

Issue: Misapplication of Policy (denial of annual leave); Hearing Date: 03/16/10;
Decision Issued: 03/17/10; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq; Case
No. 9282; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9282

Hearing Date: March 16, 2010
Decision Issued: March 17, 2010

PROCEDURAL HISTORY

Grievant was late for work and the Agency denied her request for leave to substitute for her absence. On December 8, 2009, Grievant filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On March 3, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 16, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency unfairly or misapplied policy?

BURDEN OF PROOF

The burden of proof is on 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 Virginia Department of Transportation employs Grievant as an Operations Crewman Supervisor at one of the Agency's Tunnels. She has been employed by the Agency for approximately 30 years.

The Tunnel is operated and staffed on a 24 hour basis. Attendance and promptness of staff are essential to the efficient operation of the Tunnel.

Grievant returned to her home early in the morning of November 8, 2009. She went to sleep. Grievant's work shift began at 6 a.m. She overslept because was tired. At approximately 6:28 a.m., Grievant called Supervisor R and told him she had just awoken. She asked Supervisor R if she could take an hour of vacation leave. Grievant testified that Supervisor R said she could take the hour leave. Supervisor R testified that he did not tell her she could take an hour of vacation leave. Grievant arrived at work at approximately 6:57 a.m. and began her shift late. Some of her duties were performed by another employee prior to her arrival at work. As a result of Grievant being tardy, the Agency considered her one hour of work to be unexcused and placed her on leave without pay status. The Agency's policy refers to leave without pay status as "Lost Time". Because Grievant was on leave without pay status she did not accrue annual leave that she would otherwise have accrued during an approximately two week time period.

CONCLUSIONS OF POLICY

Grievant seeks to have one hour of leave taken from her available annual leave balance and applied to cover the hour she was late to work on November 8, 2009. If her request is granted, she would be entitled to have restored approximately 9 hours of annual leave she was not given because she was on leave without pay status.

The Agency's tardiness policy provides:

The purpose of his policy is to communicate and establish a fair and objective procedure governing tardiness.

EMPLOYEE RESPONSIBILITIES: You shall apply and be accountable for adequate time management in reporting to work as scheduled, at the workplace and ready to work at the designated starting time. If you call in but cannot reach your supervisor or recognized designee at their office, use their pager number or cellular phone. This notification is not an excused absence by your supervisor. Notifying your supervisor after your designated starting time is “NO NOTICE”. You are strongly encouraged to call well ahead of your designated starting time to request vacation or sick leave. Annual leave and sick leave shall be used appropriately under those policies and shall not [be] used to cover tardiness. Any tardiness exceeding 30 minutes will result in you being placed on “lost time” in 30-minute increments, even if you have accrued leave on the books. Being placed on “lost time” results in the loss of vacation and sick leave for the time period the “lost time” occurred. REMEMBER, NOT AT YOUR WORKPLACE AT THE START OF SPECIFIED TIME IS TARDY: 1 OR 2 MINUTES IS TARDY.¹

Grievant notified the supervisor she would be tardy after her shift had already started. Under the Agency’s policy her notice was “no notice.” Grievant was tardy more than 30 minutes and, thus, she could be placed in “lost time” meaning that she would enter leave without pay status. Because Grievant entered leave without pay status, she did not accrue annual leave for a pay period. The Agency complied with its policy. Grievant had notice of the policy as evidence by her signature dated April 15, 2002 on a document showing she received the policy. Grievant has not presented sufficient evidence to reverse the Agency’s action.

Grievant argues that when she called Supervisor R, he told her she could use leave to cover her tardiness. Supervisor R disputes this assertion. If the Hearing Officer assumes for the sake of argument that Supervisor R indicated Grievant could take annual leave on November 8, 2009, no evidence was presented to show that he had the authority to deviate from the Agency’s policy. Indeed, the Operations Superintendent testified that if he had been present and overheard Supervisor R granting leave, he would have corrected Supervisor R.

Grievant objects that Supervisor R spoke with another employee about Grievant’s tardiness. Supervisor R indicated that many employees in the office knew Grievant was tardy because Grievant’s phone call to Supervisor R had been overheard. He indicated that the other employee was expressing her opinion that Grievant should be placed in lost time status. Although it might have been a better practice for Supervisor R to refrain from discussing Grievant’s tardiness with another employee, Grievant has not presented any policy that would justify reversal of the Agency’s actions because of that discussion.

¹ Agency Exhibit 3.

Grievant argues that she has only been late two times and that other employees were late and were permitted to take annual leave. It is not clear that the policy provides for mitigating circumstances based on the number of times an employee is tardy and for the reason that an employee overslept. Grievant failed to present sufficient details to support her allegation that other employees were treated differently under the policy.

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

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
600 East Main St. STE 301
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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.