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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2022-5417
August 3, 2022

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 December 29, 2021 grievance with the Department of Corrections (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about December 29, 2021, the grievant initiated a grievance challenging the agency's practices for tracking his hours of work. The grievant alleged that the only permissible method for him to "clock in" for work each day is via a timekeeping application at his workstation computer, which is located inside the maintenance warehouse at his facility. The grievant claims that, in order to access his workspace computer each day, he must first go to his facility's main administration building to retrieve sets of keys to unlock the warehouse, his personal workspace, and other areas at the facility. After obtaining his access keys, the grievant alleges he must travel approximately half a mile from the administration building to the maintenance warehouse, where he opens his workspace, logs in to his computer, and clocks in via the timekeeping application. The grievant contends that this process can involve many points of potential delay, such that the grievant may clock in up to 15 minutes after arriving at the administration building.

In his grievance, the grievant argued that the time it takes for him to obtain his keys and travel to his workspace should be considered compensable time under the Fair Labor Standards Act ("FLSA").[1] As relief, he requested that employees like himself be able to clock in at the nearest time clock to where they arrive at the facility. As the grievance proceeded through the management resolution steps, the step respondents declined to grant relief, asserting that the agency's practices were consistent with applicable requirements. The agency head declined to qualify the grievance for a hearing, and the grievant now appeals that determination to EDR.

[1] The grievant is a salaried full-time employee. His Employee Work Profile classifies him as non-exempt from FLSA requirements. *See generally* 29 U.S.C. §§ 201-219.

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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] 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" constituting "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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

In this case, the grievant essentially asserts that the agency has misapplied and/or unfairly applied policy by failing to account for his compensable time accurately under the FLSA and related regulations and policies. For an allegation of misapplication or unfair application of policy to qualify for a hearing, the grievance record must 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 general, the FLSA requires employers to pay their employees at a rate equal to one-and-one-half times their regular rate of pay for every hour worked in excess of 40 during a given workweek.[8] Under the Portal-to-Portal Act, which amended the FLSA, compensable time for FLSA purposes does not include an employee's time spent on

> (1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, [or]
>
> (2) activities which are preliminary to or postliminary to said principal activity or activities . . . .[9]

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[2] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[3] *See* Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] Ray v. Int'l Paper Co. 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[7] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[8] 29 U.S.C. § 207(a).
[9] 29 U.S.C. § 254(a).

However, time spent on "activities which are an integral and indispensable part of the principal activities" is compensable.[10] An activity is integral and indispensable not merely when an employer requires it or benefits from it, but when the activity is "an intrinsic element of [the employee's principal activities] and one with which the employee cannot dispense" if they are to perform their principal activities.[11]

Consistent with these requirements, the agency's Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, provides that, for its non-security employees, "work begins when the employee arrives at the actual workstation, place of performance of essential job functions."[12] Under this policy, the agency has designated a specific timekeeping application as its "official time, attendance, and leave system."[13] Non-security employees assigned to an agency computer "must use the computer to log in" and record their time.[14] Moreover, the policy specifically states that "picking up keys to enter a locked office is not integral" for non-security employees and, thus, would not contribute to compensable time.[15] With respect to the grievant in particular, the agency has maintained that picking up keys is not integral and indispensable to his principal activities.

According to his Employee Work Profile, the grievant is an Equipment Repair Supervisor who primarily works as a mechanic at his facility. The purpose of his position is to "[o]versee[] the maintenance, operation and repair of [the agency's] motor fleet of all assigned vehicles," to conduct training on maintenance and proper usage of such vehicles and related equipment, and to ensure appropriate vehicle inspection. The most substantial portion of the grievant's duties (45 percent) involves the management of the facility's auto shop. That responsibility includes monitoring vehicle maintenance and inspection schedules and diagnosing repair needs, completing vehicle inspections, accounting for tools, and maintaining an emergency generator system. Another portion of the grievant's duties (25 percent) involves coordinating work assignments, including to offender workers. To a lesser extent, the grievant is expected to enforce the agency's safety and security regulations with respect to equipment management and the oversight of offender workers.

The grievant alleges that, upon arrival to work each day, he must drive first to the facility's main administration building, which he cannot enter until a control room employee admits him. The grievant claims that the control room employees may be otherwise engaged and not immediately available to admit him. After he enters the building, the grievant proceeds to a secure

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[10] Integrity Staffing Solutions, Inc. v. Busk, 574 U.S. 27, 33 (2014) (citing Steiner v. Mitchell, 350 U.S. 247, 252-3 (1956)); *see also* 29 C.F.R. § 790.8. In addition, courts have recognized a "continuous workday rule" to compensate the span of time between an employee's first and last principal activity, such that travel time undertaken "after the beginning of the employee's first principal activity and before the end of the employee's last principal activity is . . . covered by the FLSA." Epps v. Scaffolding Solutions, LLC, No. 2:17cv562, 2019 U.S. Dist. LEXIS 96401, at *15-16 (E.D. Va. Apr. 2, 2019) (quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 37 (2005)).

