

Issue: Misapplication of leave policy; Hearing Date: April 19, 2002; Decision Date: May 1, 2002; Agency: Department of Juvenile Justice; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5416



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5416**

Hearing Date: April 19, 2002  
Decision Issued: May 1, 2002

**PROCEDURAL HISTORY**

On May 1, 2001, Grievant filed a grievance to contest the Agency's application of leave policy. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 28, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Unit Manager  
Shift Commander  
Senior JCO  
Personnel Analyst  
Payroll Supervisor

**ISSUE**

Whether the Agency misapplied its leave policy.

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency misapplied its leave policy. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Juvenile Justice employs Grievant as a Juvenile Corrections Officer. Grievant began working for the Agency on January 5, 1998. She accrued annual, sick, and compensatory leave in accordance with State leave policies. Her available leave balances were reflected on her paychecks. Paychecks reflected leave balances of approximately two to four weeks prior to the date of the paycheck because of the time required to report and enter leave taken.

On those occasions when Grievant desired to take leave, she sought approval from her supervisor and, if the request was approved, took the leave. If she was unsure before taking leave as to whether she had available leave balances, Grievant would contact Ms. D, the person responsible for leave entry. If Ms. D informed Grievant that she had available leave, Grievant would ask her supervisor for approval to take leave. On some occasions, Grievant’s supervisor would question whether Grievant had sufficient leave balances and would contact Ms. D to determine whether Grievant had sufficient leave. If Ms. D said Grievant had sufficient leave balances, the supervisor would permit Grievant to take leave.

Ms. D was not properly performing her job. On numerous occasions, Grievant submitted the necessary leave request to her supervisor who approved those requests and forwarded them to Ms. D for entry into the CIPS system. The CIPS system is an automated accounting system maintained by the Department of Accounts. If the leave taken is properly entered into the CIPS system, then the employee’s paycheck leave balances would closely reflect the employee’s actual leave available. Since Ms. D was not properly entering all of the leave taken by Agency employees, including Grievant, Grievant’s leave balances were overstated on her paycheck. She believed she had more leave available than she actually had accrued. When Grievant or her supervisor asked Ms. D if Grievant had available leave, Ms. D incorrectly reported the amount of leave available. Thus, Grievant took leave when she did not have available leave to take.

When an employee takes annual leave without available leave balances, the employee is placed on leave without pay status. The effect of this status is that the employee does not accrue additional leave during the pay period the employee is on leave without pay status.

In July 2000, an anonymous person called the State's Hotline complaint number and alleged leave reporting improprieties at the Facility where Grievant is employed. The caller named employees suspected of improper behavior but did not identify Grievant as one of those employees. There is no reason to believe Grievant engaged in any unlawful or otherwise inappropriate behavior. As a result of the complaint, the Agency began to audit the leave records of its employees at the Facility. Grievant's leave records were subjected to four separate audits including one external audit.

The auditors started with the date Grievant began working for the Agency and then compared the accrued leave balances with the actual leave taken. Grievant had taken leave during pay periods for which she did not have any leave balances beginning in 1999. For those days of leave when Grievant did not have accrued balances, the auditors placed Grievant on leave without pay status and removed any leave that accrued during each approximately two week pay period during which she was on leave without pay status. This had a cumulative effect on Grievant's continuing leave balances. As her accrued leave in 1999 was reduced, the amount of leave available in later months and years was likewise reduced. The likelihood that Grievant would have insufficient leave balances in subsequent months increased each time she was placed on leave without pay status in prior months.

On April 30, 2001, the Agency informed Grievant that due to insufficient leave balances, she had received a gross salary overpayment of \$631.81. The overpayment occurred between January 23, 2001 and April 17, 2001. As a result of the overpayment, the Agency began deducting \$157.95 from her paycheck through June 16, 2001 when the total balance would be paid.<sup>1</sup>

### **CONCLUSIONS OF LAW**

This case involves competing duties.<sup>2</sup> On the one hand, employees are obligated to know whether they have available leave balances. DHRM Policy 4.30(III)(D) states,

Employees are responsible for knowing the amount of accrued leave to which they are entitled and that they have earned. Employees will be

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<sup>1</sup> Grievant Exhibit 1.

<sup>2</sup> Grievant is not contesting the accuracy of the Agency's calculations of the amount of leave available. She has not offered an alternative amount due. She is contesting the Agency's right to retroactively adjust her leave balances.

required to reimburse their agencies for time taken off from work if they did not have sufficient accrued leave to cover such time off. Reimbursement may be in the form of money or annual, sick, compensatory, or overtime leave.

On the other hand, agencies are responsible for maintaining accurate leave records. DHRM Policy 4.30(IV)(B) states,

Agencies must maintain accurate and up-to-date leave records in sufficient detail that they can be evaluated during an audit by the agency's internal auditor, the State Internal Auditor, or the Auditor of Public Accounts.

Neither the Agency nor the Grievant fully complied with DHRM Policy 4.30. The question becomes what are the consequences to a party for failing to comply with DHRM Policy 4.30.

The consequence to an employee for taking leave without sufficient leave balances is that the employee must reimburse the agency for excessive leave taken. In contrast, there are no consequences to the Agency for failing to maintain up-to-date leave records.<sup>3</sup> There also is no limitation on the number of prior years that the Agency may examine to determine whether an overpayment exists. Thus, the Agency's action must be upheld.<sup>4</sup>

It is unfair to retroactively remove accrued leave from Grievant. Although employees are supposed to accurately account for their own leave, few do so. Most employees rely on the Agency's records to determine whether leave balances are available. If an employee has some question about whether leave is available, the employee may often contact the Agency staff responsible for recording leave and inquire regarding leave balances. Grievant acted in the same manner as would many employees. She relied on the accuracy of the Agency's records and contacted Ms. D if she had questions about the availability of her leave. Grievant had the right to expect to the Agency to properly account for her leave.

This appeal cannot be resolved based on whether the Agency's actions are fair to Grievant. The Hearing Officer lacks equity powers and cannot decide appeals based on fairness except in those circumstances where policy permits the Hearing Officer to consider fairness. No policy permits the Hearing Officer to correct this inequity.

## **DECISION**

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<sup>3</sup> Department of Accounts policies governing the CIPS system require agencies to timely enter leave but do not provide consequences for an agency's failure to do so. See, DOA Policy 50500.

<sup>4</sup> Grievant cites *Va. Code § 40.1-29(C)* to support her position. This section deals with regular wage withholding. In this instance, the Agency has not withheld her wages for some other purpose; it has deducted amounts due from her wages in the nature of a setoff or debt collection.

For the reasons stated herein, Grievant's request for relief must be **denied**.

## **APPEAL RIGHTS**

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar days of the date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer