

Issue: Restrictions placed for participating as a representative for State employee grievance hearings; Hearing Date: 09/20/02; Decision Date: 10/01/02; Agency: Department of Corrections; AHO: Carl Wilson Schmidt, Esq.; Case No.: 5524/5525



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5524 / 5525**

Hearing Date: September 20, 2002  
Decision Issued: October 1, 2002

**PROCEDURAL HISTORY**

The Department of Corrections placed restrictions on Grievant's actions to represent State employees in grievance hearings. On March 7, 2002, Grievant timely filed a grievance to challenge the disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 27, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 20, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Warden

**ISSUE**

To what extent may the Agency restrict Grievant's activities as a grievant representative.

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. 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 Corrections employs Grievant as a Hearing and Legal Services Officer I. He "[s]erves as facility Inmate Hearings Officer to determine whether infractions of institutional rules and regulations have occurred and to ensure equitable, expedient and accurate application of disciplinary sanctions in an objective and fair manner."<sup>1</sup>

During the prior two years, Grievant represented four employees in grievance hearings. Two of these employees worked at Grievant's Facility. The other two employees worked at other institutions within the Department of Corrections. No evidence was presented regarding the number of hours Grievant spent representing these grievants because he did not claim administrative leave, although he used work time to participate.<sup>2</sup>

On March 1, 2002, the Warden instructed<sup>3</sup> Grievant:

Effective immediately, you cannot use office time, nor office equipment (fax machines, paper, copying machines, phones, computers, etc) to represent Grievants in Grievant hearings. Representing Grievants is not a task that is identified in your attached Employee Work Profile. If you wish to represent Grievants from this point forward, you must use your personal annual leave to do so, and the scheduling of that annual leave will be treated like any other request for annual leave under personnel guidelines,

---

<sup>1</sup> Agency Exhibit 1.

<sup>2</sup> Grievant's failure to properly document his time as administrative leave does not affect the outcome of this grievance. Grievant was not disciplined for his failure to properly account for his time.

<sup>3</sup> No evidence was presented regarding whether the Agency has given similar instructions to other Agency employees serving as grievance representatives.

meaning you must receive permission beforehand from your supervisor, [Assistant Warden]. All tasks associated with representing a Grievant, including but not limited to, interviewing and preparing witnesses, interviewing and preparing clients, conference calls, preparing questions, drafting documents, and conducting research, must be done on your own time using personal annual leave, and not on state time.

Failure to abide by this direct order may result in disciplinary action against you, in accordance with the employee's Standards of Conduct.<sup>4</sup>

On March 15, 2002, Grievant represented an employee during a grievance hearing and was required by the Agency to use four and one-half hours of annual leave.

Prehearing conferences involving the parties and the Hearing Officer typically require less than a half-hour per conference. Grievance hearings involving the presentation of argument and evidence typically last fewer than eight hours per grievance. Grievant used Agency equipment to draft correspondence. He met with clients and interviewed witnesses outside of work hours and was not paid by the Agency for his time doing so.

Grievant has a good work performance record. Grievant's 1999<sup>5</sup> and 2000<sup>6</sup> evaluations show his Overall Performance Level as "Exceeds Expectations." On September 12, 2001, Grievant received an Overall Rating Earned of "Contributor." Grievant's Interim Evaluation Form for April 15, 2002 describes his performance as "continues to excel in making sure that disciplinary procedures are implemented fairly at hearings." He is described as "very conscientious."

## **CONCLUSIONS OF LAW AND POLICY**

Several policies govern resolution of this grievance. They include policies issued by the Department of Employment Resolution (EDR), Department of Human Resource Management (DHRM), and Department of Corrections (DOC)<sup>7</sup>.

---

<sup>4</sup> Grievant Exhibit 9.

<sup>5</sup> Grievant Exhibit 5.

<sup>6</sup> Grievant Exhibit 4.

