

Issue: Misapplication of Policy (overtime leave); Hearing Date: 02/25/08; Decision Issued: 02/27/08; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8789; Outcome: No Relief – Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8789

Hearing Date: February 25, 2008
Decision Issued: February 27, 2008

PROCEDURAL HISTORY

Grievant was denied leave for November 20, 2007 thereby causing him to enter leave without pay status. On November 26, 2007, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 28, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 25, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency complied with State policy?
2. Whether the relief Grievant seeks should be granted?

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 Virginia Department of Transportation employs Grievant as an Equipment Repair Technician Senior at one of its Facilities. He is a non-exempt employee under the Fair Labor Standards Act. His customary work shift is from 7 a.m. until 3:30 p.m. Grievant usually works 40 hours per week.

Grievant is a valuable employee. For example, he recently received the Technician of the Year award from the Agency. Grievant must attend training in another part of the State. In order to arrive in time for the training, Grievant must often leave the Agency's Shop at 6:30 a.m. After the training ends, Grievant must drive back to the Agency's Shop and typically arrives at 5 p.m. By attending training, Grievant typically works 2 hours more than his usual eight hour day. Grievant also participates in other duties for the Agency that require him to extend his work day. For example, Grievant was a member of the Laptop Committee and a representative for the Combined Virginia Campaign in 2007.

Grievant's Supervisor was responsible for managing several VDOT Shops. When he took over four years ago, he adopted the practice of the former supervisor regarding leave. The former supervisor permitted employees working more than 40 hours in a week to accumulate those hours and then apply them to work days for which the employee was not actually at work. Initially, the former supervisor had an employee who kept a ledger for all of the additional hours of work performed by Facility employees. Employees were supposed to report their extra hours earned and taken to the employee with the ledger. When the employee with the ledger's position was abolished, the former supervisor instructed Grievant and other employees in the Facility to keep track of their extra hours and to take them under an honor system. Employees were not required to keep any written documentation of their accumulated hour balances. For the sake of simplicity, the Hearing Officer will refer to this leave as Honor Leave.

When Grievant's Supervisor took over from the former supervisor, he continued the former supervisor's practice but his interpretation of that practice required a restriction. That restriction was that an employee who worked additional hours one day during the week must use those hours in the remainder of that week or the following

week. In other words, if an employee worked 10 hours on Monday, the employee had to use the extra two hours accumulated on Monday to offset work on Tuesday, Wednesday, Thursday, or Friday of that week or in the following week.

Grievant submits his time sheet to the Lead Technician, not to Grievant's Supervisor. The Lead Technician applies Honor Leave in accordance with the past practice except that the Lead Technician does not interpret the Honor Leave system to require an employee to use leave accrued on one day to be used in that week or the following week. He permits employees to carry Honor Leave for a longer period of time.

Grievant has a reputation for honesty and truthfulness. There is no reason to believe Grievant was attempting to manipulate the Agency's leave system.

On October 17, 2007, Grievant was standing outside the Shop and observed the electrocution of an individual¹ working on electrical wires. Since Grievant was a witness, it was necessary for him to participate in a civil suit arising from the death. Grievant received a subpoena requiring him to appear at the local Circuit Court at 11 a.m. on November 20, 2007.

On November 20, 2007 at 8 a.m., Grievant met with one of the attorney's in the civil suit. The attorney wanted Grievant to explain what he had observed that day. Later on, Grievant went to the Courthouse and waited until the case was heard. At approximately 3:15 p.m., the case ended and Grievant left the Courthouse.

Grievant submitted a leave slip to receive civil leave for eight hours on November 20, 2007. The Agency noted that the subpoena required him to be in court at 11 a.m. and doubted he would be eligible for civil leave from 7 a.m. until 11 a.m. After some consideration, the Agency decided to grant Grievant civil leave from 10 a.m. until 3:30 p.m. Grievant was given an hour before the time stated on the subpoena in order for Grievant to go home from work and change his clothes for court. The result was that Grievant was denied civil leave from 7 a.m. until 10 a.m. on November 20, 2007.

