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QUALIFICATION RULING

In the matter of the Department of Forensic Science
Ruling Number 2024-5655
January 31, 2024

The grievant has requested a ruling from the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) on whether his November 6, 2023 grievance with the Department of Forensic Science (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

On or about November 6, 2023, the grievant initiated a grievance to address a management decision regarding employees' hours of work during a multi-day training event from October 17-19, 2023. The event was scheduled to be held at the grievant's facility and to begin at 11:00 a.m. on the first day and end early on the final day to accommodate travel time for employees attending from more distant facilities. On October 6, 2023, the grievant emailed his manager for confirmation that staff at his facility "are able to both arrive and depart for the days of the meeting at the same times as section staff from the other" facilities. The manager replied in the affirmative. Following the event, however, the parties discovered that this exchange had caused confusion about work expectations for host-facility employees. Specifically, the grievant – a supervisor – had taken his manager's confirmation as permission for his employees to arrive at work in the later morning and ultimately to work less than a full 8-hour day. After becoming aware that at least some employees had worked fewer than 40 hours during that workweek, management informed employees on or about November 8 that any hours short of 40 for the training week would need to be accounted for by working additional hours or submitting leave for the week of October 17.

According to his grievance submission, the grievant took issue with management's directive because he believed it was inconsistent with prior agency practice and also unfairly reneged on what his employees had been told at the time. The grievant asserted that the management directive had damaged employee trust in his supervision, and he requested that agency management rescind its decision to have employees make up for time not worked and adhere to a clear and consistent policy for work expectations related to training events.

As the third-step respondent, the agency head made plans to update policies but declined to alter management's determination that employees would need to make up work deficits for the

week of October 17, 2023. The agency head further declined to qualify the grievance for the hearing, and 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.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Claims relating solely to the establishment and revision of salaries, wages, and general benefits 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 or agency policy may have been misapplied or unfairly applied.[3] 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 applicable policy's intent.

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" constituting "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]

The grievant in this case essentially argues that the agency has inconsistently applied policies regarding employee work hours on training days, and that this unfair application of policies may result in loss of benefits for employees under his supervision. These claims arise from upper management's response to a situation in which the grievant believed his employees had permission to come to work late and/or leave early on certain days during the week of October 16, 2023, and advised them of the same. But the grievant's managers had not intended to grant such approval and informed employees including the grievant that they must make up any hours short of 40 worked for the week in October, or draw down leave in the amount of the deficit. The grievant has maintained that this position is not consistent with past instructions, contradicted his manager's guidance immediately before the training week, and has undermined employees' trust and confidence in him as a supervisor.

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[1] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[2] *See* Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[6] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").

Upon a thorough review of the record, EDR cannot conclude that the grievance raises a sufficient question whether the grievant has experienced an adverse employment action as a result of management's actions. As an initial matter, we emphasize that this ruling addresses only those actions which appear to have pertained "directly and personally to the [grievant]'s own employment" with the agency.[7] Therefore, we evaluate the grievant's claims that he has lost "confidence and trust" as a supervisor and also that, per the management directive as applied to him, he is required to make up 1.25 hours of work from the week of October 16, 2023, or alternatively draw down his leave balances in that amount.

As to the grievant's effectiveness as a supervisor, we cannot conclude that management's decision to reverse what had been apparently told to certain employees constitutes an adverse employment action against the grievant. Each agency's management generally retains the exclusive right to manage the affairs and operations of state government and to develop and implement policies and procedures that serve their agency's operational needs. This right includes weighing the risks and benefits of different approaches to the enforcement of internal expectations for staff. Even assuming that the grievant reasonably believed that he and his staff had permission to work fewer than 40 hours during the week of October 16, the grievance record makes clear that his management did not actually approve. The grievant's manager, with the support of upper management, chose to address that discrepancy by giving the grievant and his employees corrected instructions after the fact. Although this approach could certainly create employee relations challenges for the grievant and his own managers, such effects are not within the scope of the tangible terms, benefits, or conditions of the grievant's employment to constitute an adverse employment action.

Similarly, a requirement for the grievant to work additional hours to make up for a past short workweek does not constitute an adverse employment action or constitute a misapplication of policy. Pursuant to DHRM Policy 1.25, *Hours of Work*, salaried employees "are expected to work the equivalent of a minimum of 40 hours per week."[8] Employees can also work flexible schedules with agency approval and must "[w]ork overtime hours when required by management."[9] If work hours are scheduled but not worked, employees must "[c]harge appropriate leave time."[10] Here, agency management's position is that certain employees, including the grievant, were in fact expected to work 40 hours during the week of October 16, despite any misunderstandings related to that expectation. The grievant has indicated that he worked 38.75 hours that week, based on his understanding that he had approval to do so. DHRM policy allows for a range of options for the agency to address such a discrepancy. For example, the agency could have elected to categorize the time not worked as paid administrative leave in the state personnel database. The agency also could have considered the time not worked to be unapproved leave without pay and docked employee pay accordingly. Instead of either of these two options, the agency instructed employees who had not worked 40 hours during the week of October 16 to work extra time during a subsequent week or charge leave for the difference. As it relates to the grievant, we cannot find that an instruction to work 1.25 additional hours constitutes an adverse employment

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[7] *Grievance Procedure Manual* § 2.4. Impacts on the terms, benefits, or conditions of the grievant's *subordinates'* employment are not, in and of themselves, within the appropriate scope of this grievance and thus have no bearing on whether it qualifies for a hearing.
[8] DHRM Policy 1.25, *Hours of Work*, at 2.
[9] *Id.*
[10] *Id.*

action, as the grievant can be required during any workweek to work more than 40 hours.[11] The fact that the grievant was given the alternative option to charge leave does not change EDR's conclusion that no adverse employment action is apparent from the record.

We acknowledge that the grievant has offered substantial argument to the effect that the agency's past practice and explicit instructions from upper management condoned short workweeks during training weeks. Given that the grievant additionally sought confirmation in writing that this practice would apply during the week of October 16, 2023 – and believed he had received such confirmation – it is understandable that he would view the perceived contradictions in messaging as unfair. However, an agency generally has discretion to clarify and/or update its past policies, practices, and expectations in the service of its operations. Ultimately, such changes, if grieved, may qualify for an administrative hearing only if they are so unfair as to disregard the intent of applicable policies and additionally result in an adverse employment action against the grievant. EDR cannot find that the facts presented meet this standard. Accordingly, the grievance is not qualified for a hearing.

EDR's qualification rulings are final and nonappealable.[12]

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[11] Consistent with DHRM Policy 1.25, the agency would in any case be responsible for any overtime hours assigned to employees who were not exempt from the federal Fair Labor Standard Act. *See* 29 U.S.C. § 207(a).
[12] *See* Va. Code § 2.2-1202.1(5).