

Issues: Work Conditions (other) and Management Actions (records); Hearing Date: 03/23/11; Decision Issued: 05/20/11; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case No. 9529, 9530; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 06/03/11; EDR Ruling No. 2011-3010 issued 06/29/11; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 06/03/11; DHRM Ruling issued 08/02/11; Outcome: AHO’s decision affirmed.**



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9529 / 9530**

Hearing Date: March 23, 2011  
Decision Issued: May 20, 2011

**PROCEDURAL HISTORY**

On December 17, 2010, Grievant filed a grievance against the Agency alleging the misapplication or unfair application policy. On January 4, 2011, Grievant filed a grievance against the Agency alleging the misapplication or unfair application of policy. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On February 11, 2011, the EDR Director issued Ruling No. 2011-2900, 2011-2901 consolidating the two grievances for a single hearing. On March 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 23, 2011, a hearing was held at the Agency's office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUES**

1. Whether the Agency misapplied or unfairly applied policy?

## **BURDEN OF PROOF**

The burden of proof is on the 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 Department of Correctional Education employs Grievant as a Guidance Counselor at one of its schools. The purpose of her position is to:

Provide overall coordination and support of student services in the areas of academic, personal/social, and career counseling, or selection, class scheduling, testing, orientation, and students scholastic records. Practice professional ethics with students and student records.<sup>1</sup>

Grievant is Exempt under the Fair Labor Standards Act. In accordance with Grievant’s Employee Work Profile she is expected to:

- Constantly follow established procedures for attendance and punctuality.
- Inform supervisor of all absences and schedule changes in a timely manner and in compliance with procedure.
- Timesheets and leave slips are completed in an accurate and timely manner.
- Arrives to work at scheduled time and remains until scheduled departure time unless otherwise discussed with supervisor.
- Inform supervisor of absences and submits timesheet/leave slips in a timely manner.<sup>2</sup>

Grievant works at a school located within a juvenile correctional Facility under the exclusive control of the Department of Juvenile Justice. The Department of Correctional Education must operate its school in accordance with the restrictions imposed by the Department of Juvenile Justice. One of those restrictions includes the requirement that Agency employees working at the school must comply with DJJ security procedures in order to enter the Facility and then enter the school.

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<sup>1</sup> Grievant Exhibit 14.

<sup>2</sup> Grievant Exhibit 14.

A security fence surrounds the DJJ Facility. DJJ has a security post with a Juvenile Correctional Officer located at an entryway of the fence. DCE keeps a log book at the security post and requires its employees to record their names and times of entry into and departure from the Facility. The Agency does not consider its employees to be at work simply because they have signed in at the DJJ gate. Agency employees must then pass through DJJ security procedures such as metal detecting machines that are designed to prevent individuals from bringing contraband into the Facility. It can take between three to ten minutes to pass from the DJJ gate and enter the main school building.

The Agency considers its employees to be at work at the time they reach the school building inside the DJJ gate. Once employees enter the school building, they must sign a login sheet and record the time they arrived. There is a clock within view of the log sheet inside the school. The log sheet can be viewed by students and other staff. The Principal periodically reviews the log sheet and highlights the names of employees who were tardy.

On March 4, 2009, the Principal sent Grievant and other employees at the school an email stating:

Employees must be at the workstation (inside the building) by 7:45 a.m. This will give you the opportunity to get ready for your class or the day and have students in the building by 8 a.m. as required by the MOA between DCE and DJJ and not be entering the building with students. As you know, your time has been docked if you have not been in the building by 7:45 a.m.

It is important that you be ready for students when they enter the building.<sup>3</sup>

In November 2010, the Principal installed a time clock in the main school building in order to establish with employees began working. Under the School's procedures:

- Each employee will have a separate timecard with last name and pay period on the card. Each time card allows for a 15 day period and allows for clocking in and out twice per day.
- Upon entry into the building, each employee will clock in using the assigned card. As has been directed by local policy, the time of work begins when the staff member is at the assigned workstation. In this case, inside the building is the assigned workstation.
- At lunch, each employee is expected to clock out when going to lunch and clock in again after lunch is complete. A 45 minute window will be allowed for staff members for lunch. This allows for staff members to attend meetings, complete work in the classroom, or prepare for the next class without taking a defined time

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<sup>3</sup> Agency Exhibit H.

for lunch, i.e. 11–11:45. However, as a general rule, all lunches must be completed before students arrive for afternoon classes.

