

Issue: Qualification – Compensation (Overtime and Other); Ruling Date: July 5, 2013;
Ruling No. 2013-3645; Agency: Virginia Commonwealth University; Outcome: Not
Qualified.



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

QUALIFICATION RULING

In the matter of Virginia Commonwealth University
Ruling Number 2013-3645
July 5, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether his March 14, 2013 grievance with Virginia Commonwealth University (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On June 10, 2006 the grievant was hired by the agency. He states that on July 1, 2006, agency management advised him that he would be “on call 24/7” to report to work as needed at all times. The agency implemented an on-call and overtime policy on July 1, 2010, which states that some employees, including the grievant, will be on-call outside of normal work hours for one out of every five weeks. According to this policy, on-call employees are compensated at the rate of \$1.00 per hour for each on-call hour spent outside the workplace, and at the regular overtime hourly rate for each on-call hour spent at the workplace. The grievant maintains that he has been on-call continuously from July 1, 2006 to the present, but has only been paid at the \$1.00 per on-call hour rate when he is scheduled to be on-call (i.e., every fifth week since July 1, 2010).¹ On March 14, 2013 the grievant filed a grievance challenging the agency’s failure to compensate him for his time spent on-call. After proceeding through the management 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.² Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Thus, claims relating to issues such as to the establishment or revision of wages, salaries, position classifications, or general benefits do not qualify for a hearing, unless the grievant presents evidence raising a

¹ The grievant has not raised any claims about his overtime compensation when he is on-call and at the workplace.

² See *Grievance Procedure Manual* § 4.1.

³ See Va. Code § 2.2-3004(B).

sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁴ In this case, the grievant appears to allege that the agency misapplied policy by not compensating him for remaining on-call for work emergencies continuously from July 1, 2006 to the present.

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. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷ Here, the grievant has alleged an adverse employment action because he asserts issues with his compensation for hours spent on-call.

This grievance was previously the subject of a compliance ruling (EDR Ruling Number 2013-3581). In that ruling, EDR stated that, according to the *Rules for Conducting Grievance Hearings*, "even if this grievance is qualified for a hearing, and the hearing officer rules in favor of the grievant, the hearing officer would only be able to award back pay for the 30 calendar day period immediately preceding the initiation of the grievance."⁸ Therefore, in this case any relief that could be awarded to the grievant could extend no further back than February 12, 2013, and this ruling will address the grievant's claims for that time period only.⁹

The agency's current on-call and overtime policy clearly states how employees are scheduled to be on-call and that employees receive \$1.00 per hour for each on-call hour spent outside the workplace. The grievant argues that, despite the policy, he was told he would "need to answer the phone at all times" regardless of the schedule and was not compensated accordingly. The agency's on-call policy states that "when maintenance calls are required," employees should contact the grievant for assistance with certain types of problems. The second step-respondent explained that this statement was not an order to the grievant to be on-call at all times; rather, it was intended as a reminder to personnel to "contact additional resources as needed" when advice from employees with "specific experience or skills" would be useful. This is apparently a common agency practice for facilities that operate using on-call and overtime

⁴ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b), (c).

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁸ EDR Ruling No. 2013-3581; see *Rules for Conducting Grievance Hearings* § VI(C)(1).

⁹ Neither this ruling nor EDR Ruling Number 2013-3581 address whether there may be some other legal or equitable remedy available to the grievant.

scheduling. While one of the grievant's co-workers stated that the grievant "has been . . . always on-call" since 2006, this co-worker does not claim that the grievant remained on-call specifically at the agency's direction. Moreover, the grievant's alleged "need to answer the phone at all times" does not appear to carry the same restrictions of true "on-call" status as defined by the policy. For example, the policy states that employees who are on-call must carry their work cell phone and either return calls for information or report to work as needed within one hour, but does not require the grievant to be available in this way at all times.

From the grievance record, it is apparent that the grievant has been consistently available for on-call and overtime assistance for a period of over six years. While this type of service and dedication is commendable, the grievant has not identified a specific agency directive, mandate, or policy that required him to remain "on-call" at all times, as that term is defined in the agency policy. The facts do not raise a sufficient question as to whether the agency's alleged failure to compensate the grievant for hours spent on-call is a violation of any mandatory agency policy provision or, alternatively, was so unfair as to amount to a disregard of the intent of agency policy, and therefore the grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.¹⁰



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¹⁰ Va. Code § 2.2-1202.1(5).