

Issue: Misapplication of leave policy; Hearing Date: 08/29/03; Decision Issued: 09/05/03; Agency: DJJ; AHO: Carl Wilson Schmidt, Esq.; Case No. 5762; **Administrative Review: EDR Ruling Request received 09/12/03; EDR Ruling dated 01/07/04; Outcome: HO exceeded scope of his authority. HO directed to modify decision by eliminating last 3 sentences in the Decision section [2003-164]; Administrative Review: DHRM Ruling Request received 09/12/03; DHRM Ruling dated 01/27/04; Outcome: Concurs with EDR's determination.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5762

Hearing Date: August 29, 2003
Decision Issued: September 5, 2003

PROCEDURAL HISTORY

On September 16, 2002, Grievant filed a grievance alleging the Agency misapplied policy. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Director of the Department of Employment Dispute Resolution issued a ruling on June 17, 2003 qualifying the case for a hearing. On August 4, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 29, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Three witnesses

ISSUE

Whether the Agency misapplied leave policies.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she 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 Juvenile Justice employs Grievant as a Juvenile Corrections Officer Senior. She is a full time classified non-exempt employee who receives sick leave under the terms of the Virginia Sickness and Disability Program (VSDP). Grievant works 12 hour shifts and is scheduled using a 28 day cycle sheet. Although she may be scheduled to work for 168 hours in the cycle, she is permitted to work only 160 hours. If she works over 160 hours, then the Agency may be obligated to pay her overtime compensation. To avoid this, the Agency engages in a practice it calls "schedule adjust." The Agency does not have a written policy defining this phrase or explaining when and how schedule adjust may occur. After an employee has submitted her 28 day cycle sheet for entry into the Agency's leave recordkeeping system, the Agency takes annual or sick leave claimed by the employee during the 28 day cycle, restores it to the employee's leave balances, and then replaces it with compensatory or overtime leave earned during the cycle. Schedule adjustment takes place after the employee has claimed leave and received the necessary supervisor approval to take the leave. It is intended to reduce the financial burden on the Agency.

Since April 23, 2000,¹ the Agency's payroll department has been charging Grievant's time off due to illness to compensatory, overtime, or annual leave rather than to sick leave. The Agency also used schedule adjustment to change Grievant's use of compensatory leave to annual leave.

The Agency adjusted employee schedules because it believed doing so was permitted by Department of Human Resource Management (DHRM) policies. DJJ

¹ In a memorandum dated April 18, 2000, an Agency administrator wrote:

Beginning Sunday, April 23, 2000, security staff using annual leave, call-ins, or other failure to report will not automatically be charged annual, compensatory, or sick leave. Rather, as a form of schedule adjustment, supervisors shall first adjust their overtime to cover the time period.

(Reminder: "overtime" for non-exempt employees working on a 28-day cycle refers to those hours physically worked in excess of 160 in the cycle. Any worked hours in "excess" of the 160 hours are paid at the time-and-a-half rate or overtime leave is to be awarded at the time-and-a-half rate.)

previously sought clarification of leave policies but did not receive any response until first receiving a copy of the EDR Director's qualification ruling with an attached interpretation from DHRM.

CONCLUSIONS OF POLICY

This case addresses what actions the Agency may take after Grievant has requested and received approval for leave and worked her 28 day cycle schedule.

Sick leave and annual leave are defined under DHRM Benefits Management policies. Overtime and compensatory leave for State employees are defined within DHRM Compensation Management policies. These types of leave differ in many ways including (1) how they accrue, (2) the purpose for which an employee may use leave, and (3) the time period during which the leave must be used.

Sick leave. Grievant is subject to the Virginia Sickness and Disability Program, DHRM Policy 4.57. This policy “[p]ermits agencies to provide sick leave and family and personal leave to eligible employees.” On January 10th of each year, Grievant receives at least 64 hours of paid sick leave. She may draw from this balance throughout the year. Under VSDP, an employee “may use credited sick leave for absences due to illnesses, injuries, and preventive, well-patient doctors' visits.” Moreover, employees “may use 33% of their credited sick leave for family purposes as qualified under the Family and Medical Leave Policy, No. 4.20.” Sick leave may not be “carried over at the end of the calendar year, or paid out upon employees' separation.” In other words, if an employee does not use all of his or her sick leave balance, that balance is lost at the end of the year.

