Issue: Qualification – Compensation (Other); Ruling Date: December 5, 2011; Ruling No. 2012-3139; Agency: Virginia Department of Health; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Health
Ruling Number 2012-3139
December 5, 2011

The grievant has requested qualification of his July 25, 2011 grievance with the Department of Health (the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant and members of his division previously received compensation for time spent on-call when serving as a duty officer. The agency re-evaluated this practice and determined that these employees were no longer due such compensation under the agency's On-Call Leave Policy. The grievant disputes the agency's interpretation and filed this grievance seeking restoration of the prior approach for himself and his co-workers.[1]

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] Further, complaints relating solely to the establishment or revision of wages, salaries, position classifications, or general benefits "shall not proceed to a hearing"[3] unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy.[4] In this case, the grievant asserts a claim of misapplication and/or unfair application of policy.

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

[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 issue raised applies to anyone other than the grievant will not be addressed in this ruling as those matters are not the proper subject for a grievance by this grievant. This ruling will address the denial of on-call leave to the grievant.
[2] *See* Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(C).
[4] *Grievance Procedure Manual* § 4.1(c).

generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[5] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[6] 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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] For purposes of this ruling only it will be assumed that the grievant has experienced an adverse employment action in that he has been denied the accrual of on-call leave.

The first issue is whether the grievant's service as a duty officer is considered on-duty time under the agency's On-Call Leave Policy. This Policy cites to the Fair Labor Standards Act regulation 29 C.F.R. § 785.17: "An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while 'on call.' An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call." In short, if an employee's time on-call is restricted in this manner, the employee is considered on-duty. Based on the terms of the Policy, including its incorporation of the above regulation, as well as the facts presented, this Department cannot conclude that the agency misapplied or unfairly applied its On-Call Leave Policy in determining that the grievant's on-call time would not be so restricted that he would be considered on-duty.[9]

The agency's On-Call Leave Policy also awards supplemental compensation for non-duty on-call time that meets three conditions: 1) physical restriction (the degree to which an employee's freedom of travel and performance of personal activities is restricted), 2) response time (a pre-established time to respond and/or report exists), and 3) disciplinary action (employees are subject to discipline if they do not respond to a call). The agency evaluated these criteria prior to the grievance and afterwards, with the benefit of information provided by the grievant, and concluded that the grievant's service as a duty officer did not meet these criteria. As to physical restriction, the agency found that the duty officer could be on-call anywhere statewide as long as access to a cell phone and the internet was possible. As to response time, there were mixed facts presented as to whether there was a required response time. However, it was also determined that the State Emergency Operations Center would contact the duty officer and then proceed to the next staff member on their call list after waiting approximately ten minutes. As to disciplinary action, there was no indication that any employee had been disciplined for a failure to respond to a call.

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

[6] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[8] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

[9] *Cf.* Whitten v. City of Easley, 62 F. App'x 477 (4th Cir. 2003).

An agency's interpretation of its own policies is generally afforded great deference. This Department 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.[10] In reviewing the agency's On-Call Leave Policy and the facts presented in this grievance, this Department cannot find that the agency has made an erroneous interpretation. Indeed, we agree with the agency's evaluation of the situation as it appears to be consistent with the policy language. The grievant's service as a duty officer is not so restrictive to meet the stated criteria in the On-Call Leave Policy. As such, the grievance fails to raise a sufficient question as to whether the agency misapplied and/or unfairly applied policy. The grievance does not qualify for a hearing.

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 this Department's qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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.

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Claudia T. Farr
Director

[10] *See, e.g.*, EDR Ruling No. 2008-1956 and 2008-1959.