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QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Number 2025-5751
October 23, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether her June 21, 2024 grievance with the Department of Health (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about June 21, 2024, the grievant initiated a grievance asserting that she had not received a promised salary increase, which she claimed should have been effective on January 25, 2024. On that date, the grievant began a new position with the agency, which she had apparently been offered as part of a competitive recruitment process. According to the grievant, she was considering competing offers at the time and accepted the position with the agency on the condition that the agency would match an offer from another state agency (“State Agency 2”) that she would be declining.

Until January 25, the grievant alleges she worked for the agency as an Accounting Manager, with a base salary of \$111,583. Following the recruitment process, she was offered a promotion to Deputy Director of General Accounting, at a salary of \$112,000 – the maximum of the posted hiring range for that position. The grievant claims that she informally expressed her intention to decline the position because it would mean accepting significant additional responsibilities without a commensurate salary increase. According to the grievant, she informed the hiring manager (the Director of Financial Management, who was also her current supervisor) of her intention to accept a job offer at State Agency 2 for a salary of \$120,750. The Director allegedly persuaded her to stay at their agency and accept the Deputy Director position with the promise of a “retention increase” to \$120,750.

It appears that, over the next several months, the Director and the grievant pursued the requested salary adjustment. However, the requests were apparently declined by the agency’s human resources department. After unsuccessfully attempting to learn the status of the request, the grievant filed a grievance on June 21. She has additionally resigned from the agency, due at least in part to the agency’s “failure to follow through with the promised pay increase.” Following the

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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.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action that could be remedied by a hearing officer. An adverse employment action involves an act or omission by the employer that results in "harm" or "injury" to an "identifiable term or condition of employment."⁵ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action because she asserts issues with a promotion and the associated compensation, she alleges she was denied.

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*, authorizes salary negotiations when an employee is promoted to a different Role in a higher Pay Band.⁶ Although 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.⁷ 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

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

² See Va. Code § 2.2-3004(B).

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

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ See *Muldrow v. City of St. Louis*, 144 S. Ct. 967, 974 (2024) (addressing a required element of a Title VII discrimination claim); see, e.g., *Burlington Indus. v. Ellerth*, 524 U.S. 742, 761 (1998) (defining adverse employment actions under Title VII to include "tangible" acts "such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits").

⁶ DHRM Policy 3.05, *Compensation*, at 3.

⁷ See *id.* at 19-24. The "current salary" factor is generally only considered for pay actions related to demotions and downward role changes. *Id.* at 20.

by the Pay Factors.”⁸ Because agencies are generally 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.⁹

Despite its general flexibility, Policy 3.05 imposes a notable prohibition on agencies’ discretion to make counteroffers in the situation where an employee has received a competitive salary offer from another state agency. Therefore, as relevant here, to the extent the agency desired to implement a competitive salary adjustment to retain the grievant in light of her offer from State Agency 2, this approach would not have been consistent with Policy 3.05: “A competitive offer may not occur . . . with an offer from another state agency.”¹⁰ The policy does provide for alternative, short-term retention incentives, such as bonuses up to \$10,000 and additional annual leave.¹¹ Policy 3.05 also provides for in-band adjustments. Although the adjustment process does not guarantee an outcome and may thus be of little value during active recruitment negotiations, agencies may nevertheless invoke this option to “prevent employees from seeking employment outside the agency” and/or to “align an employee’s salary more closely with those of other employees[] within the same agency.”¹²

