Issues: Qualification – Compensation (FLSA/Overtime) and Discrimination (Race); Ruling Date: July 28, 2016; Ruling No. 2016-4385; Agency: Department of Corrections; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2016-4385
July 28, 2016

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 January 11, 2016 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

The grievant is employed as a senior probation and parole officer by the agency. As a probation and parole officer, the grievant is assigned to a weekly rotation to handle GPS calls on an "on call" basis. The grievant has asked to be taken off the GPS rotation, but the agency appears to have denied the grievant's requests. The grievant asserts that other employees—in particular, the Chief and former Deputy Chief—have removed themselves from GPS duty. On or about January 11, 2016,[1] the grievant initiated a grievance challenging his continuing assignment to GPS duty as a misapplication and/or unfair application of policy and race discrimination.[2] After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that decision to EDR.[3]

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.[4] Additionally, by statute and under the grievance procedure, management is reserved the

[1] The grievant initially attempted to initate his grievance with EDR on or about January 11, 2016. After he was advised by EDR that the grievance needed to be initiated with the agency, the grievant apparently provided the grievance to the agency. The date on which this occurred is unclear.

[2] The grievant also raises a concern that he was not selected to conduct gun safety checks for agency employees. From the grievance record, it appears that he raises this issue as evidence in support of his claim of race discrimination, rather than as an independent claim. However, to the extent that the grievant has challenged his nonselection as an independent management action, there is no basis for qualification, as the nonselection does not constitute an adverse employment action. The responsibility for performing the checks does not carry supplemental pay or a special job title, and there is no evidence that his nonselection constituted an agency action having an adverse effect on the terms, conditions, or benefits of his employment.

[3] The grievant asserts that the agency failed to comply with the procedural requirements of the grievance procedure. Claims of noncompliance must be raised through the procedure set forth in § 6.3 of the *Grievance Procedure Manual*. As these claims were not raised through the noncompliance process prior to this qualification ruling, EDR considers such claims to have been waived. *See Grievance Procedure Manual* § 6.3.

[4] *See id.* § 4.1.

exclusive right to manage the affairs and operations of state government.[5] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out 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.[6]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] For purposes of this ruling only, EDR will assume, without deciding, that the grievant's continued assignment to GPS duty could arguably constitute an adverse employment action.

Misapplication/Unfair Application of 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. In this case, the grievant asserts that the agency misapplied and/or unfairly applied policy in placing and keeping him on the GPS duty rotation. In particular, the grievant argues that the agency's actions fail to comply with the Fair Labor Standards Act and related policies in that he is not granted compensatory days off for holidays during which he is on call, not paid for the time spent on call, and not paid overtime if leave is taken or a holiday occurs during a work period when he has been on call. The grievant also argues that he does not receive the stipend which officers with a "sex offender caseload" receive, even though he also is assigned to the GPS duty rotation.

On Call Pay/Overtime

The Fair Labor Standards Act ("FLSA")[10] mandates that an employer compensate employees for overtime hours *actually* worked.[11] However, the FLSA does not mandate that an employer provide vacation or holiday time, and it does not require that hours taken as vacation or holiday leave be counted as hours actually worked for purposes of overtime pay. Further, in most cases, where an employee is not required to stay at his or her work location while on call,

[5] *See* Va. Code § 2.2-3004(B).
[6] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[10] 29 U.S.C. § 201 *et seq.*
[11] *See generally* 29 C.F.R. § 785.5. For a brief discussion of the requirements imposed by the FLSA, see the "Handy Reference Guide to the Fair Labor Standards Act" by the U.S. Department of Labor's Wage and Hour Division, available at https://www.dol.gov/whd/regs/compliance/hrg.htm.

he or she is not considered to be working under the FLSA—with the exception of that portion of an on call period when an employee is actually responding to a call.[12] As such, the grievant has not shown in his grievance any basis for a finding that he would be due payment during periods of his on call status under the applicable standards of the FLSA.

