

Issues: Misapplication of leave policy and retaliation; Hearing Date: 05/26/06;  
Decision Issued: 06/06/06; Agency: DCR; AHO: Carl Wilson Schmidt, Esq.; Case  
No. 8334; Outcome: Agency upheld in full. **Judicial Review: Appealed to  
Richmond City Circuit Court; Final Order issued 08/30/06 (CL06-4649);  
Outcome: HO's decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8334**

Hearing Date: May 26, 2006  
Decision Issued: June 6, 2006

**PROCEDURAL HISTORY**

On August 18, 2005, Grievant filed a grievance alleging the Agency misapplied and/or unfairly applied policy and the Agency retaliated against him. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 23, 2006, the EDR Director issued Ruling 2006-1164 denying qualification. On April 6, 2006, the local Circuit Court reversed the EDR Director's Ruling and qualified the matter for hearing. On April 25, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 26, 2006, a hearing was completed at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUE**

1. Whether the Agency misapplied policy?
2. Whether the Agency retaliated against Grievant?

### **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 Conservation and Recreation employs Grievant as an Environmental Specialist II at one of its Facilities. The purpose of his positions is:

Provides assistance to the Erosion & Sediment Control and Construction Permitting Manager (ESC & CPM), central and regional office staff in the implementation of the agency's Stormwater Management Programs for VDOT and utility company projects. Assists in the development of guidance procedures and technical materials to insure that SWM and ESC laws are being properly implemented. Assists the ESC & CPM and Erosion & Sediment Control Training and Certification Coordinator (Training Coordinator) in the development and implementation of the Erosion & Sediment Control Training and Certification Program.<sup>1</sup>

Grievant is subject to the Virginia Sickness and Disability Program and policy. Grievant reported to the Supervisor in June and July 2005.

Grievant works a 40 hour work week consisting of four workdays of ten hours per day. He begins working at 7 a.m. and ends at 5:30 p.m. with a 30 minute lunch break. He works Mondays through Thursdays. He does not regularly work on Fridays, Saturdays, and Sundays. Grievant is a professional employee and is exempt from the overtime pay requirements of the Fair Labor Standards Act.<sup>2</sup> If his job duties require him to work more than 40 hours per week to complete his assignments, then Grievant must work more than 40 hours per week without additional compensation.

---

<sup>1</sup> Grievant Exhibit 5.

<sup>2</sup> Grievant Exhibit 5.

Under the Virginia Sickness and Disability Program, an employee receives family/personal leave.<sup>3</sup> “Family/Personal Leave (F/P) may be taken at the discretion of the employee for any purpose (family, illness, attend a funeral, or other personal needs, etc.) provided the employee gives reasonable notice and his/her supervisor approves the absence.” An employee also receives sick leave. “Sick Leave (SL) may be taken for personal illnesses, injuries, preventive care and wellness physician visits.”

On Monday, June 27, 2005, Grievant was scheduled to be away from work. He requested approval for five hours of family sick leave<sup>4</sup> in the morning and five hours of family/personal leave in the afternoon. Grievant was notified that he needed to travel to another part of the State (approximately a 2.5 hour drive away) to conduct training. Another employee was originally scheduled to conduct the training, but was unable to do so as expected. Grievant had to fill in for that employee. Grievant drove from his home to the training site on June 27, 2005. He did so during the time of day he would otherwise have been devoted to personal interests and for which he had already requested leave.

On June 28, 2005, Grievant began his training presentation in the morning and worked his entire ten hour shift. After he finished the training, Grievant drove back to his home. His return trip took approximately 2.5 hours. As a result, Grievant devoted approximately 12.5 hours to the Agency’s business even though his regular work day would last only ten hours.

Since Grievant was subject to the VSDP he was not entitled to take family sick leave on June 27, 2005. When Grievant’s Leave Activity Reporting Form was processed, the mistake was corrected and Grievant’s leave request was changed to leave for which he qualified under the VSDP. In addition, since Grievant worked for three hours traveling to the training site, Grievant’s leave was reduced from five hours of family sick leave to two hours of VSDP qualifying leave. Thus, for June 27, 2005, Grievant took seven hours of leave and worked three hours for a total of ten hours.