<sup>7</sup> The Department of Corrections has issued Procedure Number 5-17 to address employee grievances. Many of the sections are identical to the Grievance Procedure Manual issued by the Director of the Department of Employment Resolution. A grievance procedure must be established by the EDR Director pursuant to Va. Code § 2.2-1001(2). (Interestingly, unless expressly authorized by law, the DHRM Director has no authority with respect to the state grievance procedure. See Va. Code § 2.2-1201(13)). The DOC Director has no express authority to establish a separate grievance procedure. To the extent the two policies conflict, the EDR grievance procedure controls. It is unclear whether the DOC may establish a separate grievance procedure to supplement the EDR procedure. The Hearing Officer lacks the authority to overturn DOC policy even if that policy is not authorized by law. Thus, the Hearing Officer

## Office Equipment

The Agency has limited Grievant's use of office equipment as follows:

Effective immediately, you cannot use office time, nor office equipment (fax machines, paper, copying machines, phones, computers, etc) to represent Grievants in Grievant hearings.

GPM § 8.8 states<sup>8</sup>:

Grievances are official business. Therefore, in processing grievances, parties may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.

This section requires agencies to permit parties to make reasonable use of agency equipment to process grievances. A party is defined as "[e]ither the employee who initiates the grievance or her employing agency."<sup>9</sup> Grievant is not a party<sup>10</sup> under the GPM, he is a representative. Thus, the Agency's restriction of Grievant's use of office equipment is upheld.<sup>11</sup>

## Use of Administrative Leave

The Agency has prohibited Grievant from using administrative leave to represent employees in grievance hearings. He is required to use annual leave.

*DHRM Policy Governs.* DHRM Policy 4.05 authorizes employees to take administrative leave to resolve work-related conflicts. Section V(A) states that

---

interprets DOCPM § 5-17 to serve as a supplement to the EDR grievance procedure to the extent it is not inconsistent with the EDR grievance procedure.

<sup>8</sup> DOCPM § 5-17.22 restates GPM § 8.8.

<sup>9</sup> GPM § 9. DOCPM § 5-17.5 defines party as "either the employee who initiates the grievance or the employing agency."

<sup>10</sup> Section IV(A) of the EDR Rules for Conducting Grievance Hearings states, "Representatives: Party may be represented by legal counsel, another individual of choice, or themselves." This section shows EDR distinguishes between a party and a representative and that a representative is not a party unless he or she is representing him or herself.

<sup>11</sup> Although the Agency's restriction is in accordance with a strict reading of the GPM, it is not in accordance with the intent underlying the GPM of permitting employee's adequate representation. For example, if a representative must contact Agency counsel to discuss settlement of the grievance or must contact the Hearing Officer for a prehearing conference, the Agency's restriction would force the representative to be away from his or her work site to make telephone calls. This places an unnecessary burden on the representative. The Hearing Officer recommends that the Agency reconsider its absolute prohibition regarding a representative's use of office equipment.

“[e]mployees who are ... representatives of grievants, in a grievance initiated under the State’s Grievance procedure will be granted reasonable amounts of administrative leave, including allowances for travel time, to participate in grievance proceedings.”

DHRM Policy 4.05 does not define what constitutes time “to participate in grievance proceedings.” Participating in a grievance proceeding may include many actions, but surely, it must include participating in the step resolution meetings and any interaction with a Hearing Officer relating to an active grievance proceeding. Grievant is entitled to take reasonable administrative leave to represent employees in grievances and that leave should include any interaction with a Hearing Officer as part of an active grievance.<sup>12</sup>

*Preparation Time.* The Agency has restricted Grievant’s use of administrative leave in order for him to prepare for grievance hearings. These tasks might include, “interviewing and preparing witnesses, interviewing and preparing clients, conference calls<sup>13</sup>, preparing questions, drafting documents, and conducting research ....” DHRM policy does not specify whether preparation for a grievance hearing is time used to participate in a hearing thereby justifying a grant of administrative leave.

The Department of Employment Dispute Resolution<sup>14</sup> has addressed whether administrative leave may be granted for preparation time. GPM § 8.6 states, “Agencies **may** grant the employee reasonable time to prepare for the presentation of the grievance.” (Emphasis added). Under the GPM, an Agency has discretion regarding whether to grant administrative leave to an employee representative to prepare for the hearing.

*Reasonableness.* DHRM policy permits employees to receive reasonable administrative leave to serve as a grievance representative. What is reasonable is not defined by the policy. Reasonableness should be determined on an individual basis after considering all factors relating to the representation. An Agency may not arbitrarily conclude that any use of administrative leave is unreasonable.

