

Issue: Misapplication of leave policy; Hearing Date: 11/20/02; Decision Date: 11/21/02; Agency: DOC; AHO: David J. Latham, Esq.; Case No.: 5567



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5567

Hearing Date: November 20, 2002
Decision Issued: November 21, 2002

PROCEDURAL ISSUES

It is important to emphasize that in a hearing involving the alleged misapplication of policy, the hearing officer's role is solely to ascertain whether the policy was misapplied. If the hearing officer determines that policy was misapplied, he may direct the agency to correctly apply the policy. However, the hearing officer may not grant monetary compensation.¹

Grievant initially grieved the agency's decision not to authorize sick leave benefits for his absences on May 22 & 23, 2002. However, the grievant has subsequently agreed with the agency that its decision not to authorize sick leave for May 22, 2002 was correct. Accordingly, the Director of the Department of Employment Dispute Resolution (EDR) has ruled that the alleged misapplication of policy for the May 22, 2002 absence does not qualify for a hearing.² Therefore, this Decision addresses only the absence of May 23, 2002.

¹ Section 5.9(b), EDR *Grievance Procedure Manual*, effective July 1, 2001.

² *Qualification Ruling of Director* No. 2002-150, issued October 18, 2002.

APPEARANCES

Grievant
Representative for Grievant
Three witnesses for Grievant
Warden

ISSUE

Was the policy on Hours of Work and Employee Leave Procedure misapplied?

FINDINGS OF FACT

The grievant filed a grievance alleging unfair application of the leave procedure policy. Following failure to resolve the grievance at the third resolution step, the agency head refused to qualify the grievance for a hearing.³ The grievant requested a ruling from the Director of EDR as to whether his grievance qualifies for a hearing. The Director ruled that the portion of the grievance relating to the absence of May 23, 2002 is qualified for hearing.⁴

The Department of Corrections (DOC) (Hereinafter referred to as agency) has employed the grievant for 15 years. He is currently a corrections officer senior.

The facility's policy on employee leave procedure addresses notification requirements for employees who are absent and states, in pertinent part:

(1) Designated personnel, who must be absent because of illness, shall personally notify the Shift Command or supervisor on duty at least two (2) hours in advance of the beginning of their shift. The employee must leave a telephone number at which he/she can be contacted when his/her Shift Commander or supervisor reports to duty. If unable to leave a telephone number, the employee must contact his/her Shift Commander or supervisor within one (1) hour following the time scheduled to report for duty.

³ Exhibit 1. Grievance Form A, filed June 5, 2001.

⁴ Qualification Ruling of Director, *Ibid*.

(4) Notification does not automatically mean leave will be approved.⁵

The practice of most shift commanders is to instruct the officer calling in to call his own shift commander after the commander reports for duty. In some cases this is not done depending on circumstances, the shift commander and whether the officer calling in has provided a telephone number where he can be contacted.

The leave procedure policy also addresses sick leave verification. Employees on twelve (12) hour shifts may use up to thirty-six (36) hours of unverified sick leave during a twelve-month period. However, all time used in excess of the above which is charged to sick leave balances must be verified by an original doctor's certificate which shall state the employee was under his/her care and was unable to work.⁶ Failure to produce a doctor's certificate when required will normally result in disapproval of sick leave, and leave without pay for the time in question.⁷ The Warden or Administrative Duty Officer may grant an exception at their option.

Grievant works day shift and is required to report for work at 5:30 a.m. Grievant called in to the Shift Commander at 6:25 a.m. on May 22, 2002 to report that he had overslept, had the strong odor of alcohol on his breath, was dealing with unspecified personal problems, and would not be reporting to work. On May 23, 2002 grievant called in at 3:45 a.m. and advised the Shift Commander that he was dealing with personal issues and would not be reporting for work. The Shift Commander asked grievant if the day shift commander had grievant's telephone number; grievant responded affirmatively. Because his own shift commander had his telephone number and because the night shift commander did not instruct him to call the day shift commander later, grievant did not call.

