Issue: Qualification – Compensation (other); Ruling Date: January 8, 2019; Ruling No. 2019-4803; Agency: Virginia State Police; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of State Police
Ruling Number 2019-4803
January 8, 2019

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM") on whether his September 10, 2018 grievance with the Department of State Police (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed by the agency as a Senior Trooper. In August 2018, the grievant was assigned to work at an event over a period of several days. After the event, the grievant submitted a timesheet stating that he had worked 24 hours for each day he was assigned to the event because he believed his hours spent on call (stand-by) during the event were compensable. Agency management instructed the grievant to revise his timesheet to include only those hours he actually worked during the event, and to exclude off-duty hours on "un-restricted stand-by" status. On or about September 10, 2018, the grievant initiated a grievance with the agency challenging the agency's alleged failure to properly compensate him for the hours he was on call during the event and alleging that the agency retaliated against him for "accurately reporting the hours worked on his timesheet" by reducing his overtime hours after the event.[1] After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries, wages, and general benefits "shall not proceed to a hearing"[3] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of

[1] A grievance must pertain "directly and personally to the employee's own employment." *Grievance Procedure Manual* § 2.4. Consequently, the extent to which the grievant's argument about compensation for hours worked during the event applies to anyone other than the grievant will not be addressed in this ruling, as that matter is not the proper subject for a grievance by this grievant.
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* §§ 2.2-3004(A), 2.2-3004(C).

policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] 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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] For purposes of this ruling only, it will be assumed that the grievant has alleged an adverse employment action in that he asserts issues with his compensation.

Misapplication/Unfair Application of Policy

In this case, the grievant essentially asserts that the agency misapplied and/or unfairly applied policy because it did not properly compensate him for the hours he was on call during the event in August 2018. In particular, the grievant argues that the agency's actions do not comply with the Fair Labor Standards Act ("FLSA")[7] and related regulations and policies because the agency improperly determined that he spent a portion of his time during the event on "unrestricted stand-by" status, which the agency determined was not compensable. 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.

The grievant cites to a regulation under the FLSA regarding compensable hours of work for state and local law enforcement employees. Under this regulation, if "the conditions placed on the employee's activities are so restrictive that the employee cannot use the time effectively for personal pursuits, such time spent on call is compensable."[8] Resolution of this issue has historically been reviewed as to whether the employee was "engaged to wait," or whether he was "waiting to be engaged."[9] An employee is "engaged to wait," or working, only if the standby is "primarily for the benefit" of the employer.[10] The determination is dependent upon all the circumstances of the case.[11]

The agency's overtime policy, ADM 15.30, provides guidance that is consistent with the provisions of the FLSA. In particular, ADM 15.30 states that time spent on "on-call status is not compensable for non-exempt personnel" if the employee on call "is not in an assigned work area or required to remain on the employer's premises[,] . . . is not performing work activities[,] . . . is

[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] 29 U.S.C. § 201 *et seq.*
[8] 29 C.F.R. § 553.221.
[9] Skidmore v. Swift & Co., 323 U.S. 134, 137 (1944).
[10] Armour & Co. v. Wantock, 323 U.S. 126, 132 (1944).
[11] *Id.* at 133.

available to be contacted[, and] . . . [t]he off-duty time allows the employee to pursue personal needs." Agency management sent a letter to employees after the event clarifying the application of ADM 15.30 to employees who worked during the event, including the grievant. The letter states that employees assigned to the event "were placed on un-restricted stand-by" throughout the assignment, and that those hours were "not compensable." The information in the grievance record clearly demonstrates that the agency considered employees to be on call during their off-duty time for the event.

In support of his position, the grievant contends that he was "required to report for duty . . . until released by a supervisor," had to "stay overnight in housing" provided near the event, was "restricted during off-duty hours to only leave the housing complex to purchase essentials and eat," was not "allowed to leave [the area] at all during off-duty hours," was "instructed regarding the clothing [he] needed to wear at all times," and was "on-call during off-duty hours with the understanding that [he] would mobilize immediately when called." On the one hand, it is clear that the grievant's freedom of movement and activity was, at least to some extent, limited while he was assigned to the event. For example, a memorandum with reporting instructions for the event states that after an employee "has reported, they will remain [in the area] unless excused" by a supervisor. The grievant further claims that he was "called to respond to disturbances" throughout the event, and argues that this fact supports his contention that he was required to remain near the location of the event at all times.