Annual Leave. Annual leave may be used for “vacations and for other personal purposes.”² Annual leave accrues at the end of each pay period, at a rate determined by an employee's years of service with the Commonwealth.³ Moreover, unused annual leave carries over from one calendar year to the next and is paid out to an employee when he leaves state service.⁴ Annual leave is subject to a cap.

Compensatory Leave. Compensatory leave “is paid time off for an eligible employee's 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.”⁵ Employees may use compensatory leave “to provide

² DHRM Policy 4.10 (II)(A).

³ DHRM Policy 4.10 (III)(A)(1).

⁴ DHRM Policy 4.10(IV)(A) and (V)(A).

⁵ DHRM Policy 3.10(III)(A).

paid time off from work *for any purpose.*"⁶ Compensatory leave lapses within 12 months from the date it is earned.⁷

Overtime Leave. An employee receives overtime leave based on one and one-half hours of leave for every hour worked over 40 in a workweek.⁸ Overtime leave may be used for any purpose and any unused overtime leave is paid out to an employee upon his separation or transfer from the agency.⁹ Overtime leave does not lapse, but caps¹⁰ at 240 hours.¹¹

Analysis

Sick Leave. In those instances where Grievant (1) has available leave balances, (2) receives approval to take the leave, and (3) claims the leave on her time sheets, the Agency may not retroactively schedule adjust her leave regardless of the type of leave Grievant claims. DHRM Policies set forth a detailed framework defining different types of leave and specifying the circumstances under which that leave may be taken. By substituting one type of leave for another type of leave *after the fact*, the Agency is essentially redefining the leave Grievant took. The consequences to Grievant, over time, may result in a loss of paid leave. There may arise a situation, for example, when Grievant earns compensatory leave in October. On December 1st, Grievant is unable to work due to personal illness and she files the necessary paperwork and receives the appropriate supervisor approval to take sick leave. After the 28 day cycle is completed, the Agency forces Grievant to take the compensatory leave she earned in October. Grievant's sick leave for December 1st is restored to her sick leave balance and then expires at the end of the year. She is forced to use compensatory leave that she could have used in the following year. The effect on Grievant is that she loses a day of paid leave.

Sick leave is intended to be available for employees to use as needed. Nothing in DHRM Policy 4.57 implies that an Agency may decide to restore sick leave and charge another kind of leave when an employee has met the conditions required to use sick leave. DHRM states in its May 2, 2003 policy determination letter:

⁶ DHRM Policy 3.10(III)(B)(emphasis added).

⁷ DHRM Policy 3.10(IV)(B).

⁸ DHRM Policy 3.15(III)(A). An employee earns compensatory leave when she works 40 hours or less in a workweek, while overtime leave is earned when she works more than 40 hours. See DHRM Policy 3.10 and DHRM Policy 3.15.

⁹ DHRM Policy 3.15

¹⁰ The cap is 480 hours for non-exempt employees holding public safety, emergency, or seasonal positions.

¹¹ DHRM Policy 3.15 (III)(D).

Substitution of other kinds of leave for sick leave creates a disadvantage for the employee. Sick leave is the most restricted kind of leave with respect to when it can be used. When an employee qualifies to use sick leave but is compelled to [use] another kind of leave hours, he or she loses the flexibility that those other hours have. It is not appropriate for the agency to make such a change without the employee's agreement. ***

[P]olicy provides leave for the benefit of employees. This precept is nowhere clearer than in the case of sick leave. Sick leave is intended for employees to use under the circumstances described by Policy 4.55 and Policy 4.57. For an agency to deny this legitimate use, and to require instead that a more flexible kind of leave be charged, is counter to policy.

Accordingly, the Agency improperly substituted other leave for sick leave in those instances where Grievant had available sick leave balances and had met the requirements to claim and receive sick leave.