Grievant did not have any available leave balances as recorded by the Agency's Financial Management System 2 as of November 20, 2007. Because Grievant did not have any available leave balances, the Agency placed Grievant on Leave Without Pay status beginning November 20, 2007. When an employee is on Leave Without Pay status that employee may not be paid for holidays. November 21, 2007 was a holiday for 4 hours. November 22, 2007 and November 23, 2007 were also holidays. Because Grievant was placed on Leave Without Pay status as of November 20, 2007, he did not receive payment for 20 hours of holiday leave.

¹ The individual was not a State employee.

CONCLUSIONS OF POLICY

VDOT granted Grievant five hours of civil leave for November 20, 2007 to enable him to attend court in response to a subpoena. DHRM Policy 4.05 provides:

Civil and Work-Related Leave is granted to the employee to fulfill the civic duties and functions listed below. Agencies must permit employees to be away from work for these purposes:

- To appear as a crime victim or as a witness in a court proceeding or deposition as compelled by a subpoena or summons.

Grievant was entitled to civil leave on November 20, 2007 because he had been subpoenaed to appear in court. His mandated appearance in court began at 11 a.m. The Agency's decision to award Grievant civil leave from 10 a.m. until 3:30 a.m. is supported by DHRM policy. Even if the Hearing Officer assumes for the sake of argument that Grievant's meeting with the attorney at the scene of the accident was pursuant to the subpoena, Grievant would not be able to account for the one hour of work he missed from 7 a.m. until 8 a.m.

Grievant did not have available leave balances as of November 20, 2007 and the Agency placed him on Leave Without Pay Status. Under DHRM Policy 4.45, the "effective date of an employee's conditional or unconditional leave without pay is the first workday missed." Thus, the Agency's decision to place Grievant on Leave Without Pay status effective November 20, 2007 was consistent with DHRM Policy.

Because Grievant was on Leave Without Pay beginning November 20, 2007, he was not entitled to be paid for 20 hours of holiday leave beginning on November 21, 2007. DHRM Policy 4.25 provides:

To be eligible to receive holiday pay and/or compensatory leave employees must:

- be present at work or on paid leave on their last scheduled work day before the holiday; and;
- be present at work or on paid leave on their first scheduled work day after the holiday.

Employees who do not have leave to cover this period of time will not be eligible to receive the holiday(s).

FLSA non-exempt employees are eligible for holiday pay unless they are on leave without pay any portion of their last scheduled work day before the holiday, their first scheduled day after the holiday, or the day of the actual holiday. This will result in loss of holiday pay.

Grievant argues that he should be able to apply three hours of his accrued Honor Leave to November 20, 2007 thereby preventing him from entering Leave Without Pay status. Grievant argues that his Honor Leave should be considered Compensatory Leave under DHRM Policy 3.10. Under this policy, “[c]ompensatory leave is paid time off for an eligible employee 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.”

A non-exempt employee is eligible to earn compensatory leave only when the hours worked in a workweek are 40 hours or less. If a non-exempt employee works more than 40 hours, the Overtime Leave policy ([Policy 3.15](#)) applies.

EXAMPLE:

A non-exempt employee who works ten hours on Monday, calls in sick on Tuesday, and works eight hours on Wednesday, Thursday, and Friday will receive two hours of compensatory leave for the extra hours worked on Monday, rather than overtime leave, because the employee did not actually work over 40 hours during the workweek.

Compensatory leave “must be authorized in writing by the agency head or his/her designee.” In addition, that authorization must be in writing and “authorized before the employee works the hours that result in compensatory leave.”

No evidence has been presented to show that Grievant’s Honor Leave was authorized in writing in advance by the Agency Head or his designee. In addition, it does not appear that the additional hours of work are of the type that would meet the requirements for compensatory leave. Grievant worked hours that were in excess of 40 hours per week. Compensatory leave would be appropriate for a non-exempt employee only “when the hours worked in a workweek are 40 hours or less.” When Grievant attended training or conducted other duties for the Agency, he worked in excess of 40 hours per week. Thus, only the Overtime Policy would be applicable to his circumstances.

