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## QUALIFICATION RULING

In the matter of the Department for Aging and Rehabilitative Services  
Ruling Number 2022-5383  
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 6, 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”).<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup>

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 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 6, 2021, challenging the agency’s decision to cease additional pay for overtime hours and straight time hours. She further claims that RNs at her facility are paid less than other employers in the area and that it is unfair for RNs to work during emergency closings without additional compensation. As relief, the grievant requests

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<sup>1</sup> See 29 U.S.C. §§ 201 through 219.

<sup>2</sup> The agency used a two-week schedule comprised of 80 work hours for assessing overtime pay.

<sup>3</sup> 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.

compensation for overtime hours and for working during emergency closings. Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

### 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.<sup>4</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>5</sup> 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.<sup>6</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>7</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>8</sup> Adverse employment actions include any agency actions that have an adverse effect on the terms, conditions, or benefits of one's employment.<sup>9</sup> 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. 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.

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.<sup>10</sup> The FLSA, however, also articulates exemptions to this general rule for workers "employed in a bona fide executive, administrative, or professional capacity."<sup>11</sup> Here, the agency has explained that the grievant and other RNs at her facility are exempt because they meet the professional exemption.

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

<sup>5</sup> See Va. Code § 2.2-3004(B).

<sup>6</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>7</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>8</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>9</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>10</sup> 29 U.S.C. § 207(a)(1).

<sup>11</sup> *Id.* § 213(a)(1).

Regulatory guidance establishes a standard for assessing whether workers are “employed in a bona fide professional capacity.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup> 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).”<sup>18</sup> Nevertheless, the guidance goes on to describe special conditions 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.”<sup>19</sup>

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

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<sup>12</sup> 29 C.F.R. § 541.300(a).

<sup>13</sup> *Id.*

<sup>14</sup> *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).

<sup>15</sup> 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.”).

<sup>16</sup> 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).

<sup>17</sup> DHRM Overtime Pay Guidance – Effective July 1, 2010, <https://www.dhrm.virginia.gov/docs/default-source/compensationdocuments/fiscalyear11overtime-guidance.pdf?sfvrsn=2>, at 1.

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.*; see DHRM Policy 3.10, *Compensatory Leave*. Exempt employees may receive compensatory leave in other settings with management approval. See *id.*

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.

As to the grievant's claims regarding emergency closures, we similarly find no misapplication of policy. DHRM Policy 1.35, *Emergency Closings*, states that "[e]mployees designated as essential are exempt and non-exempt employees who are required to work at the workplace or assigned remote site during an authorized closing because their positions have been designated by their agencies as essential to agency operations during emergencies."<sup>20</sup> Essential employees who work during an emergency closing "are granted compensatory leave for hours worked up to the maximum number of hours of their normal work shifts whether or not the authorized closing occurs during the employee's regularly scheduled work shift and whether or not the authorized closing is for an entire or partial work shift."<sup>21</sup> To the extent the grievant is challenging her designation as an essential employee, agencies have discretion to determine which positions are designated as essential.<sup>22</sup> Here, the agency has designated RNs at the grievant's facility as essential and we have not reviewed evidence to suggest that this decision exceeds the scope of its discretion under Policy 1.35. Moreover, 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.

Finally, we note that it appears management failed to notify RNs at the grievant's facility of the change in pay practices before it was implemented and agree that the apparent lack of communication created frustration and confusion. However, the agency has represented 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.<sup>23</sup> 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.

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<sup>20</sup> DHRM Policy 1.35, *Emergency Closings*, at 3.

<sup>21</sup> *Id.*; see DHRM Policy 3.10, *Compensatory Leave*.

<sup>22</sup> See DHRM Policy 1.35, *Emergency Closings*, at 3 (stating that agencies must develop policies that include "which positions are designated, and considered to be essential to report to the workplace to perform their duties").

<sup>23</sup> See, e.g., EDR Ruling No. 2009-2090.

EDR's qualification rulings are final and nonappealable.<sup>24</sup>

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<sup>24</sup> See Va. Code § 2.2-1202.1(5).