- All teachers will again clock out at the end of the day prior to leaving.<sup>4</sup>

The Principal did not forward his local operating procedures for the time clock to the Deputy Superintendent for review prior to implementing the time clock procedure. As a result of Grievant's December 17, 2010 grievance, the Agency ended use of the time clock effective January 21, 2011. The Agency implemented a tardy procedure effective January 25, 2011 in accordance with Local Policies and Procedures Policy Number 1 – 16 as follows:

Work Hours: 7:45 a.m. to 4:15 p.m., 30 minutes for lunch

Staff of [the school] should strive to be on time on a daily basis and be ready to have students began reporting to classrooms at 7:50 a.m. School is scheduled to begin at 8 a.m. daily with the morning announcements. The following tardy policy will be affected January 25, 2011.

- Staff shall sign in at the office based on the clock above the sign in sheet. No other time will be used. Names of staff members not present at 7:45 will be highlighted.
- Delays at the [DJJ] gate will not be an excuse for being late to your workstation. You should anticipate the possibilities of delays and plan accordingly.
- Staff will be allowed 3 tardies during a pay period. On the 4th tardy, staff members will receive a Needs Improvement notice.
- Failure to meet the conditions of the Needs Improvement Plan will result in a violation of the Standards of Conduct and staff may receive a Group Notice.
- All staff shall sign in and out for lunch whether leaving the building or eating in the building. All staff must take a 30 minute lunch break.
- Tardies from lunch will count against total tardies for the pay period.
- An eight hour work day is required, if not, a salary timesheet and leave slip must be submitted.
- Time will not be made up at the end of the day.

Exceptions:

- Tardies during inclement weather conditions (snow and/or ice) will not count against the tardies to receive a Needs Improvement Plan. (Conditions: Area schools are delayed or closed)

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<sup>4</sup> Grievant Exhibit 1.

- Traffic Accidents: Staff will be allowed 2 tardies during the pay period for traffic accidents. Delays must be reported to the Principal or the Assistant Principal.

The Principal determined whether employees were tardy by granting employees an additional five minutes beyond the start time of their shifts. For example, if an employee's shift was to begin at 7:45 a.m., the employee would be considered on time if the employee arrived at the school by 7:50 a.m. If the employee arrived at the school at 7:51 a.m. the Principal would record the employee as being six minutes late. The Principal would "dock" the time of an employee who was tardy by the amount of time the employee was tardy. The Principal would force the employee to use available leave balances to cover the amount of time the employee was tardy. For example, if an employee was tardy by one half hour, the Principal would require the employee to use a half hour of available leave such as annual leave.

The Principal would not permit Exempt employees to use additional hours worked in an eight hour day or additional hours worked in a 40 hour work week to substitute for the time an employee was tardy.<sup>5</sup> For example, if Grievant was one hour late for work but worked one hour past the end of her scheduled shift, the Principal would not permit Grievant to use the one hour of extra time worked to offset her one hour of being late. If Grievant was late by one hour on a Monday but worked an additional hour beyond the end of her shift on Friday, the Principal would not permit Grievant to use the additional hour worked on Friday to cover the hour Grievant was late on Monday.

On February 16, 2011, Grievant sent the Principal an email stating, in part:

We have had this discussion before. However I am respectfully requesting that you enter the exact, actual, and correct number of hours that I work rather than round the time down to a flat "estimate" of 8 hours. Even though I am an exempt employee and my overtime is not paid, I still maintain that under reporting my total hours worked is falsification of my time sheet. Is this a practice you use for both exempt and nonexempt employees or is this practice reserved only for exempt employees? I have shared with you before that I feel uncomfortable signing a time sheet to certify that it is accurate when I know it is not. You round up tardies and you round down over time. This creates a false report of my time and creates a skewed picture of my attendance. For example, I left work yesterday at 4:30. My time sheet should read 8.25 hours, not 8.

On February 16, 2011, the Principal said Grievant an email stating:

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<sup>5</sup> The Principal also followed this approach with respect to employees who left the school for lunch and returned after the end of their lunch break.

A great deal of time is being spent on this time issue and I am aware of your concerns. As I have explained, the Commonwealth of Virginia does not recognize more than 8 hours of work per day. The 8 hours reported is a reflection of the workday although I am very much aware of the extra time that you spend working. I have requested from HR an audit of your time in order to answer your questions.

