Issue: Misapplication of policy; Hearing Date: 08/18/05; Decision Issued: 08/22/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8146

# *COMMONWEALTH of VIRGINIA*

***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

## DECISION OF HEARING OFFICER

In re:

Case No: 8146

Hearing Date: August 18, 2005
Decision Issued: August 22, 2005

## PROCEDURAL ISSUE

Grievant's grievance and his wife's grievance (Case # 8149) both addressed the same issue – whether the agency misapplied or unfairly applied agency policy. Because both grievances involve the same policy, factual background, and legal issues, they were deemed to be substantially similar to each other. Accordingly, the Director of the Department of Employment Dispute Resolution determined that the both grievances should be consolidated for the purposes of a hearing. However, separate decisions are being issued for each grievant.

## APPEARANCES

Grievant
Two witnesses for Grievant
Warden
Advocate for Agency
One witness for Agency

## ISSUES

Did the agency misapply or unfairly apply policy when it extended employee lunch periods from 30 minutes to 60 minutes?

## FINDINGS OF FACT

The grievant filed a grievance objecting to the facility's decision to extend employee lunch breaks from 30 minutes to 60 minutes.[1] The grievance proceeded through the management resolution steps; when the parties failed to resolve the grievance at the third step, the agency head did not qualify the grievance for a hearing. Grievant requested a qualification ruling from the Department of Employment Dispute Resolution (EDR). The EDR Director ruled that the grievance is qualified for a hearing.[2] The Virginia Department of Corrections (Hereinafter referred to as agency) has employed grievant as a corrections officer for ten years.

For several years, the security staff at grievant's facility has worked 12-hour shifts. Standard hours for day shift officers are from 5:45 a.m. to 6:15 p.m. with 30 minutes allowed as a meal break. Officers are not paid for the meal break. During the meal break, officers are required to leave their assigned post and may go either to the dining hall, one of multiple break rooms, an exercise room, or the administration building (where there is a telephone available to make outgoing calls).[3] Officers are not allowed to leave the facility during lunch.[4] Correction officers are scheduled on a 28-day schedule during which they are scheduled to work a total of 160 hours (40 hours per week x 4 weeks).

However, because officers work a 12-hour shift, they actually work only 13 days during each 28-day cycle (12 hours x 13 days = 156 hours). In order to achieve the required 160 hours for the cycle, officers would theoretically have to work the remaining four hours on a 14th day. In order to avoid having officers travel to the facility for only four hours work, the agency designated the 14th workday as an "Adjusted Rest Day." Officers were not required to come to work that day but would have to charge the four hours either to annual leave or compensatory time leave, whichever the officer chose. Officers were generally content with this system because they were only required to work 13 of every 28

[1] Exhibit 5. Grievance Form A, filed March 30, 2005.
[2] Exhibit 5. Department of Employment Dispute Resolution (EDR) *Qualification Ruling of Director*, No. 2005-1046, July 6, 2005.
[3] Incoming personal calls to corrections officers are first routed through the watch commander's office in order to control the volume of personal calls. While on meal breaks, officers are free to make outgoing calls from a designated telephone in the administration building.
[4] If an inmate disturbance occurs, all officers may be summoned back to their posts, even during meal breaks. If this occurs, officers are allowed to restart their full meal break after the disturbance is quelled.

days. In order to take an Adjusted Rest Day, officers made requests to their supervisors each month for the day they wanted to take off.

After a new warden arrived at the facility in March 2004, she learned that supervisors were spending inordinate amounts of time responding to officers' requests for Adjusted Rest Days and constantly juggling work schedules to accommodate the requests. Eventually, the warden devised a system that eliminated Adjusted Rest Days and the need for monthly leave requests and work schedule juggling. The purpose of the new system was to provide for more effective service and efficient work scheduling. It maximizes staffing during the work cycle and reduces scheduling work for supervisors. The warden did not receive approval from the required persons in the agency's central office prior to instituting the new system.[5] The new system essentially involved extending employee lunch breaks from 30 minutes to 60 minutes.[6] Thus, instead of working for 12 hours each day, officers now work 11.5 hours each day; the half hour difference is a second 30-minute meal break.[7] Working 14 days x 11.5 hours per day = 161 hours per 28-day work cycle.

## 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

[5] Exhibit 8. Section 5-12.6.B, Agency Procedure Number 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.
[6] Exhibit 5. Memorandum from warden to security staff, February 10, 2005.
[7] Occasionally, the two 30-minute meal breaks may have to be combined into a single, one-hour meal break depending on the needs of the institution.

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, such as a claim of misapplication of policy, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[8]

The EDR Director qualified this grievance for hearing to determine whether a second half-hour meal break during a 12-hour shift is a misapplication of agency policy. Agency policy provides that the organizational unit head shall establish work schedules to fit the needs of the unit and locality and, that such schedules must be approved by the appropriate Regional Director, Regional Administrator, Administrator in Central Office, Deputy Director, and by the Administrator of Employee Relations and Training.[9] The same policy provides that employees working at least six consecutive hours shall normally be afforded and encouraged to take a lunch period (meal break) of at least 30 minutes but no more than 60 minutes a day.[10] Thus, it is within the organizational unit head's (warden) authority to set meal breaks at 30 minutes, 60 minutes, or any period of time between those limits. Accordingly, the decision to give employees two 30-minute meal breaks (or one 60-minute meal break) is not, by itself, a misapplication or unfair application of policy.

