EMILY S. ELLIOTT
DIRECTOR

# COMMONWEALTH OF VIRGINIA

***Department Of Human Resource Management***

***Office of Employment Dispute Resolution***

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

## QUALIFICATION RULING

In the matter of the Department for Aging and Rehabilitative Services
Ruling Number 2022-5378
March 31, 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 her December 9, 2021 grievance with Department for Aging and Rehabilitative Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

### FACTS

The grievant works at one of the agency's locations as a Registered Nurse ("RN") in a position that is exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA").[1] RNs at the grievant's facility work shift schedules to provide service 24 hours per day. Prior to 2021, the agency paid RNs at the grievant's facility for overtime at one-and-one-half times their regular rate of pay for hours worked in excess of 40 per week.[2] RNs who worked during emergency closings or in certain other circumstances received additional pay at their regular rate, a practice referred to as "straight time."[3]

In 2021, agency management decided that RNs at the grievant's location, as exempt employees, should no longer receive additional pay for overtime hours or straight time hours. It is unclear precisely when this adjustment to the RNs' pay took effect, but the affected employees do not appear to have been notified of the change until November 18, 2021, after it had already occurred. To account for this change in pay practices, RNs were advised to "flex" their hours by adjusting their schedules to work no more than 40 hours per week when possible.

The grievant initiated a grievance on December 9, 2021, challenging the agency's decision to cease additional pay for overtime hours and straight time hours. The grievant asserts that she did not "receive[] anything in writing" about the change and that human resources "will not answer questions" or meet with the grievant and other RNs about the issue. Among other things, the

[1] *See* 29 U.S.C. §§ 201 through 219.
[2] The agency used a two-week schedule comprised of 80 work hours for assessing overtime pay.
[3] For example, an employee who worked additional unscheduled hours in a week, but fewer than 40 hours total, would be paid straight time for the unscheduled hours.

grievant requests as relief that the agency continue to pay her for overtime hours, conduct an "audit of all timesheets and official pay records," and provide an explanation about how overtime is paid. Following the management resolution steps, the agency head declined to qualify the grievance for a hearing.

The grievant now appeals that determination to EDR. In an attachment to her request for qualification from EDR, the grievant also alleges that the agency made changes to shift differentials, a separate pay practice, "in retaliation for complaints" about overtime pay and "complaints about [human resources] refusing to meet with RN's."

## 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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[5] 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.[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 that the grievant has alleged an adverse employment action because she asserts issues with her compensation.

The grievant argues, in effect, that management has misapplied or unfairly applied policy and/or law by changing its practice regarding additional pay for overtime hours and straight time hours. As support for her position, the grievant contends that management did not notify RNs at the facility of the change in pay practices before it went into effect, that RNs are required to provide 24-hour clinic services at the facility, and that they are no longer compensated for working overtime hours. According to the agency, RNs at the grievant's facility were previously authorized to receive overtime pay and straight time pay despite their exempt status. Due to changing business needs at the facility, management decided to cease providing this additional pay and has directed RNs to adjust their work schedules where needed to work no more than 40 hours per week, or to work as close to 40 hours as possible when overtime is required. Like other exempt employees, RNs now do not receive additional pay for working more than 40 hours per week.

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[4] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[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).

*Overtime Pay*

In relevant part, the FLSA requires employers to pay their employees at a rate equal to one-and-one-half times their standard hourly rate for every hour worked in excess of 40 during a given week.[10] The FLSA, however, also articulates exemptions to this general rule for workers "employed in a bona fide executive, administrative, or professional capacity."[11] Here, the agency has explained that the grievant and other RNs at her facility are exempt because they meet the professional exemption.

Regulatory guidance establishes a standard for assessing whether workers are "employed in a bona fide professional capacity."[12] Employees meet this exemption if they are "[c]ompensated on a salary or fee basis . . . at a rate of not less than $684 per week" and their "primary duty is the performance of work . . . [r]equiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction[] or . . . [r]equiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor."[13] The regulations specifically state that "[r]egistered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption" if they are compensated on a salary basis of at least $684 per week.[14]

In this case, the grievant has not argued that she does not meet the requirements outlined above for the professional exemption. To the extent she is attempting to challenge her FLSA status in her grievance, the available evidence indicates that the grievant works as a registered nurse, is licensed by the appropriate authority, and is paid on a salary basis in excess of $684 per week.[15] Accordingly, we have no basis to conclude that the agency has erred in determining that the grievant is exempt from the overtime provisions of the FLSA.[16]