Compensatory Leave. The Agency has also retroactively changed Grievant's use of compensatory leave to annual leave. The May 2, 2003 DHRM letter does not specifically address changing compensatory leave to annual leave. Although the letter deals with sick leave, its principles and conclusions also apply to the Agency's substitution of annual leave for compensatory leave without Grievant's approval.

Unlike sick leave, employees do not begin the year with a balance of compensatory leave. They must earn compensatory leave. Compensatory leave lapses within 12 months of the date in this earned. Annual leave does not lapses within any particular time frame (annual leave is subject to a cap). By forcing Grievant to use annual leave in place of compensatory leave, the Agency is artificially increasing her compensatory leave balances and decreasing her annual leave balances. Over a period of time, the Agency's practice results in Grievant losing compensatory leave. If the Agency's practice is taken to its logical conclusion, Grievant could work on a holiday and receive compensatory leave but never be able to claim that leave because the agency would have substituted annual leave in place of compensatory leave. The effect on Grievant is that she would work on a holiday but not be paid for that day.¹²

Calculating the Amount Due to Grievant. In most circumstances, employees are expected to keep track of their leave balances and if there are errors, the employee should notify the Agency of the error.¹³ In this case, however, Grievant submitted her time records to the Agency and Agency staff changed the type of leave she claimed and did not tell Grievant of the nature of the change. Thus, Grievant had no method of determining the accuracy of the Agency's records since the Agency's methodology was a mystery. Under these circumstances, Grievant has no responsibility for establishing

¹² Employees must be paid for working on holidays. See DHRM Policy 4.25.

¹³ See DHRM Policy 4.30(III)(D)(1).

the accuracy of her leave balances – the Agency has sole responsibility for establishing the accuracy of Grievant’s leave balances.

Grievant argues the Agency should be forced to correct its misapplication of policy starting with April 2000, otherwise the Agency will receive a windfall at her expense. The EDR Director has already addressed this issue and her ruling is binding on the Hearing Officer. The EDR Director states:

In this case, the grievant initiated her grievance on September 16, 2002. Therefore, the grievant’s relief, if any, from a hearing officer could extend no further back than August 17, 2002.

Accordingly, the Agency need not restore Grievant’s leave balances prior to August 17, 2002.

Although the 30 day rule controls the time period by which the Hearing Officer may grant relief, it does not control the Agency’s method of calculating leave balances. The Agency took Grievant's leave balances in August 2002 and then added and subtracted leave based on the leave request forms Grievant submitted after August 2002. The problem with the Agency's methodology is that it presupposes that the balances in August 2002 were accurate. In fact, Grievant's leave balances were not accurate in August 2002. The Agency could have started computing Grievant's leave balances by taking her beginning balances in April 2000 and bringing them forward to August 2002 based on Grievant's actual leave taken. Doing so would result in the Agency using more accurate leave balances in August 2002 upon which Grievant's 30 days of relief is granted. Because the Agency calculated the leave owed to Grievant using incorrect beginning balances, the Agency’s exhibit reflecting Grievant’s current balances is not correct. This distinction is significant, for example, because for the December 25, 2002 to January 9, 2003 pay period, the Agency concluded Grievant had a zero sick leave balance and thus could not take sick leave.¹⁴ Instead, the Agency changed the sick leave to compensatory leave taken. If the Agency had used an accurate August 2002 beginning balance, it may have been the case that Grievant would have had available sick leave during that time period.

To determine the proper beginning leave balances in August 2002, the Agency may either (1) take Grievant’s beginning balances in April 2000 and bring them forward to August 2002 or (2) assume that Grievant has the maximum possible leave balances available in August 2002.

Conclusion. The facts of this appeal focus on circumstances where DJJ changes Grievant’s leave after she has taken that leave. This decision does not affect the Agency’s ability to approve Grievant’s leave before she takes it. For example, DHRM Policy 4.30(III)(C)(I) states “compensatory and overtime leave may be scheduled by the agency at a time convenient to agency operations.” Thus, the Agency could force

¹⁴ See Agency Exhibit 3.

Grievant to take compensatory or overtime leave in a particular date so long as the Agency makes its decision prior to the date Grievant is expected to take the leave.