On February 16, 2011, Grievant sent the Principal an email stating:

Thank you. That is all I have ever asked is an audit.<sup>6</sup> Thank you.<sup>7</sup>

On March 15, 2011, Ms. R, acting on behalf of DHRM, sent Grievant an email stating:

We met with [Human Resource Director] regarding your complaints and are satisfied that the Department of Correctional Education (DCE) is taking pro-active steps to address your concerns. In addition to auditing your leave records, we are aware that the DCE Human Resources staff has broadened their review and plan to audit records of other employees at [Grievant's school] as well as other DCE schools.

It is important to note that all exempt employees in state government are required to fulfill their 40 hour work week. This is an obligation we will fulfill to the taxpayers of the Commonwealth of Virginia. The Fair Labor Standards Act provides this accommodation for public employees which allows for the loss of work hours to be replaced with paid or unpaid leave for public-sector employees working in exempt-level positions. I am attaching an exempt form Title 29 CFR 541.710 which provides the salary deduction exemptions for public-sector employees. As a state employee, you are required to either work a 40 hour work week or as an alternative supplement any time lost with available leave balances or have your pay docked for the respective wages equivalent to the lost time. Your exempt status as a teacher is not jeopardized by the actions taken by management to use your leave balances in order to supplement lost time due to tardiness.

In addition, your reference to working and earning overtime in your position is not relevant for exempt-level employees. The Department of Correctional Education is not obligated under the Fair Labor Standards Act to provide compensation for additional time worked in excess of 40 hours in a given work week to employees in exempt level positions. As a

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<sup>6</sup> The Human Resource Director conducted an audit of Grievant's time using the sign in sheet inside the school.

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

professional, there may be occasions when your work may require additional time. That is a standard expectation for many individuals both in the private sector and public sector who work in professional exempt positions.

As you've discussed with several consultants and DHRM, the agency is responsible for determining an acceptable arrival/departure standard, meaning it is up to DCE to identify when an employee is considered to be tardy at the DJJ schools. Given the requirements of the correctional facilities' policies and procedures, DCE must take into account the need for teachers to be in their classrooms prior to the arrival of the students. From DHRM's perspective, we find that it is a reasonable expectation provided there is some allowance for an occasional unpredictable circumstance on the grounds at the gate area. However, we do not support the contention that employees' arrivals to the outer or inner gates should be considered as the start of the workday for teachers unless a teacher is required to perform functional responsibilities upon entering the gate. At this point, no information has been provided that indicates DCE teachers are performing any duties or functions until they reach their relevant classrooms which is when your workday begins.<sup>8</sup>

## **CONCLUSIONS OF POLICY**

DHRM Policy 1.25 "provides guidelines for agencies to schedule reasonable and flexible work hours for employees as well as to provide convenient and consistent hours for citizens to transact business with the Commonwealth." Full-time salaried employees "work the equivalent of 40 hours per week for 12 months per year." The Standard Work week "consists of a five-day, 40-hour per week schedule for every seven calendar-day period." "Management reserves the right to establish and adjust the work schedules of employees in the agency, being mindful of the hours of public need." Employees are expected to:

- adhere to their assigned work schedules,
- take breaks and lunch periods as authorized,
- notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures, and
- work overtime hours when required by management.

"An employee taking approved annual<sup>9</sup> or sick leave during the week may also be asked to work additional hours during the same week. With the approval of the

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<sup>8</sup> Agency Exhibit L.

<sup>9</sup> Annual leave is, "paid time off accrued by employees and available for personal use as approved by agency management.



employee, the agency may substitute the additional hours worked for the hours of leave, thus reducing or eliminating the need for the employee to use leave. Agencies should be cautious when changing the kind of leave requested by an employee and approved by the supervisor, and should ensure that employees are able to use their leave as intended within the business demands of the agency. For example, it is not acceptable for an agency to substitute compensatory leave for sick or annual leave without the employee's permission." (Emphasis Added.)

Agency Policy 2-4 governs Documentation for Entering/Exiting Facilities. Agency Policy 2-4 is:

The policy of the Department of Correctional Education to maintain an accurate log of DCE employees' presence within a facility in order to provide notification to the Department of Corrections (DOC) or to the Department of Juvenile Justice (DJJ) for safety procedures. It is also the policy of DCE to provide an accurate record of who is present at each DCE school.