Here, it appears the Director sought to retain the grievant by seeking an in-band adjustment, which presumably would account for the grievant’s proven labor market value.¹³ According to the grievant, to persuade her to accept the Deputy Director position, the Director advised that “she had gotten approval from [agency] human resources that [the grievant] could/would get a retention increase of \$120,750 upon accepting the role of Deputy Director.” However, the grievant claims that, after she accepted the Deputy Director position at \$112,000, the Director was unable to implement the requested increase, due to “roadblocks” that the Director suspected were motivated by “personal” reasons (against the Director). In March 2024, the Director apparently took the approach of revising the Employee Work Profile for the Deputy Director position and submitting a corresponding pay action worksheet to support an increase to the grievant’s salary. This request was denied on grounds that the grievant’s recorded salary of \$112,000 was adequately aligned with the agency’s internal compensation statistics. The agency’s HR manager explained that, because the grievant’s salary was situated within the first quartile of comparable positions within the agency and statewide (and not below), her salary did not meet the criteria for an in-band adjustment for internal alignment. In response, the supervisor inquired: “What other pathways are available to increase [the grievant’s] salary to the requested \$120k? She is the lowest paid Deputy in [their Office] and is in a critical position, and it will be difficult to retain or attract other candidates at the current salary.”

The record does not reflect any response to the Director’s inquiry, and it appears she began a prolonged medical absence soon thereafter. On May 17, the grievant followed up with her interim supervisor (a deputy commissioner), inquiring about the salary “increase that was promised as a

⁸ *Id.* at 3.

⁹ 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).

¹⁰ DHRM Policy 3.05, *Compensation*, at 7.

¹¹ See *id.* at 10, 12.

¹² *Id.* at 7.

¹³ *Id.* at 22-23 (citing Market Availability and Salary Reference Data as being among the Pay Factors that should inform all compensation decisions).

condition to [her] accepting” the Deputy Director position. Upon request, the grievant provided evidence of her competing offer from State Agency 2. After receiving no updates, the grievant followed up again on June 10. The last action on this request apparent from the record is that the deputy commissioner submitted a new pay action worksheet, with requested salary increase effective June 10. The grievant inquired about backdating the action to January 25, but no response is apparent from the record. As the agency’s final word on the matter, the agency commissioner noted in her response that DHRM Policy 3.05 prevented the agency from making the grievant a counteroffer or competitive salary adjustment in response to her offer from State Agency 2.

The totality of the record available to EDR suggests that the Director and agency human resources were not in agreement on appropriate and/or desired methods to retain and promote the grievant. Although the grievant has not provided any documentation to show what the Director may have “promised” or discussed with her regarding her promotional salary prior to her acceptance of the Deputy Director position, we assume for purposes of this ruling that the grievant’s version of events is accurate: *i.e.*, she believed the Director would be able to work with agency management to implement a compensation adjustment that would effectively match the counteroffer she was declining. Essentially, she appears to have accepted her new position on faith that the Director and agency human resources would compensate her commensurate with her proven value in the state labor pool. EDR recognizes that, under DHRM Policy 3.05, the agency may have lacked options to adequately match the grievant’s offer from State Agency 2 prior to her decision of which offer to accept. Nevertheless, the agency could have attempted to utilize other retention approaches, such as a bonus or a credible commitment to assess an in-band adjustment. But the agency was not required to adopt any of these approaches in order to retain the grievant, and therefore we cannot say that the agency misapplied or unfairly applied policy by not implementing them.

If the record contained evidence that the agency made the grievant a concrete offer and then reneged on its terms, we would likely reach a different conclusion. However, there is no documentation reflecting what the Director may have promised the grievant, what the Director requested from agency HR prior to March 2024, or what information the Director may have shared with HR to support her request. As a result, based on the available record, a hearing officer would have no basis to find that the agency had obligated itself to an amount beyond the grievant’s annualized salary of \$112,000. In addition, although we sympathize with the grievant’s position, this situation illustrates the need for offers and acceptances to be memorialized in writing in order to be enforceable. Without such documentation, the record does not raise a sufficient question as to whether the agency made the grievant a compensation offer that it then failed to honor. Although the Director may have wished to retain the grievant at a competitive salary, the agency head correctly noted that a competitive offer would not have been consistent with DHRM Policy 3.05, and EDR has reviewed nothing to suggest that any additional retention incentives were fairly part of the grievant’s compensation agreement.

In sum, 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.

EDR’s qualification rulings are final and nonappealable.¹⁴

¹⁴ See Va. Code § 2.2-1202.1(5).

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