

Issue: Misapplication of policy; Hearing Date: August 5, 2002; Decision Date:
August 12, 2002; Agency: Department of State Police; AHO: Carl Wilson Schmidt,
Esq.; Case No.: 5487



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5487

Hearing Date: August 5, 2002
Decision Issued: August 12, 2002

PROCEDURAL HISTORY

On March 18, 2002, Grievant timely filed a grievance to challenge the Agency's application of policy. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On July 11, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 8, 2002, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency representative
First Sergeant
Lieutenant
Captain

ISSUE

Whether the Agency failed to follow leave policies?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency failed to follow leave policies. 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 State Police employs Grievant as a Master Trooper. He has an excellent reputation within the Agency for his dedication to law-enforcement. Grievant reports to the First Sergeant who is responsible for establishing and approving Grievant's work schedule. Grievant sometimes must work on holidays and weekends, depending on the Agency's needs.

On February 22, 2001, Grievant earned three hours of compensatory leave.¹ On February 15, 2002, Grievant received notification from the Agency that his three hours of compensatory leave earned on February 22, 2001 was set to expire. Upon being notified that his leave would be expiring, Grievant asked his supervisor, the First Sergeant, if he could take two hours of compensatory leave on February 20, 2002 and one hour on February 21, 2002. Grievant received approval from the First Sergeant.

On February 25, 2002, Grievant submitted his Leave Activity Report (SP-106) to the First Sergeant for approval. The report showed Grievant taking compensatory leave on February 20 and 21, 2002. It also showed that Grievant had worked on February 18, 2002, a holiday. Because Grievant worked on a holiday, he accrued eight hours of compensatory leave. The First Sergeant approved the Leave Activity Report and it was sent to the Agency's leave processing staff who reviewed the report. Agency staff changed Grievant's report to show a Schedule Adjusted. Rather than permitting Grievant to accrue eight hours of compensatory leave on Monday and take three hours of compensatory leave on Wednesday and Thursday of the week ending February 23, 2002, the Agency adjusted Grievant's schedule so that he accrued five hours of compensatory leave on Monday and took no compensatory leave on Wednesday and Thursday. In other words, the Agency adjusted Grievant's schedule to reflect only the net hour change in compensatory leave for Grievant during the week. Making this schedule adjustment caused Grievant to lose the three hours of compensatory leave earned on February 22, 2001.

¹ Grievant is a non-exempt employee under the Fair Labor Standards Act. Compensatory leave earned by State employees is not identical to compensatory time under the FLSA.

Grievant filed a grievance alleging the Agency failed to follow Agency policy. During the third step, the Major realized that Agency policy would permit him to extend the 12 month period for the expiration of the three hours of compensatory leave. He used the chain of command in order to communicate to Grievant that if Grievant were to write a letter asking for an extension of the leave expiration, the Major would grant the request. The Major's decision was not well communicated to the Grievant so he chose to proceed with this grievance rather than seeking an extension.

CONCLUSIONS OF LAW AND POLICY

The Agency's leave policies are contained in its General Orders and in a separate leave policy manual. General Order 41(3)(c) defines compensatory leave² as:

Compensatory leave is paid time off for an eligible employee having worked additional hours in a workweek; having worked on an official office closing day, a holiday or a scheduled day off; or when a holiday falls on an employee's scheduled day off. *** Accrued compensatory leave lapses 12 months from the date it is earned and may not be used or paid off after lapsing.

The Department's leave policy manual³ states:

Employees earning and taking comp. leave within the same week will no longer record this as two separate transactions on the SP-106. Only the NET RESULT, if any, will be recorded.

Comp. leave will be lost if not taken within one year. Employees will not be allowed to extend the life of comp. leave by manipulating the SP106.

The Department's Net Result leave policy was drafted in response to an auditor's recommendation suggesting some employees were taking compensatory leave as it was about to expire and then choosing to work during that week on a day the employee was not otherwise scheduled to work. The effect of this practice was to extend the employee's compensatory leave balance. The Agency deemed this to be a manipulation of compensatory leave.

Leave is series of account entries reflecting changes in balances. An hour of compensatory leave is not a commodity that has a separate existence from other compensatory leave hours. In other words, compensatory leave earned on one day is the same as compensatory leave earned on any other day. When leave is earned, it

² Grievant Exhibit 5.

