

Issues: Qualification – Discipline (Suspension pending investigation), Compensation – (FLSA/Overtime), and Management Actions (Assignment of Duties); Ruling Date: 03/27/14; Ruling No. 2014-3814; Agency: Old Dominion University; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Old Dominion University
Ruling Number 2014-3814
March 27, 2014

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 December 20, 2013 grievance with Old Dominion University (the “University”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the University as a Police Officer. On November 29, 2013, the grievant was placed on pre-disciplinary leave with pay in response to an investigation by local law enforcement into whether he had engaged in criminal conduct in his official capacity as a law enforcement officer for the University. The grievant returned to work on or about December 16, 2013, with a temporary administrative reassignment to the University Police Department’s communications center while the University’s internal investigation of the incident was still ongoing. The grievant resumed working in his ordinary position as a Police Officer on or about January 16, 2014, after local law enforcement and University management determined that no criminal charges or disciplinary action would be issued.

The grievant filed an expedited grievance on or about December 20, 2013, alleging that the University had misapplied and/or unfairly applied state and/or University policies related to his pre-disciplinary suspension and administrative reassignment. After proceeding through the management steps, the University president 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.¹ By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency “shall not proceed to a hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline,

¹ See *Grievance Procedure Manual* §§ 4.1(a), (b).

or a misapplication or unfair application of policy.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”³ 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.”⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁵ For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action because he asserts a loss of ordinary overtime and/or holiday pay for which he would have been eligible if not for the pre-disciplinary suspension with pay and temporary reassignment.⁶

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 University misapplied and/or unfairly applied state and University policies relating to his pre-disciplinary suspension because he was not notified of the reason for his suspension before it occurred and he did not return to work within fifteen workdays after the investigation began. He further claims that the administrative reassignment prevented him from performing the “sworn law enforcement job functions” that his position normally entails and that he did not receive notice of the University’s intent to potentially issue disciplinary action until January 13, 2014. In addition, the grievant argues that, during this time period, he was denied the ability to “work [his] regularly scheduled holiday hours, or any overtime functions” and suffered financial loss as a result.

Pre-Disciplinary Suspension with Pay

The grievant asserts that, when he was suspended with pay, the University failed to provide him with written notice of the alleged misconduct and the evidence relating to the offense in a timely manner. The grievant claims that he received an email notifying him of the reason for his removal from the workplace on or about December 2, 2013, and a due process notice on or about January 13, 2014, and that neither of these communications were timely or in compliance with DHRM Policy 1.60, *Standards of Conduct*. The grievant further argues that the University unreasonably extended the pre-disciplinary suspension because he did not return to work in his ordinary position until January 16, 2014. Finally, the grievant appears to claim that the University improperly manipulated the criminal investigation, apparently as a method of prolonging his pre-disciplinary suspension.

² Va. Code § 2.2-3004(C); *Grievance Procedure Manual* §§ 4.1(b), (c).

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ See, e.g., *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ See *Shannon v. BellSouth Telecomms., Inc.* 292 F.3d 712, 716 (11th Cir. 2002) (finding an adverse employment action when, among other allegedly retaliatory actions, the plaintiff was prevented from working overtime).

DHRM Policy 1.60, *Standards of Conduct*, states that an agency may “immediately remove an employee from the workplace *without providing advance notification* when he/she is under investigation for alleged criminal conduct that is related to the nature of his/her job or to the agency’s mission.”⁷ If an employee is placed on pre-disciplinary leave with pay “because of alleged criminal conduct that impacts the employee’s ability to do his/her job or represents a risk to the agency,” that suspension may continue “until . . . the criminal investigation is concluded without any formal charges being made.”⁸

The grievant does not appear to dispute that he came under investigation for allegedly engaging in criminal conduct while at work on November 29, 2013. The alleged criminal conduct was unquestionably “related to the nature of [his] job,” negatively impacted his “ability to do [his] job,” and also potentially “[represented] a risk to the agency” because he is employed as a police officer and charged with enforcing and upholding the law. When the incident was reported to local law enforcement and the University, the grievant was placed on pre-disciplinary suspension with pay and a criminal investigation was initiated. Although the University was not required to provide the grievant with advance or contemporaneous notice of the reason for the pre-disciplinary suspension, and it does not appear that the grievant was unaware of the reason why he was suspended when it occurred, the University did provide the grievant with further information about his pre-disciplinary suspension with pay several days later, on December 2.