DECISION

The Agency is Ordered to comply with DHRM leave policies. In those circumstances where Grievant has available leave balances and has met the conditions necessary to claim a particular type of leave, the Agency may not retroactively substitute another type of leave without Grievant's prior approval.

The Agency is Ordered to recalculate Grievant's available sick, annual, compensatory, and overtime leave balances beginning on August 17, 2002 (or prior to August 17, 2002 at the Agency's discretion). The Agency must either pay Grievant for that leave or increase her current leave balances. In order to determine Grievant's beginning leave balances as of August 17, 2002, the Agency may use either of two methods. First, the Agency may determine the actual balances in existence on August 17, 2002 by restarting the calculation from April 23, 2000 and bringing it forward to August 17, 2002. Second, the Agency may assume that Grievant has the highest possible balances available to her on August 17, 2002.

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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: R-5762

Hearing Date:	August 29, 2003
Decision Issued:	September 5, 2003
Re-Issued:	January 8, 2004

PROCEDURAL HISTORY

On September 16, 2002, Grievant filed a grievance alleging the Agency misapplied policy. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. The Director of the Department of Employment Dispute Resolution issued a ruling on June 17, 2003 qualifying the case for a hearing. On August 4, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 29, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Three witnesses

ISSUE

Whether the Agency misapplied leave policies.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she 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 Juvenile Justice employs Grievant as a Juvenile Corrections Officer Senior. She is a full time classified non-exempt employee who receives sick leave under the terms of the Virginia Sickness and Disability Program (VSDP). Grievant works 12 hour shifts and is scheduled using a 28 day cycle sheet. Although she may be scheduled to work for 168 hours in the cycle, she is permitted to work only 160 hours. If she works over 160 hours, then the Agency may be obligated to pay her overtime compensation. To avoid this, the Agency engages in a practice it calls "schedule adjust." The Agency does not have a written policy defining this phrase or explaining when and how schedule adjust may occur. After an employee has submitted her 28 day cycle sheet for entry into the Agency's leave recordkeeping system, the Agency takes annual or sick leave claimed by the employee during the 28 day cycle, restores it to the employee's leave balances, and then replaces it with compensatory or overtime leave earned during the cycle. Schedule adjustment takes place after the employee has claimed leave and received the necessary supervisor approval to take the leave. It is intended to reduce the financial burden on the Agency.

Since April 23, 2000,¹⁶ the Agency's payroll department has been charging Grievant's time off due to illness to compensatory, overtime, or annual leave rather than to sick leave. The Agency also used schedule adjustment to change Grievant's use of compensatory leave to annual leave.

The Agency adjusted employee schedules because it believed doing so was permitted by Department of Human Resource Management (DHRM) policies. DJJ

¹⁶ In a memorandum dated April 18, 2000, an Agency administrator wrote:

Beginning Sunday, April 23, 2000, security staff using annual leave, call-ins, or other failure to report will not automatically be charged annual, compensatory, or sick leave. Rather, as a form of schedule adjustment, supervisors shall first adjust their overtime to cover the time period.

(Reminder: "overtime" for non-exempt employees working on a 28-day cycle refers to those hours physically worked in excess of 160 in the cycle. Any worked hours in "excess" of the 160 hours are paid at the time-and-a-half rate or overtime leave is to be awarded at the time-and-a-half rate.)

previously sought clarification of leave policies but did not receive any response until first receiving a copy of the EDR Director's qualification ruling with an attached interpretation from DHRM.

CONCLUSIONS OF POLICY

This case addresses what actions the Agency may take after Grievant has requested and received approval for leave and worked her 28 day cycle schedule.

Sick leave and annual leave are defined under DHRM Benefits Management policies. Overtime and compensatory leave for State employees are defined within DHRM Compensation Management policies. These types of leave differ in many ways including (1) how they accrue, (2) the purpose for which an employee may use leave, and (3) the time period during which the leave must be used.