[11] *Busk*, 574 U.S. at 36-37 (finding that warehouse employees were not entitled to compensation for time spent waiting to undergo their employer's security screening, as their principal activity of packaging products for shipment could be completed if the employer had no security screening); *cf.* Aguilar v. Mgm't & Training Corp., 948 F.3d 1270, 1277-79 (10th Cir. 2020) (finding that detention officers at a county prison, in maintaining facility security as a primary work activity, were engaging in compensable work from the time that they underwent initial security screening intrinsic to their duties).

[12] Agency Operating Procedure 110.1, *Hours of Work and Leaves of Absence*, at 6.

[13] *Id.*

[14] *Id.* at 7.

[15] *Id.* at 6.

key storage system to retrieve sets of maintenance keys that unlock the maintenance warehouse, the grievant's personal workspace, and other infrastructure locations at the facility. The grievant alleges that, when he is in the administration building, it is not uncommon for other employees to engage him regarding maintenance needs, which may cause additional delay. The grievant then exits the administration building, returns to his vehicle, and drives approximately half a mile to the maintenance warehouse. He then enters the warehouse, proceeds inside to his workstation, logs into his computer (which can be slow to start), and then clocks in using the agency's timekeeping application. According to the grievant, as many as 15 minutes may elapse between his arrival at the administration building and his clock-in time at his workstation.

Upon a thorough review of the record, EDR cannot conclude that the grievance presents a sufficient question whether the grievant is engaging in uncompensated work time before he logs in to the agency's timekeeping application at his workstation computer. Because the FLSA generally excludes pre-work travel time from its wage-and-hour requirements, the grievant's time spent driving to the warehouse at the beginning of his workday, in itself, would not ordinarily be compensable under this standard. Therefore, the question is whether the grievant's first stop at the administration building to pick up his access keys is "integral and indispensable" to his principal work activities, such that his workday begins with that stop for FLSA purposes – or, instead, whether obtaining the keys is merely a "preliminary" activity outside the scope of the FLSA. It appears that the grievant's principal work activities revolve around the management and maintenance of the facility's vehicles and related equipment. We do not perceive an indispensable connection between these principal activities and obtaining keys to open the facility's maintenance warehouse and the grievant's workstation.

Instead, obtaining access keys, and/or waiting to do so, would appear to fall within the "preliminary" activities specifically excluded from FLSA coverage by the Portal-to-Portal Act. The U.S. Department of Labor has interpreted "preliminary activities" for FLSA purposes to include "activities such as checking in and out and waiting in line to do so," and traveling between the work facility entrance and the employee's workstation.[16] Moreover, courts generally consider initial security and/or inspection requirements to be excludable "preliminary activities," unless such specific security interests are themselves a principal aspect of the work the employee was hired to perform.[17]

Here, the record does not suggest any indispensable job-specific connection between the grievant's stop at the administration building to get warehouse keys and his work as an Equipment Repair Supervisor. The grievant has not alleged that he needs the keys from the administration building for any work-related purpose other than simply to open his workstation and clock in. Thus, the evidence suggests that the agency could theoretically eliminate the requirement for the

[16] 29 C.F.R. §§ 790.7(f)-(g), 790.8(c).
[17] *See, e.g.*, *Busk*, 574 U.S. at 36-37; *Aguilar*, 948 F.3d 1277-79; *see also* Whalen v. United States, 93 Fed. Cl. 579 (Fed. Cl. 2010) (air traffic controllers' time spent going through preliminary security protocols was not integral to their primary work activities). Similarly, time spent to boot up a computer and log in to work systems may be compensable for employees who must perform their principal work activities on the computer. Peterson v. Nelnet Diversified Solutions, LLC, 15 F.4th 1033 (10th Cir. 2021).

grievant to obtain these access keys without impairing his ability to maintain the agency's vehicles and equipment – the focus of his job.[18]

Moreover, the grievant has indicated his belief that his facility management plans to change the procedures at issue in his grievance by setting up secure storage for maintenance keys in the warehouse, allowing maintenance workers to report directly to the warehouse upon arriving to work. This development supports the proposition that obtaining keys from the administration building is not integral to the performance of the grievant's principal job activities. That said, it appears that the very dispensability of the grievant's stop at the administration building is what gives rise to his understandable complaint, given that he has no choice but to accomplish the agency's imperative on his personal time. Thus, the anticipated change appears to be a positive response from facility management to a reasonable employee concern. Even if reasonable, however, the grievant's complaint as expressed in his grievance does not raise a sufficient question whether the agency has misapplied or unfairly applied a relevant policy. Accordingly, the grievance is not qualified for a hearing.[19]

EDR's qualification rulings are final and nonappealable.[20]

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[18] *See, e.g.*, Jones v. Hoffberger Moving Servs. LLC, 92 F. Supp. 3d 405, 411-12 (D. Md. 2015) (citing *Busk*, 574 U.S. at 35) (loaders' wait time at their main warehouse before traveling to assigned jobsites was not indispensable because it could have been eliminated without impairing their ability to load and unload trucks, as they were hired to do).

[19] EDR's determinations in this regard only address whether the claims presented qualify for hearing under the grievance procedure. To the extent the grievant may have other legal or equitable remedies available, they could be sought in another forum. For example, nothing in this ruling precludes the grievant from pursuing a timely complaint with the U.S. Department of Labor.

[20] *See* Va. Code § 2.2-1202.1(5).