Under this policy "Entering/Exiting" is defined as Entering or leaving the particular facility's grounds." The policy sets forth certain procedures:

- A. Log sheets are to be present at the front gate and/or primary entrance used by DCE employees of every facility operated by DOC or DJJ in which DCE operates a school.
- B. The log sheet attached is the only official document to be used by each DCE school. No other log shall be used at the front gate and/or primary entrance used by DCE employees.
- C. Upon entering or exiting the facility, each DCE employee is required to complete an entry on the log by:
  1. Writing the time when he or she enters or exits the facility,
  2. Printing his or her name, and
  3. Signing the form.

When completing the entry, the employee will fill out the first available open line on the log sheet. The time reported on the log is the official time the employee enters the facility.

- D. Each DCE employee is responsible for completing a new entry each time he or she enters or exits the facility. It will be presumed that the employee is not present at the facility if he or she has not completed an entry on this log.
- E. Each Principal or his or her designee is responsible for ensuring that there are a sufficient number of log's available at the front gate of the facility. Each Principal or his or her designee will collect these forms weekly and maintain them in a secure location within the school. The log sheets are to be removed only by the principal or his or her designee.

- F. The log sheets are official records and as such, are to be kept for five years.
- G. Principals may maintain their own attendance policies and procedures within the school facilities to account for staff members' presence in the school, in addition to this policy.
- H. DCE Central Office personnel are required to note their entrance and exit from Central Office on the forums maintained at the receptionist's desk.

Grievant argued that the Principal has consistently misapplied the Agency's sign-in policy. She argued that the Principal incorrectly calculated her attendance and leave by using the sign-in sheet located in the main school office instead of using sheet located at the Facility gate. Grievant argued that her actual job responsibilities began at the DJJ front gate where the "official log" was kept.

Grievant's argument fails. The Purpose of Agency Policy 2-4 is "to maintain an accurate log of DCE employees' presence within a facility in order to provide notification ... to the Department of Juvenile Justice". The log sheet at the DJJ front gate serves as the "only official document" for the purpose of determining whether an employee is present within the facility. Agency Policy 2-4 does not defined when an employee is considered at his or her work station. The Policy specifies that "[p]rincipals may maintain their own attendance policies and procedures within the school facilities to account for staff members' presence in the school, in addition to this policy." (Emphasis Added).

The Agency considers an employee to be at work when he or she is at the school building inside the DJJ facility. An employee is not yet at work when the employee reaches the outer security gate under the control of DJJ employees. Grievant has not presented any policy prohibiting this practice. Grievant complained that she is obligated to go through DJJ security procedures which can delay her arrival times if there are a significant number of employees at the DJJ gate attempting to enter at the same time. The Agency has not violated any policy by requiring its employees to plan to arrive at the front gate with sufficient additional time to enable them to pass through security and arrive on time at the main school building. Expecting employees to plan sufficient time to pass through DJJ security procedures is not materially different from an agency expecting employees to plan sufficient time to commute to work and arrive on time.

Grievant objected to the location of Agency's sign-in log inside the school. She complained that the log was located in an area easily accessible by students and that students had sometimes changed the entries made by teachers. The evidence showed, however, that any time Grievant complained that her entries in the school log book had been changed, the Principal took her word that a change had been made and used the time Grievant told him she entered in the book.

Grievant has not identified any policy that would prohibit the Agency from locating a sign-in sheet in an open area of the school. Although the logic of Agency's

practice may be subject to question, unless it is shown to be contrary to policy, the Hearing Officer will not interfere with the Agency's practice.

Grievant objected to the Principal's practice of listing on the Salaried Employees' Timesheet and Leave Slip<sup>10</sup> the number of hours she worked as only eight hours even on those day she work more than eight hours. The Principal testified that he listed only eight hours on the timesheets because Grievant was obligated to work eight hours and any hours more than eight hours in a day was not of significance to the Agency because Grievant was not entitled to receive overtime pay without prior approval. When Grievant worked more than eight hours in a day, the Principal considered the additional hours to be irrelevant because the Agency would not compensate Grievant for the additional hours she chose to work. Grievant has not presented any policy that would require the Principal to write down every hour an employee worked beyond eight hours in a day. There is no basis for the Hearing Officer to interfere with the Principal's practice.<sup>11</sup>

Grievant argued that the Principal did not have the authority to "dock" her leave when she was late to work. She argued that the Principal's practice of taking employee leave without an employee request and without a Leave Request Slip was not sanctioned by policy.

