Issue: Compensation – Recognition Leave; Hearing Date: 09/13/07; Decision Issued: 09/17/07; Agency: VSP; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8663; Outcome: No Relief, Agency Upheld in Full; **Administrative Review: DHRM Ruling Request received 09/28/07; Outcome pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case No. 8663

Hearing Date: September 13, 2007
Decision Issued: September 17, 2007

PROCEDURAL HISTORY

The grievant initiated this grievance on November 22, 2006, to challenge the Agency's refusal to pay him the cash equivalent of twenty hours of recognition leave. The grievant did not receive relief during the management steps and requested qualification of his grievance for hearing. EDR qualified the grievance, by EDR Ruling #2007-1571, July 6, 2007.

APPEARANCES

Grievant
Advocate for Agency
Representative (and witness) for Agency

ISSUES

Is the Grievant entitled to receive the cash equivalent of his recognition leave? [1]

1 The Grievant also advanced at the grievance hearing a request for an award of mileage reimbursement for two trips to Richmond to prosecute his grievance, including the grievance hearing (70 miles round-trip; 140 miles total). Because this issue was not contained in the underlying grievance, the hearing officer is without authority to address the issue.

BURDEN OF PROOF

In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. In all other actions, the employee must present his evidence first and must prove him claim by a preponderance of the evidence. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence. GPM § 9. In this matter, the Grievant has the burden of proof to show that the agency has misapplied or unfairly applied policy.

FINDINGS OF FACT

The Agency's evidence included exhibits 1 and 2. The Grievant's evidence included exhibits from 1 to 4. All were introduced into the grievance record, without objection.

In addition to the procedural history recited above, the Grievant established that he received a "Major Contributor" rating on his performance evaluation on October 12, 2006. Grievant's Exhibit 1. On November 25, 2006, the grievant started another job with another agency of the Commonwealth. After leaving the Agency, the Grievant requested the cash redemption equivalent for the twenty hours of recognition leave which he argues he earned, was awarded, and to which he is now entitled. The Agency denied his request, asserting that even though he left the Agency after being rated a "Major Contributor," he was not eligible for the cash redemption because he left the agency prior to November 26.

Testifying for the Agency was its Human Resources Manager ("HR Manager"). He has been responsible for the Agency's compensation administration for eight years, including administration of the recognition leave policy. The HR Manager testified that the Agency's policy makes everything effective November 25 of each year. He testified that the recognition leave policy was intended to follow the state implementation date for merit increases—November 25. General Order 11, ¶ 17, states "All performance increases are effective on November 25th unless changed by the General Assembly." The HR Manager testified that November 25 is the award date for all performance awards, which follows and conforms to the performance cycle. Therefore, according to the HR Manager, an employee would not receive a performance increase unless employed on and after November 25.

The HR Manager testified that the policy has been consistently implemented and applied so that employees are not eligible for receipt of a recognition leave award if they leave the agency before November 25. The HR Manager testified that the policy has been applied in this manner consistently across the board. The HR Manager testified no one has ever been allowed to use recognition leave before November 25, and that no one has ever received the cash equivalent when leaving the agency prior to November 25. He testified that the Agency is exercising delegated authority from DHRM in developing the recognition leave program, and that DHRM approves the compensation plan for the Agency every year.

The Grievant testified that it was his understanding that his recognition leave was awarded upon completion of his performance review—October 12, 2006, in this case. He further testified that there is nothing in the written policies that requires or states that the award is not effective when the performance review is completed and he has met the eligibility with his rating. The Grievant expressed his position thoroughly at the hearing.[2]

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.

The EDR Director found that the Grievant claims that the Agency misapplied or unfairly applied policy by refusing to pay him the cash redemption equivalent for twenty hours of recognition leave. Further, the EDR Director found that the Grievant has raised a sufficient question as to whether he experienced an adverse employment action through the Agency's refusal to pay him the cash redemption equivalent for twenty hours of recognition leave.

Further, the EDR Director recognized that the grievant has also raised a sufficient question as to whether the Agency misapplied or unfairly applied General Order 11. While an agency's interpretation of its own policies is generally afforded great deference, that deference is not without limitation. If the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy, deference should not be given.[3] Further, even where an ambiguous policy is otherwise enforceable, a hearing officer may consider whether the absence

2 The Grievant had maintained in earlier stages of his grievance that he was actually still an employee of the Agency on November 25, 2006. At the grievance hearing, however, the Grievant withdrew that contention and conceded that he was an employee of his new agency as of November 25, 2006.

