

Issue: Qualification – Discipline (failure to follow instructions/policy); Ruling Date: March 19, 2018; Ruling No. 2018-4688; Agency: Department of Agriculture and Consumer Services; Outcome: Qualified in Full.



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

**QUALIFICATION RULING**

In the matter of the Department of Agriculture and Consumer Services  
Ruling Number 2018-4688  
March 19, 2018

This ruling addresses the partial qualification of the grievant's January 10, 2018 grievance with the Department of Agriculture and Consumer Services (the "agency"). The grievant asserts, in part, that he was improperly issued three Group II Written Notices. The agency head qualified the grievant's challenge to the Written Notices for a hearing, but declined to qualify specific claims presented in this grievance. The grievant has appealed the agency head's partial qualification of his grievance to the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management. For the reasons discussed below, this grievance is qualified for a hearing in full.

FACTS

In the grievant's January 10, 2018 grievance, he challenges the agency's issuance of three Group II Written Notices for working overtime hours without approval from his supervisor on several occasions. In support of his challenge to the Written Notices, the grievant contends his position should be designated as "exempt" under the Fair Labor Standards Act ("FLSA"), and thus he was not required to obtain approval from his supervisor to work overtime hours. As relief, the grievant requests that the agency rescind the Written Notices.<sup>1</sup> After the grievance advanced through the management resolution steps, the grievant requested qualification by the agency head. The agency head qualified the grievant's challenge to the Written Notices, but declined to qualify "[a]ll other issues raised in the grievance," including his "FLSA status, disputes regarding supervisory decisions on overtime, role classification, job duties and salary . . . ." The grievant now appeals the agency head's partial qualification decision to EEDR.

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>2</sup>

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<sup>1</sup> In an attachment to the agency's third step response, the grievant also requested a "salary review and role change review" by the agency's human resources office, and identifies that as a "separate issue." Additional management actions or omissions cannot be added to a grievance after it is filed. *Grievance Procedure Manual* § 2.4. The grievant may, however, file another grievance to challenge additional management actions or omissions, provided such grievance complies with the initiation requirements set forth in Section 2.4 of the *Grievance Procedure Manual*. To the extent the grievant is alleging a classification issue as an alternative claim or theory to support his challenge to the Written Notices, that argument may be presented at the hearing to the extent discussed below.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out 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>4</sup>

In this case, all matters regarding the Group II Written Notices challenged by the grievant have been qualified for a hearing, as required under the grievance procedure.<sup>5</sup> As a defense to the misconduct charged on the Written Notices, the grievant alleges that the agency has misapplied and/or unfairly applied policy and/or law by designating his position as nonexempt under the FLSA. The FLSA provides that, in general, if any employee works more than forty hours per week, he must be compensated at a rate of not less than one and one half times the regular rate at which he is employed 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 grievant argues that he satisfies any and/or all of these exemptions, with the result that he may work overtime without management approval.

Based on a review of the grievance, EEDR finds that the grievant's claim regarding his FLSA status is most appropriately considered a theory<sup>8</sup> advanced in support of his challenge to the Written Notices themselves. Indeed, the grievant explicitly describes his argument about his FLSA status as "part of [his] defense against the Written Notices" rather than a separate issue. This conclusion is further supported by the relief requested by the grievant: removal of the Written Notices, not a change in his FLSA status. Accordingly, the FLSA issue cannot be severed from the grievant's qualified challenge to the Written Notices<sup>9</sup> and may be raised at the hearing to support his position.<sup>10</sup> At the hearing, the grievant will have the burden of proof on this issue.<sup>11</sup> In addition, EEDR considers it appropriate to send any other alternative theories and claims regarding the Written Notices, including the "disputes regarding supervisory decisions on overtime, role classification, job duties, and salary" referenced by the agency head in his qualification decision, for adjudication by a hearing officer to assure a full exploration of what could be interrelated facts and issues.<sup>12</sup> For these reasons, the grievance is qualified for a hearing in full.

This qualification ruling in no way determines that the actions challenged by the grievant were in any way contrary to law or policy, but rather only determines that further exploration of

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<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).

<sup>5</sup> *Grievance Procedure Manual* § 4.1(a); *see also* Va. Code § 2.2-3004(A).

<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> As EEDR has ruled, the "claims" or "issues" raised by a grievance are the management actions being challenged. *See, e.g.*, EDR Ruling Nos. 2013-3480, 2013-3495; EDR Ruling Nos. 2007-1561, 2007-1587.

<sup>9</sup> *See* EDR Ruling Nos. 2011-2783, 2011-2784, 2011-2797; EDR Ruling Nos. 2009-2127, 2009-2129, 2009-2130.

<sup>10</sup> *See* EDR Ruling No. 2011-2796.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(C).

<sup>12</sup> As with the grievant's claim regarding his FLSA status, the grievant will have the burden of proving that the agency's action was inconsistent with state and/or agency policy for any other reason articulated in the grievance. *Rules for Conducting Grievance Hearings* §§ VI(C)(1), VI(C)(3).

the facts by a hearing officer is appropriate. Furthermore, should the grievant prevail on his challenge to the Written Notices at the hearing, the relief available under the grievance procedure is limited to rescission or reduction of the Written Notices.<sup>13</sup> Should the grievant wish to challenge his FLSA status or other related issues regarding classification and/or duties on their own, rather than simply defenses to a Written Notice, he may do so in a separate grievance. The agency is directed to submit a completed Form B to EEDR within five workdays of receipt of this ruling to the extent it has not already done so.

EEDR's rulings on qualification and compliance are final and nonappealable.<sup>14</sup>



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<sup>14</sup> Va. Code § 2.2-1202.1(5).