Sick leave. Grievant is subject to the Virginia Sickness and Disability Program, DHRM Policy 4.57. This policy “[p]ermits agencies to provide sick leave and family and personal leave to eligible employees.” On January 10th of each year, Grievant receives at least 64 hours of paid sick leave. She may draw from this balance throughout the year. Under VSDP, an employee “may use credited sick leave for absences due to illnesses, injuries, and preventive, well-patient doctors' visits.” Moreover, employees “may use 33% of their credited sick leave for family purposes as qualified under the Family and Medical Leave Policy, No. 4.20.” Sick leave may not be “carried over at the end of the calendar year, or paid out upon employees' separation.” In other words, if an employee does not use all of his or her sick leave balance, that balance is lost at the end of the year.

Annual Leave. Annual leave may be used for “vacations and for other personal purposes.”¹⁷ Annual leave accrues at the end of each pay period, at a rate determined by an employee's years of service with the Commonwealth.¹⁸ Moreover, unused annual leave carries over from one calendar year to the next and is paid out to an employee when he leaves state service.¹⁹ Annual leave is subject to a cap.

Compensatory Leave. Compensatory leave “is paid time off for an eligible employee's 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.”²⁰ Employees may use compensatory leave “to provide

¹⁷ DHRM Policy 4.10 (II)(A).

¹⁸ DHRM Policy 4.10 (III)(A)(1).

¹⁹ DHRM Policy 4.10(IV)(A) and (V)(A).

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paid time off from work *for any purpose.*²¹ Compensatory leave lapses within 12 months from the date it is earned.²²

Overtime Leave. An employee receives overtime leave based on one and one-half hours of leave for every hour worked over 40 in a workweek.²³ Overtime leave may be used for any purpose and any unused overtime leave is paid out to an employee upon his separation or transfer from the agency.²⁴ Overtime leave does not lapse, but caps²⁵ at 240 hours.²⁶

Analysis

Sick Leave. In those instances where Grievant (1) has available leave balances, (2) receives approval to take the leave, and (3) claims the leave on her time sheets, the Agency may not retroactively schedule adjust her leave regardless of the type of leave Grievant claims. DHRM Policies set forth a detailed framework defining different types of leave and specifying the circumstances under which that leave may be taken. By substituting one type of leave for another type of leave *after the fact*, the Agency is essentially redefining the leave Grievant took. The consequences to Grievant, over time, may result in a loss of paid leave. There may arise a situation, for example, when Grievant earns compensatory leave in October. On December 1st, Grievant is unable to work due to personal illness and she files the necessary paperwork and receives the appropriate supervisor approval to take sick leave. After the 28 day cycle is completed, the Agency forces Grievant to take the compensatory leave she earned in October. Grievant's sick leave for December 1st is restored to her sick leave balance and then expires at the end of the year. She is forced to use compensatory leave that she could have used in the following year. The effect on Grievant is that she loses a day of paid leave.

Sick leave is intended to be available for employees to use as needed. Nothing in DHRM Policy 4.57 implies that an Agency may decide to restore sick leave and charge another kind of leave when an employee has met the conditions required to use sick leave. DHRM states in its May 2, 2003 policy determination letter:

²¹ DHRM Policy 3.10(III)(B)(emphasis added).

²² DHRM Policy 3.10(IV)(B).

²³ DHRM Policy 3.15(III)(A). An employee earns compensatory leave when she works 40 hours or less in a workweek, while overtime leave is earned when she works more than 40 hours. See DHRM Policy 3.10 and DHRM Policy 3.15.

²⁴ DHRM Policy 3.15

²⁵ The cap is 480 hours for non-exempt employees holding public safety, emergency, or seasonal positions.

²⁶ DHRM Policy 3.15 (III)(D).

Substitution of other kinds of leave for sick leave creates a disadvantage for the employee. Sick leave is the most restricted kind of leave with respect to when it can be used. When an employee qualifies to use sick leave but is compelled to [use] another kind of leave hours, he or she loses the flexibility that those other hours have. It is not appropriate for the agency to make such a change without the employee's agreement. ***

[P]olicy provides leave for the benefit of employees. This precept is nowhere clearer than in the case of sick leave. Sick leave is intended for employees to use under the circumstances described by Policy 4.55 and Policy 4.57. For an agency to deny this legitimate use, and to require instead that a more flexible kind of leave be charged, is counter to policy.