3 *See* EDR Ruling No. 2001-064 and EDR Ruling No. 2004-932.

of fair notice of the agency's interpretation of its policy should have a bearing on the outcome of a grievance.[4]

The relevant agency policy, General Order 11, provides that "[e]mployees receiving an overall performance rating of 'Extraordinary Contributor' will receive 40 hours of recognition leave."[5] General Order 11 further provides, under the definition of "recognition leave," that:

> *Leave awarded to an employee who is rated "Extraordinary Contributor" or "Major Contributor." This leave may be used within one year of receipt, after November 25. If the employee is unable to use this leave in the one year period for which it is granted, the Superintendent may extend a carryover period until the leave is used. Recognition leave award may be redeemed for cash if the employee leaves the agency; it will not count toward leave accrual amounts.*[6]

Here, EDR noted that General Order 11 does not expressly state when an employee becomes vested in the right to recognition leave or the cash equivalent, although its express language could be viewed as differentiating between the *award* of leave occurring upon achieving a "Major Contributor" rating and the *use* of leave after November 25. The agency asserts that because General Order 11 provides that recognition leave cannot be used until after November 25 of each year, General Order 11 bars the payment of cash redemption equivalents for employees who earn the "Major Contributor" rating on their annual performance evaluation, but who leave the agency prior to November 26 the same calendar year.

In its qualification ruling, EDR stated that such an interpretation could be viewed as expanding rather than interpreting the provisions of General Order 11, particularly in light of the absence of any express provision as to when the right to recognition leave or the cash equivalent vests, and in light of the express provision that a "recognition leave award may be redeemed for cash if the employee leaves the agency." Moreover, as EDR determined, the Agency's interpretation of General Order 11 must be consistent with the provisions of Department of Human Resource Management policies. DHRM Policy 1.20, *Employee Recognition Programs*, could be interpreted to mandate that an employee receive a lump sum payment for his or her recognition leave when leaving the agency. Additionally, in contrast to the Agency's arguments, there is no provision in state law or policy that requires this recognition leave to be awarded after November 25th, as with the annual performance increase in state employee salaries. Indeed, DHRM Policy 1.40, *Performance Planning and Evaluation*, does not discuss recognition leave at all.

DHRM Policy 1.20, *Employee Recognition Programs*, provides, "Recognition leave up to five workdays may be awarded to a salaried (non-wage) employee in a calendar (leave) year." The policy also provides:

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4 *Id.*

5 Department of State Police, General Order No. 11, *Performance Management System* ¶ 15(c)(1).

6 General Order 11 ¶ 2(n).

> Recognition leave lapses within 12 months from the date it is awarded. However, agencies may extend the 12-month retention period for recognition leave if the agency has been unable to allow the employee to use the leave.
>
> An employee shall be paid in a lump sum for his or her recognition leave:
>
> - When the employee leaves state service by resignation, retirement, layoff, termination, or death;
> - When the employee is transferred, promoted or demoted from one agency to another; or
> - When the employee is placed on Long Term Disability under the Virginia Sickness and Disability Program (VSDP).
>
> In addition, agencies may pay employees for their recognition leave balances if:
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> - At the end of the 12-month period, the agency has been unable to allow the employee to use the leave, or
> - The employee moves from one organizational unit to another within the agency.

As characterized by the EDR Director, this controversy is grounded in what is perhaps an ambiguity in the recognition leave program as to when recognition leave "vests." *See* EDR Ruling #2007-1571, July 6, 2007. "Vesting" is not a term that appears in the applicable written policies, and it was not a term used by the witnesses at the grievance hearing. However, the HR Manager testified that the Agency's policy is to "award" recognition leave on November 25 following the performance cycle. *Merriam-Webster's Dictionary of Law*, © 1996 Merriam-Webster, Inc., defines "vest":

> **a:** to give to a person a fixed and immediate right of present or future enjoyment of;
> **b:** to grant or endow with a particular authority, right, or property; to become vested; *specifically***:** to entitle one unconditionally to the payment of pension benefits upon termination or retirement

I find that because the Agency's timeline for awarding recognition leave is uniform for all employees, *i.e.*, not subject to the vagaries of the performance evaluation dates of each individual employee, the award date, or vesting date, for recognition leave is November 25. The performance evaluation date is simply a random date determined by when the employee and his or her supervisor manage to schedule or complete the evaluation process—not an "award" date. Further, because a supervisor has the authority to change or modify the performance evaluation until the end of the performance cycle, it would be improper to assign any special significance to the performance evaluation date.

