

Issue: Qualification/compensation/other; Ruling Date: September 26, 2006; Ruling #2006-1328; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF THE DIRECTOR

In the matter of Department of Mental Health, Mental Retardation
and Substance Abuse Services

Ruling No. 2006-1328

September 26, 2006

The grievant has requested a ruling on whether her January 9, 2006 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (the agency) qualifies for hearing. The grievant essentially asserts that the agency's decision to deny her on-call compensation for her lunch break was a misapplication or unfair application of policy. For the reasons set forth below, this grievance does not qualify for hearing.

FACTS

At the time the grievant initiated her grievance, she was employed by the agency as a Counselor II.¹ The grievant does not appear to challenge the agency's assertion that her position is exempt from the overtime provisions of the Fair Labor Standards Act (FLSA). Her duties included assisting with involuntary admissions to the agency facility where she was employed. According to the grievant, the agency required her to carry a cell phone on her lunch break so that if she were needed to respond to an urgent admission call, she could be reached. The agency, however, asserts that it informed the grievant that any admission that could not await the grievant's scheduled return from lunch would be turned over to her supervisor or designee. (The grievant counters that she was unaware of this alleged arrangement, and that it would not make sense for her to have to carry a phone if someone else at the facility was truly covering in her absence.)

The grievant contends that because she was required to be on call during her lunch break and her lunch was interrupted on a regular basis, she should have been provided with compensatory leave. She notes that the Administrator On-Call and the Physician On-Call both receive compensatory leave. Because the agency has elected to pay these and apparently other employees on-call pay, she asserts that all employees should be so compensated.

¹ Since she initiated this grievance, the grievant has taken another job with the agency, a Community Liaison position with the Forensic Unit. She is no longer required to carry a cell phone to lunch.

DISCUSSION

Misapplication/Unfair Application of Policy

For a misapplication or unfair application of policy claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. The primary policies implicated in this grievance are the Department of Human Resource Management (DHRM) Policy 3.05, the “Compensation” policy, and Policy 3.10—the “Compensatory Leave” policy. Under Policy 3.05: “Agencies *may* choose to provide this supplement to employees who are required to be available to return to work.”² Additionally, under DHRM Policy 3.10, employees (such as the grievant) who are exempt from the overtime requirements of the Fair Labor Standards Act (FLSA), may be awarded compensatory leave under certain circumstances. For instance, when an exempt employee is required by the agency head or his/her designee to work more hours in a workweek than the agency head or his/her designee believes is reasonably expected for the accomplishment of the position's duties, the agency may offer compensatory leave.³ The grievant asserts that because the agency provides on-call compensation to a number of exempt employees, it should do so for all.

Misapplication of Policy

First, Policy 3.05 states that an agency “may” provide on-call pay. In other words, while this provision allows management to provide such pay to non-exempt employees such as the grievant, it does not require it. Similarly, under Policy 3.10, “[a]n exempt employee *may* be awarded compensatory leave when the employee is required by the agency head or his/her designee to work more hours in a workweek than the agency head or his/her designee believes is reasonably expected for the accomplishment of the position’s duties.” Again, policy grants management the discretion to award compensatory leave but does not mandate it. Here, management notes that agencies may implement policies for on call pay, “where specific job classifications are highly competitive and market conditions make it necessary in order to retain staff.”⁴ Accordingly, the agency has implemented several policies that provide on-call payments to certain individuals, such as the On-Call Physician and Administrator. Other employees purportedly also receive on-call

² DHRM Policy 3.05, p. 20, (emphasis added). (With *non*-exempt employees, the agency *must* provide compensation if the on-call assignment is so restrictive that it prevents the employee from effectively using the time for personal benefit.) *Id.*

³ An exempt employee will also earn compensatory leave when required by the agency head or his/her designee to work: 1. on an official office closing day if he or she is designated as an "essential employee"; or 2. on a holiday.

⁴ Agency Head's March 10, 2006, Qualification Response.

compensation. However, the agency's decision to provide on-call compensation to some exempt employees does not require it to provide such compensation to all exempt employees. Thus, the agency does not appear to have violated any mandatory policy provision by denying the grievant on-call compensation.

Unfair Application of Policy

To qualify an unfair application of policy for hearing, there must be sufficient evidence that despite its compliance with state and agency policy requirements, the agency's contested actions, in their totality, amounted to a disregard of the intent of those policies. As a preliminary matter, none of the employees who received on-call leave were similarly situated to the grievant who held the position of a Counselor II. Had they been, the denial could potentially constitute an unfair application of policy, absent a legitimate, compelling reason for the disparate treatment. Moreover, the intent of the above policies is to grant management the discretion to determine, in its best business judgment, which similarly situated employees should be provided with on-call compensation.⁵ Management has wide latitude in determining which non-exempt employees should receive on call compensation.⁶ So long as management's decision to exclude a particular group of similarly situated employees from receiving on-call compensation is not based on an improper motive, for instance retaliation, then such decisions may not be second-guessed by this Department or its hearing officers.⁷ In this case the grievant did not assert that any sort of improper motive influenced management's decision to deny on-call compensation to its social workers. Accordingly, this Department cannot qualify this grievance for hearing.

⁵ For purpose of this discussion the term "compensation" includes both pay and leave.

⁶ Management has "great flexibility and a high degree of accountability for justifying their pay decisions." EDR Ruling No. 2006-1122.

⁷ *C.f.* EDR Ruling No. 2006-1122, a case where a grievant asserted that "providing some employees with an in-band adjustment and not others is not fair." This Department held in EDR Ruling No. 2006-1122, in note 12:

This is not to say that the agency's discretion in determining which employee should receive an in-band adjustment is without limitations. In particular, an agency could not deny an employee an in-band adjustment on the basis of unlawful retaliation, discrimination or some other improper motive.

See also DHRM Policy 3.05 which requires that the agency continuously review its "compensation practices and actions to ensure that similarly situated employees are treated the same and that all aspects of compensation management are conducted without regard to race, color religion, gender, age, national origin, disability, or political affiliation." Policy 3.05, p. 6

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APPEAL RIGHTS, AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director