Grievant has established that representing four employees in a two-year period is a reasonable use of administrative leave for grievance hearings. He has established

---

<sup>12</sup> For example, Grievant’s scheduling and participation in prehearing telephone conferences involving the Hearing Officer would be covered by administrative leave. Writing letters and submitting documents to the Hearing Officer would also be permitted as administrative leave.

<sup>13</sup> Conference calls with the Hearing Officer would not constitute preparation for the grievance because prehearing conferences are part of the grievance hearing. Other conference calls may be considered preparation time.

<sup>14</sup> It is unclear whether the EDR Director has the authority to determine when administrative leave must be granted. Determining when to grant administrative leave is a primary function of the Department of Human Resource Management. The Hearing Officer is bound to comply with the Grievance Procedure Manual even if the underlying source of authority for provisions of the GPM are beyond the scope of EDR’s authority.

that his work performance has not suffered and that his participation in the grievance process has improved the efficiency of the grievance process. There are approximately 260 workdays available in any given year; using two of those days for administrative leave is reasonable.<sup>15</sup>

The Agency contends Grievant's use of any administrative leave is unreasonable because of the severe budget crisis the Agency is experiencing. It identified specific duties that Grievant could be doing to assist with the Agency's operations and lessen the hardship resulting from staff layoffs. There is no doubt that the Agency is facing a budget shortfall unseen in many decades. Every aspect of the Agency is affected and many employees are experiencing extreme personal hardship. This fact, however, is insufficient to permit the Agency to define reasonable administrative leave as being no administrative leave whatsoever.

Although there are many duties Grievant could perform other than representing State employees in grievances, the Agency has not established that it assigned specific duties to Grievant because of the budget shortfall and that Grievant failed to perform those duties because he was too busy serving as a grievance representative. The Agency has not established a connection between Grievant's core responsibilities and his grievance activities. Based on the evidence presented, the Agency has not established that Grievant's work performance has been diminished by his service as a grievant representative.

### Agency Definition

Grievant may not represent employees outside of the institution where he works under the Agency's restriction.<sup>16</sup> The Agency argues that the term "agency" may be defined to include the entire Department of Corrections and also separate institutions because each institution has a separate budget and staff reporting to a Warden who has primary control over that institution.

There is no authority supporting the Agency's contention. Agency as used in the GPM refers to the Department of Corrections as a whole and not to its particular units. DOCPM § 5-17.5 defines "Director" to mean the Director of the Department of Corrections. "Agency head" is defined as "the Director, Commissioner, or other

---

<sup>15</sup> The Hearing Office is not suggesting Grievant may participate in **only** two grievances per year. Grievant has established that it is reasonable for him to use administrative leave to participate in at least two grievances per year given his workload, job performance, and other factors.

<sup>16</sup> Although not expressly stated in the March 1, 2002 letter to Grievant, the Agency's step response shows it considers as unreasonable Grievant's representation of employees employed outside of Grievant's institution. The First Step Respondent states:

The Grievance procedure manual has a provision that allows for state employees to represent disciplined state employees in state grievance proceedings, at the discretion of the employing Agency. Inherent in that provision is the understanding that such representation would occur infrequently, and only within the employing institution.

appointed head of the state agency or the individual who has been delegated the authority to act for the agency head.” “Unit or organizational unit” is defines as “an operational unit of the Department, such as an institution ....” Nothing in this language or elsewhere in DOCPM § 5-17 suggests that an organizational unit such as an institution should also be considered an agency.<sup>17</sup> Grievant may not be restricted to representing only employees also working where he is employed.

### Exclusive Right to Manage

The Agency contends it has an exclusive right to manage the affairs of its business and because of that right it may establish rigorous restrictions on Grievant’s activities regardless of whether those restrictions are contrary to EDR, DHRM, or DOC policy.<sup>18</sup> According to the Agency, its exclusive right to manage is created by *Va. Code § 2.2-3004(B)* which states:

Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management’s response, including any appropriate remedial actions, shall be prompt, complete, and fair.

The Agency’s argument is without merit. It fails to distinguish between a statute which **creates** a right to manage and a statute which merely **recognizes** that right elsewhere created in the Code of Virginia.

*Creation of Right to Manage.* The Department of Corrections has only the powers given to it by the Virginia General Assembly through statute. Articles 2 and 3 of Title 53.1 of the *Code of Virginia* create the State Board of Corrections and the Department of Corrections.