Additionally, the Grievant could not have used the recognition leave before November 25, and the unrebutted evidence from the Agency is that it has always considered

November 25 as the award date for recognition leave. Thus, employees are not given a "fixed and immediate right of present or future enjoyment of" the recognition leave until after November 25. *See Merriam-Webster's Dictionary of Law* definition "a" above. Further, based on the Agency's unrebutted evidence, it does not "entitle one unconditionally to the payment of" the recognition leave. *See Merriam-Webster's Dictionary of Law* definition "b" above. According the Agency's evidence, there are conditions to the receipt of recognition leave, applied to each and every employee, *i.e.*, the employee who qualified for the recognition leave must be employed with the Agency on November 25 following the previous performance cycle. Because the Grievant was not employed by the Agency on November 25, he was not eligible to use the recognition leave. By logical extension, neither was he eligible to receive the cash redemption value. Therefore, I find that the recognition leave awards vest with the employees no earlier than November 25 following the previous performance cycle. This is particularly an unfortunate circumstance for the Grievant, as November 24, 2006, was the Grievant's last day with the Agency.

As shown by the Grievant, and recognized by the EDR Director, there is room to find that the Agency's "written" policy is ambiguous on the award date, vesting date, etc., for recognition leave. However, to the extent that the written policy may be ambiguous on the point, the unwritten policy, unrebutted by the Grievant's evidence, is that the Agency considers November 25 as the award date, and that no vesting occurs before then. Whatever ambiguity may exist, however, does not make the "unwritten" policy clearly erroneous, inconsistent or contrary to existing policy or law. Thus, there is no room to conclude that the Agency has misapplied or unfairly applied the policy.

While the applicable policy may have room for differing interpretations, the Grievant has not shown any evidence that suggests the Agency varies in the manner of its interpretation and implementation. There may be room within General Order 11 for the Agency to implement the policy as the Grievant suggests, or even in another manner with either an award or vesting date earlier than November 25. Such an interpretation, however, is just that—a differing interpretation not compelled by the applicable policy and law.

I recognize that the Grievant contends that DHRM Policy 1.20 prohibits the Agency from using November 25 as its award date. However, I find that there is nothing in DHRM Policy 1.20, General Order 11, or any of the other applicable policies, that prohibits the Agency from using November 25. Contrary to the Grievant's well-considered argument that the Agency lacks authority to use the November 25 date, the Agency's application of the policy to award recognition leave on November 25 following the previous performance cycle is not inconsistent with written policy, rule or statute. Since the Agency applies the policy in this manner consistently for everyone, and because the evidence shows the Agency intended the policy to work this way, the Agency has not misapplied or unfairly applied policy.

The agency has also shown that its actions with respect to recognition leave awards were consistent with its past practice. The Grievant has not presented any evidence to rebut that presented by the Agency, and he did not identify any circumstance in which the recognition leave policy had ever been applied differently. Moreover, while the Grievant did not expressly

assert that the Agency unfairly applied its policy on recognition leave, I note that there is no evidence that the Agency has applied this policy inconsistently.

Where the question involves an interpretation and application of authority which is within the specialized competence of the agency and the agency has been entrusted with wide discretion by the General Assembly, the agency's judgment is entitled to special weight in the absence of a clear abuse of delegated discretion. *Avalon Assisted Living Facilities, Inc. v. Zager*, 39 Va.App. 484, 574 S.E.2d 298 (2002). Here, the Agency is interpreting its own policy.

Management is reserved the exclusive right to manage the affairs and operations of state government. Under the EDR Director's Rules for Conducting Grievance Hearings, the Hearing Officer is not a "super-personnel officer." Therefore, the Hearing Officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy. In this case, the Agency's actions are consistent with law and policy. To impose or devise a different policy than that consistently implemented by the Agency would improperly substitute the Grievant's or the hearing officer's judgment over the Agency's exercise of its exclusive right to manage its affairs and operations.

Finally, the Grievant may not have had "actual" notice of the Agency's interpretation of this policy, but there is no evidence of any diligent inquiry by the Grievant before he decided to leave the Agency for another. I find, based on the circumstances of the Agency's consistent application of the policy for all other similarly situated employees, that "fair notice" to the Grievant was provided by and through the Agency's actions of consistent treatment and implementation. The Grievant did not assert any detrimental reliance or other equitable circumstances that make the Agency's application of the policy unjust.[7]

DECISION

For the reasons stated herein, Grievant's request for relief is denied.

APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review: This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

7 The circumstance of missing the date by just one day is certainly unfortunate, but not a legally sufficient basis to reach a different result.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804)371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main Street, Suite 400, Richmond, VA 23219 or faxed to (804)786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision: Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

Cecil H. Creasey, Jr.
Hearing Officer