July 4, 2005 was a holiday and it occurred on a Monday. Grievant did not work any hours on that day. Because Grievant’s work day was ten hours, he received eight hours of holiday leave and pay for the July 4<sup>th</sup> holiday, but had two remaining hours for which to account.<sup>5</sup> Grievant wanted to take the 2.5 extra hours he worked on June 28, 2005 and apply that time towards his two hour deficit for the July 4<sup>th</sup> holiday.

---

<sup>3</sup> See DHRM Policy 4.57, *Virginia Sickness and Disability Program*.

<sup>4</sup> Grievant incorrectly requested family sick leave. Since he was under the VSDP, he did not accrue family sick leave. Instead, he accrued family personal leave and personal sick leave.

<sup>5</sup> See DHRM Policy 4.25, *Holidays*, which gives an example of an employee working four ten hour days and a holiday falls on a Monday: “Monday is a holiday and the employee does not work, but is entitled to 8 hours of holiday pay. To make up for the additional 2 hours that the employee would have worked had Monday not been a holiday, he or she may work those hours on another day or may charge them to accumulated leave.”

On June 30, 2005, Grievant sent the Supervisor an email indicating he spent time traveling to and from the training course and would like to apply the extra time “to the 2 hours needed to complete my hours on the Fourth of July Holiday.” The Supervisor replied, “You need to turn in a leave form for two hours for the 4<sup>th</sup> of July Holiday on Tuesday July 5<sup>th</sup>.”<sup>6</sup>

On July 5, 2005, Grievant responded to the Supervisor, “Has there been a change in policy? In the recent past I was given the option of working the extra 2 hours or submitting a leave slip. Given my current situation, I’d like [to] work the additional hours rather than submit a leave request.”<sup>7</sup>

The Supervisor spoke with the Human Resource Director regarding Grievant’s request. They concluded that the Supervisor had applied an outdated Agency policy that the Supervisor obtained by searching the Agency’s intranet. They agreed that the DHRM policy superseded the Agency’s internal policy. The Supervisor sent Grievant an email dated July 6, 2005 stating:

After discussion with [the HR Director], it appears that the DCR policy does not lineup with the DHRM policy. If you wish to make up the two hours for Monday the [Fourth] of July you will need to work two hours this week. There will be no schedule adjustment for the approximate five hours you indicated you worked last week over the forty. Also, there will be no schedule adjustment for additional hours in the future that are necessary to perform the duties of the position. Please let me know if you will make the time up this week and if so when you will be working the extra hours. If you are not going to make the hours up by Friday I will sign the leave form you provided me.<sup>8</sup>

On July 7, 2005, Grievant submitted and had approved a Leave Activity Reporting Form to take two hours of family/personal leave for July 4, 2005.<sup>9</sup> This leave slip accounted for the difference between Grievant’s ten hour work day and the eight hours of holiday leave he received for July 4<sup>th</sup>.

## CONCLUSIONS OF POLICY

DHRM Policy 1.25, *Hours of Work*, “provide guidelines for agencies to schedule reasonable and flexible work hours for employees as well as to provide convenient and

---

<sup>6</sup> Grievant Exhibit 7.

<sup>7</sup> Grievant Exhibit 7.

<sup>8</sup> Grievant Exhibit 7.

<sup>9</sup> Grievant Exhibit 3.

consistent hours for citizens to transact business with the Commonwealth.” A standard workweek is the, “regular workweek for full-time positions, which consists of a five-day 40-hour per week schedule for every seven calendar-day period.” Employees may work alternate work schedules which “may include, but are not limited to, four 10-hour days, rotational shifts, flexible hours, and job sharing.”

Agency managers determine whether employees will work alternate schedules because, “[m]anagement reserves the right to establish and adjust the work schedules of employees in the agency, being mindful of the hours of public need.” In addition, “Management can adjust an employee’s work schedule temporarily within a workweek to avoid overtime liability or to meet operational needs. **At management’s discretion**, employee’s schedules can be adjusted to meet the employee’s personal needs.”<sup>10</sup> (Emphasis added).

Grievant contends the Agency misapplied or unfairly applied State policy #306 because the Agency should have allowed him to take the 2.5 additional hours of work on June 28, 2005 and apply that towards the two hour deficit accruing on July 4<sup>th</sup>. Grievant’s argument fails because there is no policy requiring the Agency to do as Grievant asks.