To the extent the Department of Corrections as a right to manage, that right originates in Title 53.1 of the *Code of Virginia*. For example, *Va. Code § 53.1-10* states:

The Director shall be the chief executive officer of the Department and shall have the following duties and powers: 1. To supervise and manage

---

<sup>17</sup> One could argue that DOCPM § 5-17.19 defines agency to be an institution. This section states, “State employees who serve as witnesses or representatives in grievances arising in their **own agency** shall be compensated for the actual time at the hearing ....” Another interpretation of this language would be that the Department intends to limit representation to other DOC employees and to prohibit reimbursement for representation in other State agencies. Either interpretation is inconsistent with the EDR grievance procedure which makes no distinction between representing employees working outside of the representative’s agency.

<sup>18</sup> The Agency argues that its statutory right to manage enables it to disregard State agency policies because those policies do not have the force of law.



the Department and its system of state correctional facilities. \*\*\* 3. To employ such personnel and develop and implement such programs as may be necessary to carry out the provisions of this title, subject to chapter 29 (§ 2.2-2900 et seq.)<sup>19</sup> of Title 2.2, and within the limits of appropriations made therefor by the General Assembly.

Since the DOC Director is given the duty and power to supervise and manage, it is reasonable to conclude the Department of Corrections, acting through its Director, has the right to manage the affairs of its business.

*Recognizing Right to Manage.* In this grievance, the Agency relies on *Va. Code § 2.2-3004(B)* as the source of its authority to exercise its right to manage which it has interpreted as an exclusive right. *Va. Code § 2.2-3004* is located in Chapter 30 of Title 2.2 of the *Code of Virginia*. This chapter is entitled “State Grievance Procedure” and it focuses on the Commonwealth’s policy to encourage the resolution of employee problems and complaints. Nothing in the chapter can be construed to **create** a right to manage in any State agency. *Va. Code § 2.2-3004(B)* addresses solely the qualification of grievances for hearing and as part of that qualification **acknowledges and recognizes** an agency’s right to manage created elsewhere. *Va. Code § 2.2-3004(B)* inserts the word “exclusive” only with in the context of what type of issues qualify for a hearing. A brief discussion of the origins of the exclusive right language may be helpful.

*Grievance Exclusive Right.* In 1978, the General Assembly passed *Va. Code § 2.1-114.5:1*<sup>20</sup> which set forth a grievance procedure. Section B of that statute stated:

Nothing in this procedure is intended to circumscribe or modify the existing management right of any State agency to do the following: (i) direct the work of its employees as well as establish and revise wages, salaries, position classifications and general employee benefits; (ii) hire, promote, transfer, assign and retain employees within the agency; (iii) maintain the efficiency of governmental operations; (iv) relieve employees from duties of the agency in emergencies; and (v) determine the methods, means and personnel by which operations are to be carried on.

In 1979, the General Assembly deleted the above language for *Va. Code § 2.1-114.5:1* and substituted.<sup>21</sup>

Management reserves the **exclusive right to manage** the affairs and operations of State government. **Accordingly**, the following complaints are nongrievable: (i) establishment and revision of wages or salaries,

---

<sup>19</sup> *Va. Code § 2.2-2900 et seq.* is entitled the Virginia Personnel Act.

<sup>20</sup> 1978 Acts of Assembly, Chapter 845.

<sup>21</sup> 1979 Acts of Assembly, Chapter 734.

position classifications or general benefits, (ii) work activity accepted by the employee as a condition of employment or work activity which may reasonable be expected to be a part of the job content, (iii) the contents of ordinances, statutes or established personnel policies, procedures, rules and regulations, (iv) failure to promote except where the employee can show established promotional policies or procedures were not followed or applied fairly, (v) the methods, means and personnel by which such work activities are to be carried on, (vi) termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition, (vii) the hiring promotion, transfer, assignment and retention of employees within the agency, and (viii) the relief of employees from duties of the agency in emergencies. (Emphasis added.)

Webster's New Universal Unabridged Dictionary defines "accordingly" as: "1. therefore; so; in due course. 2. In accordance; correspondingly." By using the word "Accordingly" in *Va. Code § 2.1-114.5:1*, the General Assembly tied the first sentence granting an exclusive right to the second sentence listing the examples of that exclusive right. Thus, the exclusive right to manage was defined by the examples listed and an employee could not challenge those issues by filing a grievance. *Va. Code § 2.1-114.5:1* preserved the Agency's exclusive right by not permitting an employee to initiate a grievance challenging that right.