Turning to the grievant's claims as a matter of state policy, we likewise find no error in the agency's decision. Applicable DHRM guidance states that "agencies are under no obligation to compensate" exempt employees for working overtime hours.[17] The guidance further indicates that exempt employees should only receive overtime pay "when necessary to ensure that critical assignments can be performed in emergency situations" or "to employees in critical positions with difficult labor market conditions and for whom such payments are typical among other employers (e.g., Registered Nurses)."[18] Nevertheless, the guidance goes on to describe special conditions

[10] 29 U.S.C. § 207(a)(1).
[11] *Id.* § 213(a)(1).
[12] 29 C.F.R. § 541.300(a).
[13] *Id.*
[14] *Id.* § 541.301(e)(2). The U.S. Department of Labor has published a fact sheet that discusses this issue in more detail. *See* U.S. Department of Labor, *Fact Sheet #17N: Nurses and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA)*, https://www.dol.gov/agencies/whd/fact-sheets/17n-overtime-nurses (rev. Sept. 2019).
[15] Licensed practical nurses at the grievant's facility in nonexempt positions would remain eligible for overtime pay under the FLSA. 29 C.F.R. § 541.301(e)(2) ("Licensed practical nurses and other similar health care employees . . . generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.").
[16] For the same reasons, the grievant is also not entitled to overtime pay pursuant to the Virginia Overtime Wage Act, which excludes from coverage employees who are exempt from the overtime provisions of the FLSA. Va. Code §§ 40.1-29.2(A), (D).
[17] DHRM Overtime Pay Guidance – Effective July 1, 2010, https://www.dhrm.virginia.gov/docs/default-source/compensationdocuments/fiscalyear11overtime-guidance.pdf?sfvrsn=2, at 1.
[18] *Id.* at 2.

where employees receive benefits for working additional hours. For example, exempt employees "earn compensatory leave when required . . . to work on a holiday or, if [they are] designated as an essential employees, on an official office closing day."[19]

In this case, the agency previously elected to pay the grievant and other RNs at her facility for overtime hours, but decided to discontinue this practice in 2021. DHRM guidance gives management the discretion to approve or deny overtime pay for exempt employees and, indeed, the guidance indicates that exempt employees should only receive overtime pay in limited circumstances. Although overtime pay may be a common practice for RNs as noted in the DHRM guidance, this fact does not abridge the agency's discretion to determine whether approving additional pay for overtime hours or straight time hours is an appropriate practice for its employees. In this case, the agency concluded that changing business needs at the grievant's facility warranted elimination of overtime pay for RNs. The grievant understandably disagrees with the agency's choice, but she has not identified, and EDR has not found, a mandatory policy provision that the agency has misapplied or unfairly applied.

Finally, as to the grievant's contention that management failed to notify RNs at her facility of the change in pay practices before it was implemented, we agree that the apparent lack of communication created frustration and confusion. The grievant's allegation that management and/or human resources would not meet with or answer questions from the grievant and other RNs is equally concerning. However, the agency provided the grievant with an explanation of the changes to overtime pay in November 2021. The agency has represented to EDR that it retroactively paid the grievant for her overtime hours through the date she received notice of the change in November 2021 as a means of addressing the delay in communication.

In conclusion, EDR cannot second-guess the agency's decisions regarding the management of its operations and affairs, absent evidence that the agency's actions are plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[20] Here, the evidence before EDR demonstrates that the grievant is not entitled to overtime pay pursuant to any requirement in law or policy. In addition, there is no information in the grievance record to suggest that the agency has treated the grievant differently than other similarly situated employees; to the contrary, it appears that all RNs at the grievant's facility have been affected by the change in pay practices for overtime hours. For these reasons, we find that the grievance does not raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy, acted in a manner that was inconsistent with other decisions regarding employee compensation, or was otherwise arbitrary or capricious. Under the circumstances presented in this case, it appears that the agency's decision was consistent with the discretion granted by policy. Accordingly, the grievance does not qualify for a hearing on these grounds.

