

Issue: Qualification – Work Conditions (hours of work/shift); Ruling Date: October 27, 2015; Ruling No. 2016-4240; 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 2016-4240
October 27, 2015

The grievant has requested a ruling on whether his July 16, 2015 grievance with Old Dominion University (the University) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Server Support Group (SSG) System Administrator with the University. On or about July 22, 2015, he initiated a grievance, challenging whether the University discriminated against him in refusing to grant his proposed telework schedule. He alleges that other employees, of different races and ages, have been allowed to telework full-time or for extended periods of time, while he was not. After proceeding through the management steps, the University head declined to qualify the grievance for a hearing. The grievant now appeals that determination.

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 Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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 policy may have been misapplied or unfairly applied.³

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

Further, the grievance procedure generally limits grievances that qualify to those that involve “adverse employment actions.”⁴ Thus, typically, the 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 University actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

Under the facts presented to EDR, it does not appear that the denial of the grievant’s telework request amounted to an adverse employment action. Subjective preferences regarding one’s employment do not render an employment action adverse without sufficient objective indications of a detrimental effect.⁷ In this instance, the grievant has presented insufficient evidence that the denial of an extended telework schedule has had a significant detrimental effect on his employment. The grievant has not been denied all telework privileges; rather, he seeks additional privileges which the University is unwilling to grant. An employee’s unmet preference regarding work hours or job location is not enough to result in an adverse employment action.⁸

Furthermore, in this case, the grievant claims that racial and age discrimination influenced the University’s decision to deny his proposed telework schedule following the relocation of his wife to another state, 850 miles away. Grievances that may be qualified for a hearing include actions related to discrimination.⁹ To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the University provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the University’s professed business reason was a pretext for discrimination.¹⁰

Even were EDR to assume that the University’s denial of the grievant’s requested telework schedule might constitute an adverse employment action, the grievant’s claim of discrimination in this instance would not qualify for a hearing. Here, the grievant asserts that he has been discriminated against on the basis of race and age. He claims that the University has allowed other University employees with spouses relocating to cities that would require over a four hour commute to telework full-time. He further claims that other University employees

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 See, e.g., *Jones v. D.C. Dep’t of Corr.*, 429 F.3d 276, 284 (D.C. Cir. 2005); *James*, 368 F.3d at 377; *Fitzgerald v. Ennis Bus. Forms, Inc.*, No. 7:05CV00782, 2007 U.S. Dist. LEXIS 875, at *14-15 (W.D. Va. Jan. 8, 2007); *Stout v. Kimberly Clark Corp.*, 201 F. Supp. 2d 593, 602-03 (M.D.N.C. 2002).

⁸ See EDR Ruling No. 2015-3936.

⁹ See *Grievance Procedure Manual* § 4.1(b).

¹⁰ See *Hutchinson v. INOVA Health System, Inc.*, C.A. No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).

who are of a different race and are significantly younger than him have been allowed an extended telework schedule of two days in conjunction with the weekend when their spouse relocated a lesser distance. However, when the grievant requested an extended telework schedule due to his wife's relocation out of state, the University offered him only two days per week as a telework option. Therefore, he claims that the University improperly denied him the telework schedule he requested based upon his race and age.

In response, the University indicates that all employees in the grievant's immediate workgroup (the other SSG System Administrators), regardless of race or age, are only authorized to telework one day per week. Further, the grievant was offered a telework schedule of two days per week to better accommodate his family situation. However, the managers of the grievant's workgroup take the position that maintaining a regular presence on campus is a critical component of the grievant's job, and thus the schedule sought by the grievant would not fit the University's business needs. The other University employees cited by the grievant who have apparently been allowed more extensive telework schedules do not appear to be similarly situated to the grievant in that they have different job titles, duties, and/or workgroups. Because there is no indication that the University's non-discriminatory reasons for the grievant's reassignment were pretextual, the grievant's claims of discrimination would not qualify for a hearing on that basis.

EDR's qualification rulings are final and nonappealable.¹¹



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¹¹ Va. Code § 2.2-1202.1(5).