Grievant argues that the agency is prohibited by its policy from involuntarily extending meal breaks to offset extra hours worked.[11] However, the subsection to which grievant refers must be read in conjunction with the entire policy section to understand the section's intent. Reading the entire section makes it clear that the purpose of the rules contained therein is to assure that (i) employees are afforded the opportunity for a full 160 hours of compensation during the 28-day cycle and, (ii) employees who report to work are able to work at least half their shift before being sent home. The prohibition against extending meal breaks therefore applies to individual situations when an employee has been required to work extra hours on one day due to an unusual circumstance. In those cases, the agency may not involuntarily extend the employee's meal break on that day to compensate for the extra hours worked. The prohibition does not apply to the implementation of a standard work schedule that extends the length of the meal break for all employees on a permanent basis (providing it complies with Procedure 5-12.8.A).

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[8] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

[9] Exhibit 8. Section 5-12.6.B, Agency Procedure Number 5-12, *Hours of Work and Leaves of Absence*, May 12, 1997.

[10] Exhibit 8. Section 5-12.8.A, *Ibid.*

[11] Exhibit 5. Section 5-35.12.A.3, Agency Procedure 5-35, *Overtime and Schedule Adjustments,* June 1, 1999.

Grievant argues that employees working in one particular building at the facility have not been placed under the new work hours system and are still permitted to have only one 30-minute meal break and adjusted rest days. The warden acknowledged that, due to unique problems in one building, implementation of the new system was temporarily delayed for employees in that building until September 2005. In September, all corrections officers will be under the new system.

Grievant states that an EDR Consultant researched his case and provided him with the results. One issue raised by EDR is whether grievant's meal breaks are compensable under the Fair Labor Standards Act (FLSA). Although grievant neither raised this issue nor offered any evidence on the issue, it is concluded that his meal breaks are not compensable. As stated in the Findings of Fact, during his meal breaks, grievant is relieved from duty. In fact, he is not permitted to remain at his assigned post but is instead required to go either to a dining hall, break room, exercise room, or the administration building. During his meal breaks, he may eat a meal, exercise, read, rest, meditate, or make personal telephone calls outside the facility. Thus, the "predominant benefit" of the break belongs to the employee.

A second issue raised by EDR is whether grievant's meal breaks constitute "On-Call" time. The applicable policy states that "General availability of employees for call back to the work site in the event of an emergency or as backup for absent personnel is *not* considered on call time and is *not* compensable." (Italics added)[12] The evidence reflects that employees on meal breaks are called back to work sites only if there is a major inmate disturbance requiring "all hands on deck;" such disturbances are infrequent events that constitute an emergency. Minor problems, such as an inmate requiring medical attention, are handled by the employees who have relieved grievant during his meal break. If an employee should have to be recalled from a meal break, he is permitted to take another meal break once the disturbance is resolved.

Policy 5-35 provides that law enforcement employees (including corrections officers and corrections officers senior) qualify for the enforcement exemption of the FLSA. For such enforcement employees, the FLSA permits a work period of 28 days and provides that employees must actually work 160 hours before becoming eligible for premium pay (overtime pay).[13] Time that is paid, but not worked (such as holidays, annual leave, sick leave, compensatory leave, and other types of leave) does not count toward the hours required to earn premium pay. However, any employee who actually works 161 hours under the new schedule (and who takes no leave and has no holidays) must be paid premium pay for one hour, or be given earned compensatory leave. The issue of one additional hour of work during each 28-day cycle was not raised during the hearing. Because the organizational unit head did not obtain approval for the new working hours system prior to implementation, proper procedure (Agency

[12] Section 5-35.15, *Ibid*.
[13] Section 5-35.7.B, *Ibid*.

Procedure 5-12.6.B) was not followed. The agency must take appropriate steps to assure that all required approvals are obtained and that the DHRM and FLSA requirements are met.

## DECISION

Grievant has not demonstrated that the working hours schedule implemented on March 20, 2005 is a misapplication or unfair application of policy because policy permits up to a 60-minute meal break. The additional 30-minute meal break is not compensable under either agency policy or the FLSA. Further the extra meal break is not on-call time as that term is used in agency policy and in the FLSA.

However, the hours of work schedule should have been reviewed and approved by required members of agency management prior to implementation. Further, it appears that grievant, and by extension all officers, are required to work 161 hours per 28-day cycle under the new schedule.

Therefore, it is hereby ORDERED that the agency promptly review the working hours schedule at grievant's facility and comply fully with the requirements of all applicable policies including particularly Agency Procedures 5-12.6.B. and 5-35.7.B. If grievant works beyond 160 hours in a 28-day cycle, he will be eligible for either premium pay or earned compensatory leave for hours beyond 160, consistent with the provisions of Policy 5-35.7.B.

## APPEAL RIGHTS

You may file an administrative review request within **15 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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 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 15-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.[14] 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]

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David J. Latham, Esq.
Hearing Officer

[14] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

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