Based on the information submitted by the parties, it does not appear that any time lapse between when the grievant’s pre-disciplinary suspension with pay began and his receipt of notification regarding the reason for the suspension was excessive. November 29 was a state holiday and December 2 was the next business day after the suspension occurred. It appears, therefore, that the University provided the grievant with further information about his suspension and the pending investigation as soon as was practicable following the incident. The due process notice that the grievant received on January 13, 2014 was issued as a result of the University’s internal investigation and was not directly related to the outcome of the criminal investigation. This notice will be discussed further below.

The grievant’s claim that he remained suspended until January 16, 2014, past the time when he should have been returned to work, is similarly unpersuasive. The grievant was interviewed by local law enforcement on or about December 6, 2013 as a part of its criminal investigation. Shortly thereafter, the criminal investigation concluded when local law enforcement determined that the grievant would not be charged with any criminal offense. Subsequently, on or about December 16, the grievant returned to work with a temporary administrative reassignment to the University Police Department’s communications center while

⁷ DHRM Policy 1.60, *Standards of Conduct*, § C(2) (emphasis added).

⁸ *Id.* § C(2)(a).

a parallel internal University investigation of the incident continued.⁹ The grievant received his full base salary for the duration of the pre-disciplinary suspension.¹⁰

The grievant appears to further claim that the University somehow manipulated or improperly influenced local law enforcement's criminal investigation. More specifically, he asserts that local law enforcement "thoroughly investigated" the incident on November 29 and determined that the complaint was "completely unfounded," and that University management later "repeatedly called and prompted" local law enforcement to investigate the complaint further. There is no evidence in the record to support these assertions, and the grievant apparently acknowledged during the management resolution steps that he did not have any factual information to support these claims. Regardless of the reason, it is clear that the criminal investigation continued until at least December 6, when the grievant was interviewed by local law enforcement. There is nothing to indicate that the University improperly extended the grievant's pre-disciplinary suspension beyond when the criminal investigation concluded. Most importantly, EDR has been unable to identify any mandatory policy provision that may have prohibited the University from contacting local law enforcement regarding the criminal investigation, and the grievant has cited to none. Indeed, it is reasonable to conclude that communication between the University and local law enforcement would have been necessary, and there is no indication that any such contact negatively impacted the grievant or was somehow improper.

There is no evidence that the pre-disciplinary suspension was either inconsistent with other University actions or was otherwise arbitrary or capricious. Accordingly, EDR finds that the grievance does not raise a sufficient question as to whether the University may have misapplied and/or unfairly applied state or University policy in relation to the grievant's pre-disciplinary suspension with pay. The grievance does not qualify for a hearing on this basis.

Administrative Reassignment

The grievant argues that, when he returned to work after the conclusion of the criminal investigation, he was placed on an "unreasonable quasi-suspended work status" because he was not permitted to work in his ordinary position, but was instead temporarily reassigned to the University Police Department's communications center. The grievant claims that, for the length of the reassignment, he was "denied the capacity to perform any sworn law enforcement job functions" and was ordered to "perform alternative job duties" that were "outside the scope of [his] expertise and [his] training." The grievant further states that he was "forced to work an alternative work schedule outside [his] regular shift" and was "prohibited from engaging in any overtime work duties or special events."

⁹ The grievant argues that his suspension continued until January 16, 2014, when he returned to work in his ordinary position. The administrative reassignment itself will be discussed further below, but there is no dispute that the grievant returned to work on or about December 16.