³ Agency Exhibit 4.

may be subject to an expiration period, but that fact alone does not make it a separate entity from other compensatory leave.

The Agency's Net Result policy supports the actions it took regarding Grievant's leave accounting. This policy addresses only the earning and taking of compensatory leave in the same week – it is not limited to the taking of leave in the same week that leave is earned.⁴ In other words, it does not matter when the leave taken was first earned. All that matters is that when compensatory leave is taken in a week, if compensatory leave was earned in that same week, the Agency will make a schedule adjustment that nets the compensatory leave.⁵

There is nothing inherently improper or inconsistent with the Net Result policy. Within certain limitations, the Agency has the authority to designate the number of hours and the days an employee must work. It likewise had the authority to designate when an employee will not work. One way to designate when an employee will not work is to schedule the taking of compensatory leave.⁶ The Net Result rule had the effect of a schedule adjustment.

Grievant attempted to take the compensatory leave he earned on February 22, 2001 and use it on February 20th and 21st. Since compensatory leave is not a commodity, Grievant's intent to use leave earned on a particular day is of little significance.⁷ From the perspective of the Agency's leave recording system, Grievant attempted to take two hours of compensatory leave on February 20th and one hour on February 21st. The source of that leave was from the available balances of compensatory leave. Leave hours reflected in Grievant's compensatory leave balances are indistinguishable from other compensatory leave in those balances.

There are several factors making the Agency's action unfair to Grievant in this instance. First, the Agency's compensatory leave policy is separate from the State Police Manual containing General Orders. General Orders are distributed to State police officers but the Agency's compensatory leave policy was not distributed to

⁴ If the Hearing Officer were to interpret the Net Result policy to mean that only the compensatory leave earned in a week would be taken in that same week, the interpretation would be contrary to the reason the policy was created. The policy was created to prevent artificial extension of compensatory leave set to expire. If compensatory leave earned in one week must be considered as the leave taken in that same week, the Net Result policy would have no effect on expiring leave. Thus, no potential manipulation could be avoided.

⁵ For example, if compensatory leave is taken on a Monday but compensatory leave is accrued on a Friday, the Net Result rule applies even though the compensatory leave used on Monday did not accrue until several days later.

⁶ General Order 41(5)(a) states, The Agency "may assign the time for taking compensatory leave based on the needs of the Department."

⁷ When an employee uses compensatory leave, the leave reporting form does not require the employee to indicate the dates on which the employee earned the leave. All that is necessary is that the employee have sufficient compensatory leave balances in order to use compensatory leave.

Grievant.⁸ He had no knowledge of the policy before filing his grievance.⁹ Based on the facts of this case, it is appropriate for Grievant to question whether the Agency is misapplying General Order 41(3)(c) which suggests compensatory leave does not expire until 12 months has passed after the leave was earned. In short, Grievant had insufficient notice of the Agency's leave policy. Second, the Agency's leave policy was developed to prohibit employees from "manipulating" their compensatory leave so as to extend the 12 months expiration period. The Hearing Officer finds that Grievant's objective in taking the three hours of compensatory leave was to use it before the leave expired and not to manipulate his compensatory leave. The fact that Grievant had to work on a holiday thereby generating the accrual of compensatory leave, was because of the Agency's needs and was at the direction of Grievant's supervisor.¹⁰ The reason for the Agency's Net Result rule does not apply to Grievant's behavior.

The Hearing Officer recommends that the Agency extend the life of the three hours of compensatory leave so that Grievant may take it beyond the 12-month period. If the Agency requires documentation sufficient to support leave audits, this recommendation should serve as sufficient documentation of Grievant's request. Or the Agency may require Grievant to submit a simple request for extension of the compensatory leave.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**. The Agency should consider the Hearing Officer's recommendation that the Agency extend the time frame for the three hours of compensatory leave earned on February 22, 2001.

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:

⁸ In most instances, it is not necessary for the Agency to show that an employee is actually aware of a particular policy in order to enforce that policy against the employee.

⁹ Not only was Grievant unaware of the policy, his supervisor was also unaware of the policy.

¹⁰ General Order 41(3)(c) states, "An employee must have Department approval before earning compensatory leave."

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.

Carl Wilson Schmidt, Esq.
Hearing Officer

