

Issue: Compliance – Grievance Procedure (other issue); Ruling Date: May 31, 2016;  
Ruling No. 2015-4126; Agency: Department of Motor Vehicles; Outcome: Grievant  
Not in Compliance.



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

**COMPLIANCE RULING**

In the matter of the Department of Motor Vehicles  
Ruling Number 2015-4126  
May 31, 2016

The Department of Motor Vehicles (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether the grievant’s March 21, 2015 grievance is in compliance with the grievance procedure and seeks permission to administratively close the grievance. For the reasons set forth below, the grievance may be closed.

FACTS

At the time the grievance was initiated, the grievant was employed by the agency as a Division Manager at a call center. On or about March 21, 2015, he filed a grievance alleging that “the supervisors [at the call center] may be incorrectly classified as exempt and have not/are not received/receiving appropriate compensation for their additional hours worked.” As relief, the grievant requested “review through the management steps.” The agency requested a compliance ruling from EDR on March 27, 2015, arguing that the grievance did not comply with the grievance procedure because the grievant had “raised a concern on behalf of his subordinates” and “the concern [did] not relate to [the grievant]’s own employment.” The agency further asserted that the grievant was “attempting to use the grievance process as a replacement for normal communication between himself and management,” and that the filing of a grievance as “the normal starting point for attempted resolution” of a workplace dispute was not consistent with the purpose of the grievance procedure.

While this ruling was pending, EDR agreed to stay its decision in the matter at the request of the parties. During this time, the grievant’s position with the agency was changed such that he no longer works in the position he occupied when he filed the grievance or at the call center where he previously worked. Instead, he now supervises a smaller team and performs a different type of work for the agency. The grievant has the option to work remotely or at an office that is located at a different agency office than the call center. The grievant has indicated recently that he wishes the hold on EDR’s ruling to be lifted, and thus EDR must address the agency’s request to administratively close the grievance.

DISCUSSION

The grievant has filed a grievance challenging the agency’s decision to classify the supervisors at his call center as exempt from the overtime provisions of the Fair Labor Standards

Act (“FLSA”). The grievance procedure provides that, in general, “any management actions or omissions may be grieved,” but that a grievance must “[p]ertain[] directly and personally to the employee’s own employment . . . .”<sup>1</sup> The grievant has confirmed that he believes both he and other supervisors at the call center are inappropriately designated as exempt employees. Thus, while the grievance may, in part, present the grievant’s concerns about the classification of other employees, it also challenges a perceived issue about his own employment.<sup>2</sup>

However, Section 2.4 of the *Grievance Procedure Manual* further provides that a grievance cannot be “used to harass or otherwise impede the efficient operations of government.”<sup>3</sup> This prohibition is primarily intended to allow an agency to challenge issues such as the number, timing, or frivolous nature of grievances, and the related burden to the agency.<sup>4</sup> While neither the number, timing, or frivolous nature of the grievances, nor the related burden to an agency, are controlling factors in themselves, those factors could, in some cases, support an inference of harassment cumulatively or in combination with other factors. Such determinations are made on a case-by-case basis, and because closing a grievance on these grounds is an extreme sanction, the analysis of such a claim carries a commensurately high burden.<sup>5</sup>

The FLSA provides that, in general, if any employee works more than forty hours per week, he must be compensated at a rate of time and a half for the time worked in excess of forty hours.<sup>6</sup> However, the FLSA provides an exemption from the overtime pay requirement for persons “employed in a bona fide executive, administrative, or professional capacity.”<sup>7</sup> The agency has indicated that it determined the grievant is exempt because he is an administrative employee. An employee is employed in an administrative capacity if (1) he is “[c]ompensated on a salary or fee basis at a rate of not less than \$455 per week,” (2) his “primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers,” and (3) his “primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.”<sup>8</sup>

The grievant has not presented any information that would suggest the agency’s designation of his former position as exempt from the overtime provisions of the FLSA was somehow in error or that there had been a change in his job duties such that he should have been classified as nonexempt. Furthermore, the agency employs human resources personnel to assess

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<sup>1</sup> *Grievance Procedure Manual* § 2.4.

<sup>2</sup> To the extent any of the claims presented in the March 21 grievance relate to the FLSA status of other agency employees, however, they would not be properly raised in this grievance. *See id.* Other employees who believe their classification may be incorrect would need to file their own grievances to properly challenge those issues, and any such grievance would have to satisfy the initiation requirements of the grievance procedure. *See id.*

<sup>3</sup> *Id.*

<sup>4</sup> *See* EDR Ruling No. 2010-2374; EDR Ruling No. 2002-224.

<sup>5</sup> *See, e.g.*, EDR Ruling No. 99-138.