When Grievant worked 2.5 additional hours on June 28, 2005, the Agency was not obligated to compensate him. Grievant is a professional employee exempt from the overtime requirements of the Fair Labor Standards Act. The Agency could have granted Grievant’s request, but it was not obligated to do so since it had discretion to adjust Grievant’s schedule to meet Grievant’s personal needs. Before exercising its discretion, the Agency required Grievant to obtain prior approval from his Supervisor. Grievant did not obtain prior approval from the Supervisor. The Agency’s failure to exercise its discretion is not a misapplication of policy.

Grievant contends the Agency unfairly applied State policy by permitting Agency employees in other divisions to make adjustments to their work schedules in the manner Grievant’s now seeks. The evidence, however, showed that to the extent the Agency treated its employees differently, it had a legitimate business reason for doing so. For example, employees in one division often had to work evening and weekend hours in order to meet with and accommodate private citizens. Those employees could use additional hours worked beyond their normal workday to offset subsequent work time on later workdays. These employees, however, had to obtain prior approval from their supervisors to adjust their schedules. Grievant was not unfairly treated by the Agency because he did not seek prior approval from his Supervisor and his duties are significantly different from these field office employees. In other words, Grievant is not similarly situated with the other Agency employees permitted to adjust their work schedules.

---

<sup>10</sup> DHRM Policy 1.25.

Grievant argues the Agency misapplied or unfairly applied Agency Policy #306. Grievant's argument fails. The Supervisor applied Agency Policy #306 because he found it on the Agency's intranet and believed it was the policy to enforce. Once the HR Manager realized the DHRM policy superseded the Agency's policy, Grievant was asked to comply with DHRM policy. The Agency complied with DHRM policy prior to Grievant filing a grievance. Accordingly, the Supervisor's application of Agency Policy #306 is moot.

In conclusion, Grievant's objective was to take hours that he worked over 40 hours per week and use those hours as credit for hours needed to supplement holiday leave and pay. DHRM policy permits this practice but only at the Agency's discretion. The Agency has decided to exercise its discretion on a case by case basis and only after pre-approval from the employee's supervisor. To the extent, Grievant was treated differently from other Agency employees, the different treatment resulted from variations in the type of schedules Grievant and those other employee worked. Distinguishing between Grievant and other employees because of legitimate business needs is not a violation of State policy.

### Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>11</sup> (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant contends the Supervisor retaliated against him because he objected to the Supervisor's first application of policy.<sup>12</sup> Grievant believes the Supervisor singled out Grievant when the Supervisor notified Grievant "Also, there will be no schedule adjustment for additional hours in the future that are necessary to perform the duties of

---

<sup>11</sup> See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>12</sup> The Hearing Officer will assume for the sake of argument that Grievant engaged in a protected activity when he complained to the HR Manager about the Supervisor's application of Agency Policy #306.

the position.” Grievant’s argument fails because he has not suffered an adverse employment action. The Supervisor’s email was intended to inform Grievant that Grievant would not receive a schedule adjustment simply because Grievant worked more than 40 hours in a week. This position is consistent with DHRM policy and with the HR Manager’s interpretation of policy when he wrote:

Exempt employees – considered to be professional – are not eligible ... for routine schedule adjustments for regular and alternative work schedules. An exempt employee can work at 168-hour work week, but will be paid 40 hours.<sup>13</sup>

DHRM Policy gives Agency managers the discretion to adjust employee’s schedules to meet the employee’s personal needs. Because the Agency has discretion, it may treat employees differently based on its operational needs. In this case, the Agency has explained the different treatment of its field operations employees and Grievant because of the differences in their jobs. There is no credible evidence to support the allegation that the Agency retaliated against Grievant for engaging in a protected activity.

## DECISION

For the reasons stated herein, Grievant’s request for relief for the misapplication or unfair application of policy is **denied**. Grievant’s request for relief regarding retaliation is **denied**.

## 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. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

---

<sup>13</sup> Grievant Exhibit 7.



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. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 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 all of your appeals to the other party and to the EDR Director. 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. 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>14</sup>

[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].

*S/Carl Wilson Schmidt*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>14</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.