*Retaliation*

Regarding the grievant's allegation of retaliation, she appears to claim that management eliminated shift differential pay at her facility because she and other RNs complained about the

[19] *Id.*; *see* DHRM Policy 3.10, *Compensatory Leave*. Exempt employees may receive compensatory leave in other settings with management approval. *See id.* The agency has confirmed that, following the change in pay practices, the grievant and other RNs at her facility will earn compensatory leave consistent with Policy 3.10.
[20] *See, e.g.,* EDR Ruling No. 2009-2090.

changes to overtime pay and lack of communication described above. Although the shift differential and retaliation issues do not appear to have been challenged in the original grievance and new claims cannot be added to a grievance after it has been filed,[21] we will nonetheless address these matters here in the interest of providing a thorough response to the grievant's concerns.

According to the agency, RNs who worked certain shifts at the grievant's facility were previously paid an additional amount per hour, in addition to their regular salary, as a shift differential.[22] The shift differential rate applied to employees regularly assigned to eligible shifts, as well as employees from a different shift who worked additional hours on an eligible shift. As with overtime pay and straight time, the agency decided to eliminate shift differential pay for RNs in December 2021. The grievant and other RNs received notice of the impending change on November 18, 2021. The agency chose to replace the shift differential with a supplement to the base salary of employees assigned to eligible shifts. As a result, RNs who did not receive a shift supplement to their base salary would no longer receive additional pay for working hours on shifts that previously would have been eligible for the shift differential rate.

A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[23] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[24] In this case, we will assume the grievant engaged in protected activity by attempting to address her concerns about changes to overtime pay, including through the grievance procedure.[25] Even assuming that the grievant has experienced an adverse employment action, and inferring a causal connection between the grievant's protected activity and the agency's removal of shift differential pay at her facility based on their temporal proximity,[26] we find that the agency has provided legitimate, nonretaliatory business reasons for its decision.

DHRM Policy 3.05, *Compensation*, describes pay supplements as "non-base-pay payments that apply to specific positions under certain circumstances."[27] Of note, "Shift Pay" is a specific type of supplement to be "used when an agency has a demonstrated need based on staffing problems or market conditions for shifts that do not conform to the first shift, or 8:00 a.m. to 4:00 p.m."[28] As with the agency's decision to eliminate overtime pay discussed above, the agency elected to replace the prior shift differential system with pay supplements, beginning in December 2021, due to changing business needs at the grievant's facility. The agency explained to the

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[21] *Grievance Procedure Manual* § 2.4.
[22] Shift differentials appear to have been paid to employees who worked evening and night shifts.
[23] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[24] *Id.*
[25] *See* Va. Code § 2.2-3000(A).
[26] *See* Tinsley v. First Union Nat'l Bank, 155 F.3d 435, 443 (4th Cir. 1998) (stating that "merely the closeness in time between" an employee's exercise of protected activity and the adverse action is sufficient to establish a causal connection for a claim of retaliation under Title VII (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989))). The temporal connection between the grievant's protected activity and the changes to shift differential pay are unclear in some respects. We need not ultimately resolve this issue given the non-retaliatory justification identified in this ruling.
[27] DHRM Policy 3.05, *Compensation*, at 15.
[28] *Id.* at 16.

grievant and other RNs that they were the only employees the facility paid using shift differentials, and that pay supplements would "make it more equitable for [employees] who work 24/7 at the center." Significantly, the agency indicated that it would review the salaries of affected employees and identify an appropriate supplement amount to offset the loss in pay from elimination of the shift differential.[29] EDR is unaware of any mandatory policy provision that would prevent the agency from modifying its pay practices in this way. To the contrary, the evidence reviewed by EDR suggests that the agency's decision was a reasonable exercise of discretion consistent with state compensation policy.

For these reasons, EDR's review of the grievance record shows that the agency's decision regarding shift differential pay was based on legitimate, nonretaliatory business reasons, and there is nothing to demonstrate that those reasons were merely a pretext for retaliation. Furthermore, there are no facts that would indicate the grievant's protected activity was the but-for cause of the agency's actions. Accordingly, EDR concludes that the grievant's claim does not raise a sufficient question as to whether retaliation has occurred, and does not qualify for a hearing on these grounds.

EDR's qualification rulings are final and nonappealable.[30]

*Christopher M. Grab*
Director
Office of Employment Dispute Resolution

[29] Management informed the grievant and other RNs that shift differentials would continue until the pay supplements were finalized, apparently to reduce the impact of the change on their pay.
[30] *See* Va. Code § 2.2-1202.1(5).