Accordingly, the Agency improperly substituted other leave for sick leave in those instances where Grievant had available sick leave balances and had met the requirements to claim and receive sick leave.

Compensatory Leave. The Agency has also retroactively changed Grievant's use of compensatory leave to annual leave. The May 2, 2003 DHRM letter does not specifically address changing compensatory leave to annual leave. Although the letter deals with sick leave, its principles and conclusions also apply to the Agency's substitution of annual leave for compensatory leave without Grievant's approval.

Unlike sick leave, employees do not begin the year with a balance of compensatory leave. They must earn compensatory leave. Compensatory leave lapses within 12 months of the date in this earned. Annual leave does not lapses within any particular time frame (annual leave is subject to a cap). By forcing Grievant to use annual leave in place of compensatory leave, the Agency is artificially increasing her compensatory leave balances and decreasing her annual leave balances. Over a period of time, the Agency's practice results in Grievant losing compensatory leave. If the Agency's practice is taken to its logical conclusion, Grievant could work on a holiday and receive compensatory leave but never be able to claim that leave because the agency would have substituted annual leave in place of compensatory leave. The effect on Grievant is that she would work on a holiday but not be paid for that day.²⁷

Calculating the Amount Due to Grievant. In most circumstances, employees are expected to keep track of their leave balances and if there are errors, the employee should notify the Agency of the error.²⁸ In this case, however, Grievant submitted her time records to the Agency and Agency staff changed the type of leave she claimed and did not tell Grievant of the nature of the change. Thus, Grievant had no method of determining the accuracy of the Agency's records since the Agency's methodology was a mystery. Under these circumstances, Grievant has no responsibility for establishing

²⁷ Employees must be paid for working on holidays. See DHRM Policy 4.25.

²⁸ See DHRM Policy 4.30(III)(D)(1).

the accuracy of her leave balances – the Agency has sole responsibility for establishing the accuracy of Grievant’s leave balances.

Grievant argues the Agency should be forced to correct its misapplication of policy starting with April 2000, otherwise the Agency will receive a windfall at her expense. The EDR Director has already addressed this issue and her ruling is binding on the Hearing Officer. The EDR Director states:

In this case, the grievant initiated her grievance on September 16, 2002. Therefore, the grievant’s relief, if any, from a hearing officer could extend no further back than August 17, 2002.

Accordingly, the Agency need not restore Grievant’s leave balances prior to August 17, 2002.

Although the 30 day rule controls the time period by which the Hearing Officer may grant relief, it does not control the Agency’s method of calculating leave balances. The Agency took Grievant's leave balances in August 2002 and then added and subtracted leave based on the leave request forms Grievant submitted after August 2002. The problem with the Agency's methodology is that it presupposes that the balances in August 2002 were accurate. In fact, Grievant's leave balances were not accurate in August 2002. The Agency could have started computing Grievant's leave balances by taking her beginning balances in April 2000 and bringing them forward to August 2002 based on Grievant's actual leave taken. Doing so would result in the Agency using more accurate leave balances in August 2002 upon which Grievant's 30 days of relief is granted. Because the Agency calculated the leave owed to Grievant using incorrect beginning balances, the Agency’s exhibit reflecting Grievant’s current balances is not correct. This distinction is significant, for example, because for the December 25, 2002 to January 9, 2003 pay period, the Agency concluded Grievant had a zero sick leave balance and thus could not take sick leave.²⁹ Instead, the Agency changed the sick leave to compensatory leave taken. If the Agency had used an accurate August 2002 beginning balance, it may have been the case that Grievant would have had available sick leave during that time period.

To determine the proper beginning leave balances in August 2002, the Agency may either (1) take Grievant’s beginning balances in April 2000 and bring them forward to August 2002 or (2) assume that Grievant has the maximum possible leave balances available in August 2002.