In 1995, the General Assembly removed many limitations on what matters could form the basis of a grievance, but retained prior restrictions when determining whether a grievance could qualify for a hearing. In other words, the test for whether an issue violated the Agency's exclusive right to manage was delayed from the beginning of the grievance process to the hearing qualification stage. If an employee filed a grievance listing an issue that encroached on the exclusive right to manage, the employee could take his or her grievance through the step process, but it would not qualify for a hearing before a Hearing Officer. As part of this change, the General Assembly passed *Va. Code § 2.1-116.06* which states:

B. Management reserves the exclusive right to manage the affairs and operations of state government. Management shall exercise its powers with the highest degree of trust. In any employment matter that management precludes from proceeding to a grievance hearing, management's response, including any appropriate remedial actions, shall be prompt, complete, and fair.

C. Complaints relating solely to the following issues shall not proceed to a hearing: (i) establishment and revision of wages, salaries, position classifications, or general benefits; (ii) work activity accepted by the employee as a condition of employment or which may reasonably be expected to be a part of the job content; (iii) contents of ordinances, statutes or established personnel policies, procedures, and rules and regulations; (iv) methods, means, and personnel by which work activities

are to be carried on; (v) termination, layoff, demotion, or suspension from duties because of lack of work, reduction in work force, or job abolition; (vi) hiring, promotion, transfer, assignment, and retention of employees within the agency; and (vii) relief of employees from duties of the agency in emergencies.

For the most part, *Va. Code § 2.1-116.06* is the same as former *Va. Code § 2.1-114.5:1* except that it divides part of the prior statute into two subsections and adds two new sentences regarding the agency exercising trust and remedial actions. There is no reason to believe that the General Assembly intended this change to extend the exclusive right to manage into the Hearing Officer's decision-making authority or the application of established written policies by other agencies. Indeed, the third sentence to subsection B shows that that subsection addresses only matters not qualifying for a hearing. It confirms that the General Assembly intended the exclusive right to remain regarding matters not qualifying for a hearing.<sup>22</sup>

Although a Hearing Officer always should be mindful that an agency is responsible for managing its business, once a grievance is qualified for a hearing, the issues in that grievance do not encroach on the Agency's exclusive right.<sup>23</sup> If the Agency's reasoning is adopted it would mean that the Agency's exclusive right to manage would enable it to disregard the grievance procedure when the grievance procedure interfered with the operations of its business.

### Retaliation

Grievant contends the Agency is retaliating against him. No credible evidence was presented supporting this argument and, thus, Grievant's request for relief regarding retaliation is denied.

## **DECISION**

Grievant's request to use Agency office equipment as a grievance representative is denied.

The Agency is Ordered to comply with the Grievance Procedure Manual to permit Grievant to represent State employees from any State agency and to permit Grievant to use administrative leave within reason. The Agency is Ordered to permit

---

<sup>22</sup> The exclusive right to manage language appears in subsection B of *Va. Code § 2.1-116.06*. Subsections A through E of that statute address qualification of grievance hearings. Subsection F addresses hearing locations. In contrast, *Va. Code § 2.1-116.07* addresses Hearing Officer decisions, duties, and costs. Isolating the exclusive right in a section dealing with hearing qualification further suggests the exclusive right does not govern Hearing Officer decision-making.

<sup>23</sup> One exception to this may be when an Agency mistakenly qualifies for hearing an issue that would otherwise be within its exclusive right.

Grievant to claim administrative leave rather than annual leave for his representation of a grievance on March 15, 2002.<sup>24</sup>

The Agency is ordered to permit Grievant to represent employees outside of the institution or facility in which he works.

Grievant's request for relief regarding his claim of retaliation is **denied**.

### **APPEAL RIGHTS**

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>25</sup>

---

<sup>24</sup> Grievant should be granted 4.5 hours of administrative leave on March 15, 2002 and his annual leave balance increased by the 4.5 hours of annual leave taken on that day.

<sup>25</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

---

Carl Wilson Schmidt, Esq.  
Hearing Officer