Agency policy, while consistent with the FLSA, provides greater benefits in regards to on call pay than required under by the FLSA. Under agency Operating Procedure 110.2, *Overtime and Schedule Adjustments*, a probation officer who receives a GPS call (or email) after work hours receives a minimum of 2 hours of compensation or leave, even if less time is actually worked.[13] If the actual time worked is more than 2 hours, the employee receives compensation or leave for the period of time worked.[14] If an employee responds to a GPS call while on call during a holiday, the employee receives an additional period of compensatory leave of either 2 hours or the actual time worked. However, where an employee responds to a call during a work period in which there has been a holiday or the employee has taken leave, he or she does not receive overtime compensation unless he or she has exceeded 160 hours of work time *excluding* the holiday and/or leave time.[15]

In this case, the grievant has not presented any evidence to show that he has not been compensated in accordance with either the mandates of the FLSA or the agency's policy. Further, he has not identified any law or policy requiring that he receive compensation for on call time, additional leave days to make up for holidays spent on call, or overtime compensation where he has actually worked 160 hours or less in a work period. Lastly, the grievant has not shown that the agency has been inconsistent in its application of its pay policies. As there is no evidence that the agency has violated a mandatory policy or abused its discretion, the grievance does not qualify for a hearing on this basis.

Stipend

The grievant also asserts that he should be paid a $1,200 stipend which is provided to employees with a sex offender caseload. He argues that as he performs the same GPS duty as these officers, he should receive the additional compensation.

The agency states that the stipend is provided for employees whose positions are classified with cost codes as being sex offender specialists (with sex offender specialist caseloads) and notes that the grievant's position is not classified in this manner. The agency also states that GPS duty is not limited to employees who have been identified as sex offender specialists. To the contrary, GPS duty is currently performed by all probation officer staff who have completed the required training, including the Chief and the Deputy Chief of the office.

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[12] *See* 29 C.F.R. § 785.17. *See also* Fact Sheet #22: Hours Worked under the Fair Labor Standards Act, available at https://www.dol.gov/whd/regs/compliance/whdfs22.htm.

[13] *See* Department of Corrections ("DOC") Operating Procedure 110.2, *Overtime and Schedule Adjustments*, § IV(A)(4)(c).

[14] *Id.*

[15] Under agency policy, the work period for law enforcement officers is 28 days, with overtime eligibility after 160 hours worked. *Id.* at §§ III, IV(A)(2); *see also* 29 C.F.R. § 553.224. Agency policy, in accordance with the FLSA, excludes holidays and leave time from those hours considered actually worked. DOC Operating Procedure 110.2, *Overtime and Schedule Adjustments*, § IV(A)(2)(b).

Agency management has significant discretion in the administration of its policies and standard facility operating procedures.[16] In this case, it appears the agency allocated available funding to provide additional pay to employees acting as sex offender specialists. That sex offender specialists may perform some similar duties to those performed by other employees does not mandate that both groups of employees be compensated identically. EDR cannot second-guess management's decisions regarding the administration of its policies absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious,[17] which the grievant has not demonstrated here. Accordingly, the grievance does not qualify for a hearing on this basis.

Discrimination

In addition, the grievant argues that the agency has engaged in discrimination based on his race and/or color. In particular, he argues that two employees of another race—the Chief and Deputy Chief of his office—removed themselves from the GPS rotation, but that he was not allowed to be released from this duty.

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, age, political affiliation, genetics, disability, or veteran status.[18] 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 not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[19]

In this case, there are insufficient facts to indicate that the grievant's continued assignment to perform GPS duty had a discriminatory motive. To the contrary, it appears that the decision to continue the grievant's GPS assignment was based on the nature of the grievant's position and the necessity to provide GPS coverage, rather than his race and/or color. From information provided to EDR, it appears that for a limited period of time, the Chief may not have been in the rotation for GPS duty, but that he has subsequently returned to the rotation, and that the former Deputy Chief was removed from the rotation only in the period leading to his retirement. The current Deputy Chief has been on the rotation for GPS duty since she began in the position, and both the grievant and the other Senior Probation and Parole officers are on the rotation. Further, according to the agency, all probation officer staff who have been trained are currently assigned to GPS duty, and the agency is in the process of training all district probation officer staff.

A grievance must present more than a mere allegation of discrimination – 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. Having reviewed the

[16] *See, e.g.*, EDR Ruling No. 2011-2903.
[17] *See, e.g.*, EDR Ruling No. 2009-2090.
[18] *See, e.g.*, Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.
[19] *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 214 (4th Cir. 2007) (citations omitted).

evidence, EDR finds that the grievant's allegations do not raise a sufficient question as to whether the grievant's continued assignment to GPS duty was based on his race and/or color. Consequently, the grievant's claim of discrimination does not qualify for a hearing.

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of his grievance for hearing is denied. EDR's qualification rulings are final and nonappealable.[20]

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[20] Va. Code § 2.2-1202.1(5).