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QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2023-5488
December 29, 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 September 27, 2022 grievance with the Virginia Employment Commission (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant was a non-exempt state employee with the Virginia Employment Commission through August 9, 2022 and filed a grievance due to an alleged overpayment that was rescinded from the grievant’s final paycheck. The grievant alleges that this overpayment was in fact the proper amount of pay he was due and that the agency incorrectly rescinded that payment from the final paycheck. The problem originates from the time-keeping function of Cardinal, the state employee interface where all employees report their hours on a weekly basis. The grievance and the agency’s respective response references the week of June 20 – June 24, 2022, that Monday being the Juneteenth holiday. In February 2022, the agency gave “improper guidance” as to how to accurately report time worked on holidays. The agency determined that the grievant, who worked physical hours on the 20th despite it being a holiday, incorrectly reported those hours, resulting in Cardinal accounting for more hours than the grievant actually worked and created an overpayment. This led to a dynamic discussion among various offices of the agency as to how to report the time. The issue primarily stems from the distinction between Overtime – Straight Time and Overtime – Time and a Half. The discussions between the office representatives and the grievant included much disagreement as to when to report certain worked hours as either Regular Time or one of these two types of overtime pay. Eventually, the Finance department decided to look at all agency employees’ time in Cardinal back to October 2021 in order to ensure everything was accurately reported, and retroactively resolve overpayment or underpayment as needed. This led to the agency finding that there were inaccuracies in the grievant’s time for five separate weeks dating back to October 2021 (not including the week of June 20, 2022, which was deemed accurate), resulting in further pay being considered overpayment and rescinded. For relief, the grievant is requesting that the original reported time is reinstated and the amount that was subtracted for an alleged overpayment be given back to the grievant.

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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 Thus, 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 The grievant has not alleged any issues of discrimination or retaliation. Consequently, this grievance can only qualify for a hearing if 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, the available facts 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 applicable policy's intent.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 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷ For purposes of this ruling only, EDR will assume that the grievant has alleged an adverse employment action because the grievance asserts issues with reduced compensation (if improperly reduced).

The grievant argues, in effect, that the agency misapplied or unfairly applied state policy and/or law by rescinding payment that the agency deemed as overpayment for the week of June 20, 2022. It appears that the agency acknowledged the error and subsequently took steps to correct it. However, the agency further corrected multiple weeks of payment retroactively, going back to October 2021. The grievant argues, in particular, that the agency has been contradictory and unreliable in providing a consistent rule and explanation as to how to report time as a non-exempt employee on holidays. This argument is supported by a string of agency emails through August 2022 in which multiple representatives of different departments conversed over what the rule is regarding reporting holiday time, or more broadly, overtime versus regular time. There was also notice given in February 2022 of the correct policy to follow, but these emails ultimately concluded

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, e.g., EDR Ruling No. 2022-5309.

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").

that that policy was misleading or incorrect. As relief, the grievant requests that the corrections that resulted in overpayment be rescinded.

Upon a thorough review of all the evidence presented by the parties, EDR cannot conclude that the grievance presents a sufficient question whether the agency has misapplied or unfairly applied policy in recovering its overpayment of the grievant's salary. As was evidenced in the string of emails, and supported by the agency's finance department, it was determined that while the timesheet for the week of June 20, 2022 was accurate, there were five other weeks going back to October 2021 that were inaccurate. While the strings of emails included much discourse and sometimes inconsistencies among agency representatives and employees, the finance department's response ultimately clarified the rule regarding holiday pay and overtime pay for non-exempt employees, and EDR finds no misapplication of policy regarding these corrections.

To explain the policy, consider the week of June 20, 2022. That Monday, the 20th, is a holiday, meaning that state employees are paid for that day off when eligible. If a non-exempt employee were to work that day anyway, they would report those hours as Regular Hours in addition to the Holiday leave hours. Here, the employee would put into the timesheet 8 hours of "Holiday" and 6 physical hours of "Regular Hours." Overtime, whether "Straight Time" or "Time and a Half," is only used when the total hours in a week exceeds 40 – however, the key distinction is that "Time and a Half" is only used if the threshold of 40 hours *physically worked* has been met. Continuing with the example, so far there are 8 hours of Holiday leave and 6 hours of physical work on Monday. Tuesday, the employee works a total of 10 hours, 8.5 hours are worked on Wednesday, and 10 hours are worked on Thursday. At this point, the total number of hours (including Holiday leave) is 42.5 hours, exceeding the 40-hour threshold. However, only 34.5 hours have been physically worked. For that reason, the excess 2.5 hours past the 40-hour limit are reported on Thursday as 2.5 hours of Overtime – Straight Time. Finally, 9 hours are worked on Friday. A portion (5.50 hours) of those are reported as Overtime – Straight Time, and now that the total hours physically worked has amounted to 40 hours, the remaining 3.5 hours are reported as Overtime – Time and a Half. In addition to the explanations given by the agency, this policy and application is also supported by the DHRM policies regarding holidays and overtime.⁸ As was mentioned, the week of June 20, 2022 was ultimately determined to be accurate as the grievant reported it, but the finance department used this same policy to correct five other timesheet weeks. The corrections appear to be just as accurate and the grievant has not identified any information suggesting otherwise.

The grievant has not pointed to any applicable law or policy, and we identify none, that mandated the agency to take a different approach. According to the agency, the Virginia Department of Accounts provides agencies with accounting guidance that they are required to follow, which includes guidance on overpayments.⁹ Regardless of errors, such as inconsistencies in communication or waiting until several months have passed to review and correct a timesheet, the agency is obligated to correct timesheets and collect any overpayments that resulted from

⁸ DHRM Overtime Pay Guidance – Effective July 1, 2010; *see also* DHRM Policy 4.25, *Holidays*, at 3 (“For non-exempt employees, only hours physically worked over 40 hours in any one workweek shall be compensated at the overtime rate of time and one-half, regardless of how many hours are worked on the holiday.”)

⁹ *See Commonwealth Accounting Policies and Procedures Manual*, “Unpaid Leaves of Absences and Overpayments.” According to the *Manual*, agencies should establish written policies and procedures for the recovery of overpayments and provide these policies to employees. *Id.* at 5.

errors.¹⁰ In essence, such corrections are not only under the broad discretion of the agency to correct as needed, but are required by the Department of Accounts to remedy whenever an error surfaces. Although we understand the grievant's frustration and observe that the record suggests a lack of clarity in the agency's discussions with the grievant (and the rest of the agency and their employees) about the proper procedures for reporting holiday time and overtime, we find nothing to suggest that the agency's ultimate actions with respect to the overpayment and rescission of such overpayment violated any policy mandate or disregarded any applicable policy's intent.

In conclusion, upon a thorough review of the record, EDR is unable to identify a sufficient question as to whether the agency misapplied or unfairly applied state or agency policy in the circumstances presented in this case. Accordingly, the grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹¹

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Office of Employment Dispute Resolution

¹⁰ *Id.*

¹¹ *See* Va. Code § 2.2-1202.1(5).