On the other hand, there are many unresolved questions about the precise nature of the restrictions placed on the grievant while he was on call during the event. During the management steps, the grievant indicated that, based on the instructions he received from management, he assumed he would not be permitted to leave the event, and further stated that he was aware the agency considered him to be on call during off-duty time. While the grievant claims that he was required to stay in provided housing near the location of the event, the agency's memorandum requesting additional staffing states that "[l]odging will be provided," but does not indicate that employees would be required to stay on-site. By his own admission, however, the grievant did not ask to stay off-premises or leave the area of the event, nor did he request clarification about the nature of any limitations on his movement or activities during the event. Furthermore, the grievant does not appear to allege that he performed work activities when he was not actually working during the event or that he was required to remain in a work area when he was on call. Similarly, and although the grievant argues that his choice of clothing was restricted by management throughout the event, he also acknowledged that he was not prohibited from wearing certain types of clothing or bringing other personal items with him for use while he was on call.

An agency's interpretation of its own policies is generally afforded great deference. EEDR has previously held that where the plain language of an agency policy is capable of more than one interpretation, the agency's interpretation of its own policy should be given substantial deference *unless* the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy.[12] In reviewing ADM 15.30, the regulation cited by the grievant, and the

[12] *See*, *e.g.*, EDR Ruling Nos. 2008-1956, 2008-1959.

facts presented in this grievance, this Office cannot find that the agency has made an erroneous interpretation and application of its policy here. The grievant has not presented information that raises a sufficient question as to whether his assignment during the event was so restrictive that it met the stated criteria in ADM 15.30 and/or the FLSA to be considered compensable time such that qualification of this issue is warranted. Accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

In addition, the grievant asserts that the agency retaliated against him for "accurately reported the hours worked on his timesheet" by changing his schedule for the week after the event to reduce the number of overtime hours he was permitted to work. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[13] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[14] Ultimately, to support a finding of retaliation, EDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[15]

For purposes of this ruling only, EEDR will assume the grievant engaged in protected activity, in that his decision to report his hours worked during the event could be construed as an attempt to make a complaint and/or discuss workplace-related concerns about the agency's compensation practices for on call time.[16] In support of his claim of retaliation, the grievant contends that he and other employees "were instructed that they would be permitted to work overtime" during the week following the event, but his "schedule was changed" after he turned in his timesheet for the event. Assuming without deciding that the agency's decision to reduce the grievant's overtime hours after the event occurred constitutes an adverse employment action, EEDR has not reviewed evidence that raises a sufficient question as to whether the agency's actions were the result of a retaliatory motive, rather than legitimate work-related concerns. For example, management sent an email to agency staff after the event stating that, "if at all possible, work schedules should be adjusted" for the following week to allow employees "adequate time to rest" and "reduce [the agency's] overtime expenses . . . ." During the management steps, the grievant appears to have further confirmed that he was not directed to modify his schedule after the event, but rather chose to do so because he did not want to give the agency "ammunition" to

[13] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).
[14] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 139-40 (4th Cir. 2014).
[15] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[16] *See* Va. Code §§ 2.2-3000(A), 2.2-3004(A).

use against him when he challenged the agency's decision about compensation during the event. The grievant also indicated that other employees were asked to adjust their schedules for the week after the event.

As stated above, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the methods, means and personnel by which work activities are to be carried out, as well as the establishment and revision of salaries, wages, and general benefits.[17] Here, EEDR has reviewed nothing to indicate that the agency's actions with regard to the grievant were based on anything other than legitimate, non-retaliatory business reasons. Furthermore, there does not appear to be evidence raising a sufficient question that, to the extent there was any retaliatory motive, such a motive was the but-for cause of the actions complained of by the grievant. Accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[18]

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[17] *Id.* §§ 2.2-3004(B), (C).
[18] *See id.* § 2.2-1202.1(5).