¹⁰ An employee's base pay compensation is his or her "hourly wage, weekly, semi-monthly, monthly or annual salary." DHRM Policy 3.05, *Compensation*. This amount does not include any other non-base pay compensation, such as overtime. *See id.*

In addition to the relevant provisions of the *Standards of Conduct* discussed above, University policy states that University management “will conduct a parallel administrative investigation” in cooperation with local law enforcement in relation to any criminal offenses committed by departmental employees.¹¹ For all University investigations that are “classified as unfounded, exonerated, or unsubstantiated,” the employee “will be notified by letter as to the outcome of the investigation.”¹²

The University was required by policy to initiate an internal investigation when the grievant came under criminal investigation on November 29, 2013. When the grievant returned to work after the conclusion of the criminal investigation on December 16, 2013, the University temporarily reassigned grievant until the University investigation was completed. The University investigation concluded on or about January 13, 2014, when the grievant met with a representative of University management and was advised, in writing and as required by University policy, that no disciplinary action would be issued. He returned to his ordinary duties as a police officer three days later, on January 16, 2014.

EDR has been unable to identify any specific policy that either grants or denies the University the authority to order a temporary reassignment as part of an investigation into the possible misconduct of an employee, and neither the grievant nor the University have cited to any such policy. Furthermore, it does not appear unreasonable that the University took such action based on the nature of the alleged criminal conduct and the grievant’s position as a law enforcement officer, in order to limit his contact with the public in an official capacity until the internal investigation was concluded. It is also noteworthy that, while the investigation was pending, the University was closed for two weeks as part of its winter holiday break. During this time, it appears that the grievant and other University personnel were not at work, and thus the investigation was unable to progress as quickly as it normally would have.

For the length of the reassignment, the grievant had an alternate work schedule, was unable to work overtime and holiday hours, and performed different work tasks than he ordinarily carries out. While the administrative reassignment caused temporary modifications to the grievant’s work schedule and job responsibilities, it was, as discussed above, prompted by the University’s obligations to the public and legitimate need to complete an internal investigation. Furthermore, the grievant continued to receive his full base salary throughout this period, and he was not permanently denied the ability to work overtime or holiday hours as a result of the investigation. As of January 16, 2014, the grievant has been fully restored to his ordinary position and may now work overtime and/or holiday hours as necessary.

Similarly, the fact that one consequence of the administrative reassignment was a temporary limitation on the grievant’s ability to work overtime does not render it improper. Although the grievant and other University law enforcement personnel appear to routinely work overtime as a method of earning additional pay,¹³ employees are not entitled to work holiday and

¹¹ ODU Police Departmental Directive 1018, *Office of Professional Standards*, § XI(B).

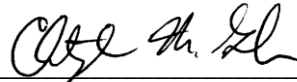
¹² *Id.* § XVI(A).

¹³ See ODU Police Department Procedure 12-01, *Overtime Procedure*.

overtime hours and receive the associated pay without restriction.¹⁴ While we sympathize with the grievant's position, and it is unfortunate that the investigation took place while the University was closed for break, a period in which many holiday and/or overtime opportunities were available, it does not appear that the University misapplied and/or unfairly applied any policy with respect to the grievant's ability to work overtime.

There is no evidence that the temporary assignment was either inconsistent with other University actions or was otherwise arbitrary or capricious. For example, EDR has reviewed nothing to suggest that any other University law enforcement personnel have faced similar charges of misconduct and been treated any differently than the grievant, and the grievant has presented no evidence to the contrary. As a result, the grievant's claims relating to his administrative reassignment and his ability to work overtime and holiday hours while the University conducted its investigation do not raise a question as to whether any policy was misapplied and/or unfairly applied, and the grievance does not qualify for a hearing on these bases.

EDR's qualification rulings are final and nonappealable.¹⁵



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¹⁴ See DHRM Policy 1.25, *Hours of Work* ("A non-exempt employee under the Fair Labor Standards Act may work overtime hours only as authorized in advance by his or her supervisor or manager.").

¹⁵ See Va. Code § 2.2-1202.1(5).