notify [the assistant superintendent]." In short, it does not appear that the grievant has assumed full supervisory authority over those officers. The grievant has not shown that the agency's refusal to grant him a pay increase violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policy. The grievant has also presented no evidence that the agency's denial of a pay increase was inconsistent with other

[9] DHRM Policy 3.05, *Compensation*.
[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 2008-1879.

decisions made by the agency or otherwise arbitrary or capricious. Even assuming the grievant inherited additional duties that the former School Sergeant performed, it does not appear those duties were substantial enough to find that the agency was arbitrary or capricious in refusing to grant him an increase in pay.[11]

For the reasons stated above, this grievance does not qualify for hearing. There is no evidence that the agency has misapplied or unfairly applied policy, or that it was arbitrary or capricious in its treatment of the grievant's salary, even assuming that the grievant has effectively been assigned some duties of the former School Sergeant position.

CONCLUSION AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.[12] The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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[11] Nothing in this ruling is meant to indicate that the grievant could not have been awarded or may not still be deserving of an upward adjustment based on the duties he performs. Indeed, analysis of the pay factors and policy provisions might justify such pay actions if the agency chose to take it. This ruling finds only that the grievant has failed to show sufficient evidence that the agency misapplied or unfairly applied policy or otherwise abused the discretion granted under DHRM Policy 3.05.

[12] Va. Code § 2.2-1202.1(5).