

Issue: Qualification – Compensation (other); Ruling Date: September 19, 2018;  
Ruling No. 2019-4767; Agency: Department of Behavioral Health and Developmental  
Services; Outcome: Not Qualified.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution**

**QUALIFICATION RULING**

In the matter of the Department of Behavioral Health & Developmental Services  
Ruling Number 2019-4767  
September 18, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management on whether her June 21, 2018 grievance with the Department of Behavioral Health & Developmental Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Trainer and Instructor II at one of the agency’s facilities. On February 9, 2018, the agency head declared a state of emergency at that facility and requested volunteers to assist with certain tasks. The grievant assisted with managing the schedule for nurses covering extra shifts pursuant to this request. Those nurses providing direct patient care outside of their regular work hours received additional compensation for performing extra duties; however, the grievant requested additional compensation for performing additional scheduling duties and was denied. The agency asserts that the grievant did not provide direct patient care, nor did she perform duties outside of her regularly scheduled work hours; thus, she is not eligible to receive the additional compensation. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>1</sup> 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 a hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>2</sup> The grievant has not alleged discrimination, retaliation, or discipline.<sup>3</sup> Therefore, the

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<sup>1</sup> See Va. Code § 2.2-3004(B).

<sup>2</sup> *Id.* § 2.2-3004(C).

<sup>3</sup> In her response to the agency head’s qualification decision, the grievant cites to the Equal Pay Act, which, in general, requires equal pay irrespective of one’s sex. Nothing in the grievance packet reviewed by EEDR indicates any potential issue exists under the Equal Pay Act.

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."<sup>4</sup> 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."<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>6</sup> For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that she asserts issues with her compensation.

EEDR has thoroughly reviewed the grievance record, but found no mandatory policy provision that the agency has violated, and the grievant has cited to none. DHRM Policy 3.05, *Compensation*, allows agencies to award an employee a pay supplement to "address unique needs of an agency" in "situations where employees are doing something in addition to what is normally expected . . . ."<sup>7</sup> In this instance, the agency determined that it would award supplemental pay only to those employees performing duties involving direct patient care during the state of emergency. It is undisputed that the grievant did not perform such duties, but rather, facilitated the scheduling of others doing so. Though the grievant cites to another "third shift scheduler" who did receive extra compensation during this emergency, the agency indicates that this employee, a nurse, performed direct patient care duties and was compensated for those, not scheduling duties. The agency asserts that the grievant's regular job duties as set forth in her Employee Work Profile require her to serve as back-up scheduler for nursing, as she did during the time period in question. Having reviewed the information provided, EEDR finds that there is insufficient evidence to demonstrate that the agency's decision violates a specific mandatory policy provision or is outside the scope of the discretion granted to the agency by the applicable compensation policies.

As stated above, DHRM Policy 3.05, *Compensation*, is intended to grant the agencies the flexibility to address issues such as changes in an employee's job duties, the application of new job-related skills, and retention.<sup>8</sup> The policy is not intended to limit the agency's discretion to evaluate whether an individual pay action is warranted. In cases like this one, where a mandatory entitlement to additional pay does not exist, the agency is given great discretion to weigh the relevant factors. Therefore, based on the totality of the circumstances, EEDR cannot

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<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> DHRM Policy 3.05, *Compensation*.

<sup>8</sup> See *id.*

find that the agency's denial of the grievant's request for supplemental pay was improper or otherwise arbitrary or capricious. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.<sup>9</sup>



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Christopher M. Grab  
Director  
Office of Equal Employment and Dispute Resolution

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<sup>9</sup> Va. Code § 2.2-1202.1(5).