Conclusion. The facts of this appeal focus on circumstances where DJJ changes Grievant’s leave after she has taken that leave. This decision does not affect the Agency’s ability to approve Grievant’s leave before she takes it. For example, DHRM Policy 4.30(III)(C)(I) states “compensatory and overtime leave may be scheduled by the agency at a time convenient to agency operations.” Thus, the Agency could force

²⁹ See Agency Exhibit 3.

Grievant to take compensatory or overtime leave in a particular date so long as the Agency makes its decision prior to the date Grievant is expected to take the leave.

DECISION

The Agency is Ordered to comply with DHRM leave policies. In those circumstances where Grievant has available leave balances and has met the conditions necessary to claim a particular type of leave, the Agency may not retroactively substitute another type of leave without Grievant's prior approval.

The Agency is Ordered to recalculate Grievant's available sick, annual, compensatory, and overtime leave balances beginning on August 17, 2002 (or prior to August 17, 2002 at the Agency's discretion). The Agency must either pay Grievant for that leave or increase her current leave balances.

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:

4. 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.
5. 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.
6. 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.³⁰

[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

³⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of the
Department of Juvenile Justice
January 27, 2004

The Department of Juvenile Justice has requested an administrative review of the hearing officer's September 5, 2003, decision in Grievance No. 5762. The agency's representative has requested that this Agency rule on whether the decision of the hearing officer is consistent with policy and to the Department of Employment Dispute Resolution to determine if the hearing officer "exceeded his authority by granting relief beyond that which is available under the grievance procedure." The agency head, Sara Redding Wilson, has requested that I respond to your request.

FACTS

The Department of Juvenile Justice employs the grievant as a Juvenile Corrections Officer Senior. She is a participant in the Virginia Sickness and Disability Program (VSDP) and accrues leave balances according to the provisions of that program. The grievant works a 12-hour shift on a 28-day cycle. On September 16, 2002, the grievant filed a grievance in which she claims that since April 23, 2000, her agency has charged her time off for illness to compensatory, overtime, or annual leave rather than sick leave. By not using the sick and family leave for illnesses, she has had high leave balances at the end of the year. Thus, this caused her to lose leave time at the end of each year because the leave balances lapsed.

The grievant challenged the loss of leave by filing a grievance. In a decision dated September 5, 2003, the hearing officer concluded that the agency improperly substituted other leave for sick leave in those instances where grievant had available sick leave balance and had met the requirements to claim and receive sick leave. The hearing officer also found that DJJ was retroactively re-characterizing the grievant's compensatory leave as annual leave. The hearing officer directed that the DJJ take one of the following actions to correct the improper action:

The Agency is ordered to recalculate Grievant's available sick, annual compensatory, and overtime leave balances beginning on August 17, 2002 (or prior to August 17, 2002 at the Agency's discretion). The

Agency must either pay the Grievant for that leave or increase her current leave balances. In order to determine Grievant's beginning leave balances as of August 17, 2002, the Agency may use either of two methods. First, the Agency may determine the actual balances in existence on August 17, 2002 by restarting the calculation from April 23, 2000 and bringing it forward to August 17, 2002. [Option 1] Second, the Agency may assume that Grievant has the highest possible balances available to her on August 17, 2002 [Option 2].

The agency contends that the hearing officer went beyond his authority when he directed that the agency should calculate loss of leave for a period of time which goes back further than 30 days before the grievance was filed.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. When an agency misapplies policy, the relief that a hearing officer may grant is limited to ordering the agency to go back to the point at which the policy was misapplied, and then apply the policy properly. By statute, this Department has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. The Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

Since this Agency concurs that DJJ officials violated the sick leave policy, the only issue that remains is the relief to be granted to the grievant. The Department of Employment Dispute Resolution, in a ruling dated January 7, 2004, has determined that the hearing officer exceeded his authority when he directed that the agency use one of the two options above to calculate the grievant's leave balances. Use of either option could have given her a greater leave balance than that to which she was entitled. Rather, EDR determined that the leave balances should have been calculated on the basis of 30 days prior to the date the grievant filed her grievance. The Department of Human Resource Management concurs with that determination. Pending the hearing officer concurring with EDR's directive, DHRM will have no further involvement in this matter.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services