<sup>6</sup> 29 U.S.C. § 207(a)(1); *see also* DHRM Policy 3.10, *Compensatory Leave*; DHRM Policy 3.15, *Overtime Leave*.

<sup>7</sup> 29 U.S.C. § 213(a)(1).

<sup>8</sup> 29 C.F.R. § 541.201(a). 29 C.F.R. Sections 541.200 through 541.203 contains additional regulatory guidance relating to the administrative exemption, as well as factors to be considered in determining whether an employee is employed in an administrative capacity.

and evaluate the classification of positions as either exempt or nonexempt based on the requirements of the FLSA as well as state and agency policy, and there is nothing to suggest that the agency's classification decision was not supported by the facts. As a result, we must conclude there is nothing to truly address in this case that would require full consideration by all management step-respondents. In short, the agency concluded that the grievant was an exempt employee in compliance with the relevant provisions of the FLSA and there is no likelihood that the grievant's status would be retroactively changed as a result of this grievance. If the grievant wishes to consult with the agency's human resources or management staff to discuss any concerns with regard to his FLSA status, he is free to do so.<sup>9</sup> However, there are no further issues to address or facts to explore in a grievance challenging the agency's determination that the grievant was exempt from the overtime provisions of the FLSA when he was employed in his former position.

In addition, we note that over fourteen months have passed since the grievance was originally filed. This lapse in time and the intervening changes to the grievant's job render the arguments regarding the agency's decision as to the FLSA status of his former position no longer applicable to his current position with the agency. These factors, and specifically the change in the grievant's employment such that he no longer works in the position he occupied when he initiated the grievance disputing his FLSA status, must be considered by EDR determining whether the grievance should be permitted to proceed at this time.

Finally, we must also be cognizant of the grievant's past grievance activity in reaching a decision in this case. Based on the information provided to EDR, it appears that the grievant filed no fewer than ten grievances (including the March 21, 2015 grievance at issue in this ruling) between August 21, 2014 and March 26, 2015.<sup>10</sup> EDR must be vigilant not to allow the grievance procedure to become a tool for an employee to challenge each and every action taken by his/her superiors, however minor. While the individual issues presented in this case and in the other grievances may, in whole or in part, have been appropriate for presentation through the management steps, it appears that the grievant had begun using the grievance process as a substitute for communicating directly with agency management about his concerns. The grievance procedure is not intended to be used for this purpose and EDR considers such activity to be an abuse of the grievance process. The grievant filed at least ten grievances over a period of approximately eight months to challenge management actions with which he disagreed, but that appear to have had little or no adverse impact on his employment. As a result, the facts and circumstances surrounding the March 21, 2015 grievance, when considered with knowledge of the grievant's prior grievance activity, could support an inference that the grievant has used the grievance procedure to harass or otherwise impede the efficient operations of government.

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<sup>9</sup> The agency has indicated that it conducted a review of the grievant's Employee Work Profile after this grievance was initiated and determined that he is properly designated as an exempt employee.

<sup>10</sup> Four of these grievances have already been the subject of a qualification ruling by EDR and were not qualified for an administrative hearing. *See* EDR Ruling No. 2015-4104, 2015-4105, 2015-4106, 2015-4107. One grievance was voluntarily closed, and four other grievances were pending with the agency when this grievance was filed.

Taking all of these factors into account, it is EDR's determination that the March 21, 2015 grievance may be administratively closed.<sup>11</sup> Use of the grievance procedure in this case would not advance the interests of any party or the Commonwealth, as there are no issues of substance to address. Accordingly, EDR concludes that the March 21, 2015 does not comply with Section 2.4 of the *Grievance Procedure Manual* because it supports an inference of harassment and impedes the efficient operations of government.<sup>12</sup>

EDR's rulings on matters of compliance are final and nonappealable.<sup>13</sup>



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<sup>11</sup> If the grievant wishes to raise any concerns regarding his FLSA status in his current position, those issues may be presented in a new grievance that sets forth the particular reasons for any such dispute. This ruling only determines that the grievance does not comply with the initiation requirements of the grievance procedure and may be administratively closed. Nothing in this ruling is meant to address whether some other legal or equitable remedy may be available in relation to the claims raised in the grievance.

<sup>12</sup> This ruling does not find that the grievant has somehow divested himself of the right to file any future grievances with the agency. Indeed, if this grievance was addressing a more substantial or material matter, there would be no question that it ought to proceed. This ruling is confined to the precise facts of this case, in light of the grievant's prior conduct in his grievances and the nature of the management action at issue. The grievant is cautioned, however, to consider in the future whether informal communication with agency management may be a more efficient method for resolving workplace-related issues that have little or no real effect on his employment instead of filing of additional grievances. Upon request from the agency, EDR will exercise its authority to rule that a grievance may be administratively closed where appropriate.

<sup>13</sup> See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).