The shift commander to whom grievant spoke at 3:45 a.m. did not appear for the hearing, despite being listed as a witness by both parties. The agency representative averred that this witness was on vacation. The call-in page for grievant includes a handwritten note to the effect that grievant, "was to told to call back but did not."⁸ When grievant first examined this page during the last week of May 2002, this handwritten note was not on the page. None of the witnesses that testified at the hearing knew who had written the note.

As of May 23, 2002, grievant had exceeded his 36 hours of unverified sick leave.⁹ Grievant did not see a physician on either May 22 or 23, 2002. In early

⁵ Exhibit 6. Section 213-7.2.f, Facility Institutional Operating Procedure Number (IOP) 213, *Hours of Work and Employee Leave Procedure*, effective April 15, 2002.

⁶ Exhibit 6. Section 213-7.2.g, IOP 213, *Ibid*.

⁷ Exhibit 6. Section 213-7.2.h, *Ibid*.

⁸ Exhibit 2. Call-in book page for grievant, January-June 2002.

⁹ Exhibit 1. Second step resolution response of Warden, June 20, 2002.

May 2002, grievant had contacted the employee assistance program (EAP) regarding his personal problems. The EAP carrier approved grievant to be interviewed and treated by a social worker beginning on June 27, 2002.¹⁰

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.¹¹

A key witness in this case was the shift commander that grievant spoke with early in the morning of May 23, 2002. However, the witness failed to appear for the hearing. The grievant did not request an order because the agency had indicated that the shift commander was also scheduled to be a witness for the agency. Neither party made arrangements to have the witness testify by telephone. Neither party obtained an affidavit from this witness in lieu of his personal appearance. Because there is no testimony or written statement from this witness, the grievant's sworn testimony that the shift commander did not tell him to call back carries more evidentiary weight than the hearsay evidence that he did. Therefore, it is concluded that the shift commander did not direct grievant to call back the day shift supervisor.

¹⁰ Exhibit 5. Letter from EAP carrier to social worker, May 6, 2002.

¹¹ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

However, while grievant prevails on the callback issue, this is not dispositive of the case. The issue grieved is whether the agency properly applied its leave policy. Grievant acknowledges that he had already exceeded his allotted amount of unverified sick leave. The policy provides that any time used in excess of the 36 allowable hours must be supported by a physician's written certificate of disability. Grievant did not see a physician on May 23, 2002 and has not provided any evidence from a physician to show that he was disabled on that date. Therefore, pursuant to IOP 213, the facility normally disapproves sick leave and charges the time to leave without pay. The agency followed that procedure in this case.

The grievant observes correctly that the Warden may grant an exception to the policy. However, while the policy provides this option to the Warden, he is not required to make an exception. Section 2.2-3004.B of the Code of Virginia states, in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." When a policy provides that agency management has the option to exercise discretion and judgement, a hearing officer may not interfere with that management decision, unless the decision is arbitrary or without any reasonable basis. Here, the Warden made a reasonable decision to disapprove payment for the leave, rather than to discipline grievant for his failure to comply with the two-hour call-in requirement. Thus, the Warden has demonstrated a measured and reasoned response to grievant's actions.

Grievant argues that his contact with the EAP carrier, and their approval of future treatment by a social worker should, in effect, be a substitute for the requirement to provide a physician's certificate. This argument is not persuasive for two reasons. First, grievant did not see a physician who could attest to disability, if any. Without a certification of disability from a medical professional, the agency cannot assume that grievant was unable to work on May 23, 2002. Second, the grievant was not scheduled to be interviewed by the social worker until June 27, 2002 – more than one month after the absence at issue herein. The mere fact that grievant had made an appointment for the future cannot reasonably substitute for a disability certification in the present.

Therefore, it is concluded that the agency did not violate any mandatory policy provision. Moreover, the decision to disapprove sick leave for one day was fair and did not disregard the policy's intent.

DECISION

The grievant has not demonstrated by a preponderance of evidence that the Hours of Work and Leave Procedure policy was misapplied.

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.¹²

[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]

David J. Latham, Esq.
Hearing Officer

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.