The purpose of DHRM Policy 3.15, Overtime Leave, is to provide “guidelines to agencies for awarding overtime leave in lieu of overtime compensation when appropriate.” Under this policy:

[a]gencies may elect to grant overtime leave instead of overtime pay when an employee covered by the FLSA (non-exempt) works more than 40 hours in any workweek. Only hours physically worked are used to determine if compensation for overtime is required.

Non-exempt employees working more than 40 hours in a standard workweek are entitled to be paid for their overtime work. DHRM Policy 3.15, however, changes the Agency’s obligation from paying money to the employee to “paying” the employee with

additional leave. It is the Agency's sole discretion as to whether to change its obligation to a non-exempt employee from money as the form of compensation to leave as the form of compensation.

"Agencies must provide written notification to affected employees of the decision to grant overtime leave prior to the performance of the overtime work." In Grievant's case, the Agency did not provide him with written notification that the overtime he worked would be treated as overtime leave. Thus, there is no basis to consider Grievant's Honor Leave as overtime leave.

"It is not necessary to inform employees each time they work overtime, if there is an agency policy that states when overtime leave will be granted in lieu of overtime pay and if that policy is clearly communicated to all affected employees." In Grievant's case, there is no agency policy stating when overtime leave will be granted in lieu of overtime pay. Grievant presented evidence of an informal practice within his work unit. Even if the Hearing Officer were to consider that informal practice to be an agency policy, that practice was not "clearly communicated to all affected employees." Grievant's Supervisor, the Lead Technician, and several other employees in Grievant's work unit seemed to have materially different understandings of what was the actual practice to be followed.

"Employees must request and receive approval from their supervisors to use overtime leave. Failure to obtain approval, however, will not remove the agency's obligation to compensate an eligible employee for overtime worked." Grievant did not have written approval from the Agency to be granted overtime leave and he did not receive approval from his supervisor to use overtime leave. The Agency may remain obligated to pay Grievant for the overtime he worked, but that is not an issue before the Hearing Officer. Grievant is not seeking money payment for overtime he worked in 2007 and before. Grievant is seeking to have the Hearing Officer force the Agency to treat some of his Honor Leave as overtime leave and have that leave applied to his shortfall of hours worked on November 20, 2007. The Hearing Officer does not have the authority to force the Agency to treat Grievant's overtime worked as overtime leave and then apply that overtime leave to November 20, 2007.

One could argue that the Agency is treating Grievant unfairly. Grievant is obligated to follow the instructions of his supervisors and Agency managers. He can be disciplined for failure to do so. Grievant was instructed to maintain an informal tally of the hours of overtime he worked and told that he would be able to use those hours to justify his time away from work. Grievant complied with his supervisor's instructions and acted in good faith. The Agency, however, might argue that it is obligated to comply with DHRM policies regardless of what informal policies some of its managers and supervisors adopt on their own without authorization to do so. The Agency's obligation to comply with DHRM policy may be more important than the consequences to one of its employees who may have been acting in good faith.

The Hearing Officer has only that authority given to him by Virginia statute, the Grievance Procedure Manual, and the Rules for Conducting Grievance Hearings. Resolving an issue of whether Grievant was treated fairly is a question of equity. The Hearing Officer has not been granted equity authority.² Indeed, Section VI(A) of the Rules for Conducting Grievance Hearings provides:

Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be. Further, a hearing officer is not a "super-personnel officer." Therefore, in providing any remedy, 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 short, there is no basis upon which the Hearing Officer can grant relief to Grievant under the facts of this case with the authority given to the Hearing Officer.

DECISION

For the reasons stated herein, Grievant's request for relief 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 14th St., 12th Floor
Richmond, VA 23219

² Although the Hearing Officer has been granted authority to mitigate, that authority applies only with respect to disciplinary actions. This grievance does not involve disciplinary action.

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.³

[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

³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.