EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219

Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Department of Agriculture and Consumer Services
Ruling Number 2021-5172
December 11, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his August 6, 2020, grievance with Virginia Department of Agriculture and Consumer Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is not qualified for a hearing.

FACTS

The grievant operates a state vehicle in the performance of his job duties, which involve traveling to work locations within an assigned geographic territory. In the past, the grievant lived within his assigned work territory and parked the state vehicle at his home. In 2017, the grievant moved outside his assigned work territory. It appears that the grievant's state vehicle cannot be used out of his assigned work territory; as a result, he received permission from the agency to park his state vehicle at a location used by another state agency within his assigned work territory. The grievant drives his personal vehicle to where the state vehicle is parked and then drives the state vehicle to work locations within his assigned work territory. At the conclusion of his workday, the grievant parks the state vehicle at its assigned parking location and drives his personal vehicle home.

In 2018, the grievant signed a "State Vehicle Acknowledgement and Use Agreement" form noting that he is a "Home Based/Mobile Worker." The form further stated that, because of this designation, a portion of his travel in the state vehicle was considered commuting pursuant to Internal Revenue Service ("IRS") regulations and therefore taxable as a fringe benefit. IRS guidance explains that "[a] fringe benefit is a form of pay for the performance of services" and that fringe benefits are "taxable and must be included in the recipient's pay unless the law specifically excludes it."[1] The agency applies a "commuting rule" described by the IRS to calculate the value provided to employees who commute in a state vehicle, which amounts to $27.50 of additional taxable income per pay period for the grievant. The grievant added a handwritten notation to the form stating that he understood a portion of his travel "as interpreted by" the agency

[1] IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, at 3 (2020), irs.gov/pub/irs-pdf/p15b.pdf.

was considered commuting under IRS regulations, suggesting that he did not agree with the commuting designation.

In June 2020, the grievant received a new agreement form and an addendum to the form that contained similar information describing approved use of the state vehicle. The grievant believed that the form was initially inaccurate because it stated that he would park the state vehicle at his home. He amended the form to include the location where he parked the state vehicle and noted that he did not agree that a portion of his travel was considered commuting, and then returned the signed form to the agency. After further discussions with agency management about the content of the agreement form and addendum, the grievant was instructed on July 9 to sign and return the documents no later than July 10. The grievant responded by sharing further concerns about the content of the forms, their accuracy in describing his use of the state vehicle, and the agency's determination that he was commuting in the state vehicle, but he ultimately signed and returned the forms on July 10.

On August 6, 2020, the grievant initiated a grievance alleging that the agreement form he was directed to sign "contained nonfactual information," some of which was ultimately resolved before he signed the form on July 10. The grievant further claims that the "addendum form is still not factual" because he does not agree that a portion of his travel in the state vehicle is commuting for purposes of taxable fringe benefits. As relief, the grievant requests that the agency "[c]hange the form to factually represent that" the agency has determined a portion of his travel as commuting instead of an acknowledgment that he agrees with that decision, as well as an independent investigation into whether he is in fact receiving a taxable fringe benefit by using the state vehicle for commuting.[2] Following the management resolution 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.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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.[5] The grievant has not alleged discrimination, retaliation, or discipline; therefore, his claims could only qualify for hearing based upon a theory that the agency has misapplied or unfairly applied policy.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined

[2] The grievant also initially asked for a copy of the grievance "in its entirety" to be "placed in [his] employee file," though he later removed this request from his desired relief.
[3] *See Grievance Procedure Manual* §§ 4.1 (a), (b).
[4] *See* Va. Code § 2.2-3004(B).
[5] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[6] *See Grievance Procedure Manual* § 4.1(b).

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, EDR will assume that the grievant has alleged an adverse employment action because he raises issues with the agency's calculation of his taxable benefits, which affects his compensation.

The grievant essentially argues that the agency has misapplied or unfairly applied policy and IRS regulations by determining that he uses his assigned state vehicle for personal commuting and considering such use a taxable fringe benefit. The grievant contends that he is not "commuting" as that term is used by the IRS because he does not park his state vehicle at home, nor does he receive the benefit of commuting from home in the state vehicle. The grievant also alleges that the language in the agreement form stating that he "understands" his travel in the state vehicle is considered commuting is inaccurate because he does not agree with that determination. The grievant requests modification of either the language on the agreement form or the agency's decision that he is commuting in his state vehicle. 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.

The agency's Policy 4.5, *Obtaining and Operating State Vehicles*, defines "commuting mileage" as follows:

> Round trip mileage traveled routinely by the employee between their residence and primary work location. Mileage and other commuting costs incurred are considered a personal expense. Commuting in a state vehicle is defined by the Internal Revenue Code as a taxable fringe benefit subject to reimbursement or taxable income.

Policy 4.5's discussion of commuting for "Home Based/Mobile Workers" further clarifies that "home based employees do not report to an office at the beginning of each workday," but instead "park their assigned state vehicle at home." Although a home-based employee's travel between their residence and work location(s) is business mileage "[f]or state compliance purposes," the policy clarifies that IRS regulations on this matter differ. According to the policy, regulatory guidance from the IRS states that a home-based employee's "first and last trip of the day" in an employer-owned vehicle is "personal or commuting mileage." As a result, "the value of commuting [in a state vehicle] will be considered taxable income and reflected in the employee's payroll as a taxable fringe benefit." In accordance with Policy 4.5, the agency calculates the value of home-based employees' personal commuting in their state vehicle as a taxable fringe benefit that is included in their income.

IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, describes a "commuting rule" for employers to "determine the value of a vehicle [they] provide to an employee for

[7] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[8] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

commuting use by multiplying each one-way commute (that is, from home to work or from work to home) by $1.50."[9] The commuting rule applies if the following conditions are met:

- The vehicle is provided "for use in [the employer's] trade or business and, for bona fide noncompensatory business reasons, [it] require[s] the employee to commute in the vehicle."[10]
- The employer establishes "a written policy under which [the employer does not] allow the employee, nor any individual whose use would be taxable to the employee, to use the vehicle for personal purposes other than for commuting or de minimis personal use."[11]
- The employee does not "use the vehicle for personal purposes other than commuting and de minimis personal use."[12]
- The employee using the vehicle is not a "control employee."[13]

The evidence available to EDR in this case indicates that the grievant meets all four of the above conditions. He operates a state vehicle as part of his job and is required to commute partially in a state vehicle to his work location(s). The agency has adopted Policy 4.5 addressing this subject and additionally requires employees who use state vehicles to sign a "State Vehicle Acknowledgment and Use Agreement" form explaining the permitted uses of their state vehicles. The agreement form specifically notes that the IRS considers a portion of home-based employees' travel in their state vehicles as personal commuting, which is a taxable fringe benefit according to the IRS guidance above. There is no dispute that grievant uses his assigned state vehicle for business purposes only and is not a control employee.

According to the agency, most employees who hold jobs like the grievant's live within their assigned work territory and park their state vehicles at home. The grievant and the agency appear to agree that those employees receive a taxable fringe benefit from commuting in their state vehicles. Indeed, the grievant has acknowledged to EDR that, when he lived within his assigned work territory, he received a taxable fringe benefit from commuting in a state vehicle (both in principle and as reflected in his taxable income). The grievant's current situation, however, is more complicated and does not appear to be directly addressed in agency Policy 4.5 or IRS regulations. The agency has determined that the grievant commutes from home to his assigned work location(s) in two stages: first, by driving his personal vehicle from home to where the state vehicle is parked within his assigned work territory, and then by driving the state vehicle parked to his first work location of the day. The agency has indicated that some employees who are unable to park their state vehicles at home commute in the same two-stage fashion and receive the same taxable fringe benefit as the grievant for partially commuting in their state vehicle.

---

[9] IRS Publication 15-B, *Employer's Tax Guide to Fringe Benefits*, at 26 (2020), irs.gov/pub/irs-pdf/p15b.pdf: *see* 26 CFR §§ 1.61-21(f)(1), (f)(3)(i).
[10] IRS Publication 15-B at 26; *see* 26 CFR §§ 1.61-21(f)(1)(i), (f)(1)(ii).
[11] IRS Publication 15-B at 26; *see* 26 CFR § 1.61-21(f)(1)(iii). De minimis personal use includes, for example, "a stop for a personal errand on the way between a business delivery and an employee's home." IRS Publication 15-B at 26.
[12] IRS Publication 15-B at 26; *see* 26 CFR § 1.61-21(f)(1)iv).
[13] IRS Publication 15-B at 26; *see* 26 CFR § 1.61-21(f)(1)(v). A "control employee" for a government employer is an elected official or an employee whose compensation is equal to or exceeds an amount paid to certain federal government executives. *See* IRS Publication 15-B at 26; 26 CFR § 1.61-21(f)(6). The grievant is not an elected official or executive.

The grievant alleges that he does not receive the same benefit as employees who park their state vehicles at home and commute directly to their work location because he must drive his personal vehicle to pick up his state vehicle each day. The grievant also states that, because the agency considers him to be working from the time he picks up his state vehicle until he parks it at the end of the day, he cannot be commuting in the state vehicle. Policy 4.5 appears to address this issue, noting that a home-based employee's travel between their residence and work location(s) is business mileage "for state compliance purposes." Though the grievant's work hours include time spent driving the state vehicle, Policy 4.5 and relevant IRS regulations nonetheless indicate that the grievant is commuting for fringe benefits purposes until he arrives at his first work location, whether he is driving his personal vehicle or a state vehicle. Furthermore, EDR has not reviewed evidence to suggest that the grievant's conditions of employment, including his hours of work or the agency's method of calculating his work time, are different from other employees who commute, whether fully or partially, using a state vehicle.

For purposes of grievance hearing qualification, an agency's interpretation of its own policies is generally afforded great deference. EDR 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.[14] Though the grievant's position here is understandable, we have not reviewed evidence to demonstrate that the agency's application of Policy 4.5 or its interpretation of IRS guidance to the grievant's specific circumstances are plainly erroneous. To the contrary, the grievant appears to receive at least some benefit from partially commuting in his state vehicle, as compared with commuting from home to his first work location using only his personal vehicle. Moreover, the agency's application of its policy to the grievant's circumstances is substantially similar to the commuting benefit realized by employees who live within their assigned work territory because the grievant uses his state vehicle as much as possible for all work-related travel within his assigned work territory.

In conclusion, EDR has thoroughly reviewed agency Policy 4.5, the relevant IRS regulations cited by the grievant, and the others facts presented in this grievance and found no basis to support the grievant's contention that the agency has misapplied or unfairly applied its policy here. The grievance does not raise a sufficient question whether the agency's determination that the grievant receives a taxable fringe benefit from partially commuting in his state vehicle is inconsistent with applicable policy or regulations such that qualification of this issue would be warranted. Accordingly, the grievance does not qualify for a hearing.[15]

EDR's qualification rulings are final and nonappealable.[16]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[14] *See*, *e.g.*, EDR Ruling Nos. 2008-1956, 2008-1959.
[15] This ruling decides only that the grievant's claims do not qualify for an administrative hearing under the grievance procedure. It does not address whether there may be some other legal or equitable remedy available to the grievant, nor does it make any determination regarding the IRS regulations that form the basis for the agency's actions except as they are applied to the grievant according to the agency's policy.
[16] *See* Va. Code § 2.2-1202.1(5).