Under DHRM Policy 1.25, Grievant is obligated to work a standard work week consisting of five days, 40 hours per week for every seven calendar day period. The Agency had the authority to set a time at which Grievant's eight hour shift began and establish her shift as eight hours per day. If Grievant failed to arrive in her workstation on or before the beginning of her work shift, she was tardy.<sup>12</sup> If Grievant was scheduled to begin her shift at 7:45 a.m. but was not at her workstation until 7:46 a.m., she was tardy by one minute. The Agency had the discretion to disregard that one minute or any number of minutes Grievant was late so long as it did so in a uniform manner. In this case, the Principal ignored Grievant's tardiness until she was more than five minutes late.<sup>13</sup> The Principal had the authority to make that decision. When Grievant failed to complete an eight hour shift as required by the Agency, the Agency was authorized to reduce her compensation.

Grievant argued that if she was tardy on a particular day but worked beyond the end of her shift by an amount of time equally the amount of time she was tardy, she should received credit for having worked an eight hour shift. Grievant has not presented any policy requiring the Agency to adopt this approach. Under DHRM Policy

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<sup>10</sup> Grievant and the Principal signed these timesheets.

<sup>11</sup> Grievant argued that the Principal was falsifying documents. Whether the Agency wished to seek a change in behavior by an employee using the Standards of Conduct is solely within the judgment of the Agency.

<sup>12</sup> Tardiness is a Group I offense, See Attachment A, DHRM Policy 1.60.

<sup>13</sup> The Principal applies the same five minute standard to all employees.

1.25, the Agency has the authority to establish the beginning and end of Grievant's shift and expect her to work that shift. Although the Agency has the discretion to apply additional time worked beyond the end of an employee's shift to offset the time an employee was tardy to work, the Agency is not obligated to exercise that discretion. No evidence was presented that the Principal inconsistently applied that discretion or otherwise singled out Grievant for harsher treatment.

Grievant argued that the Agency should be obligated to calculate her time based on a 40 hour period. Under Grievant's approach, she could be late to work on a Monday by three hours but if she worked an additional three hours during the week and the total number of hours she worked in a week totaled 40 hours, she would not be docked for being tardy. Grievant has not presented any policy that would require the Agency to calculate her work time in the manner she prefers. If the Agency adopted her approach, it would have the effect of permitting her to adopt a flexible schedule based on the work hours she would prefer to work in any given week. Nothing in policy supports this approach.

On those days Grievant was late to work, the Agency was not obligated to pay her for the time she was not working. The Agency had the authority to reduce Grievant's compensation for the time she missed from working her schedule shift because she was late to work.<sup>14</sup>

Rather than reducing Grievant's salary, the Agency compelled Grievant to use her annual or other leave.<sup>15</sup> Grievant asserted that the Agency lacked the authority to compel her to use annual or other leave to cover the time she was tardy. Grievant's assertion is correct. DHRM Policy does not authorize the Agency to reduce leave balances against her will. Although it is likely that most employees would prefer to have their leave balances reduced rather than receive a lower paycheck, the Agency cannot compel an employee to accept that choice. Because Grievant has not authorized the Agency to offset her time absent from work due to tardiness, the Agency must restore Grievant's leave taken for that time and reduce Grievant's salary to reflect her absence from work.<sup>16</sup> The Agency must restore to Grievant any leave taken from her to cover the time she was tardy.<sup>17</sup> The Hearing Officer's authority to order a remedy is limited to 30 days prior to the filing of a grievance.<sup>18</sup> In this case, the Agency must restore

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<sup>14</sup> The Agency had the discretion to permit Grievant to apply the time she worked in addition to eight hours in a day, but it was not obligated to do so. The Agency was obligated to exercise that discretion consistently among employees.

<sup>15</sup> Although the Agency have the discretion to permit Grievant to use annual leave to cover her tardiness rather than reducing Grievant's pay, the Agency did not have the authority to impose that choice on Grievant.

<sup>16</sup> On those days when Grievant was tardy but worked hours after the end of a regular shift, the Agency has the sole discretion to use the additional hours of work to offset the tardiness.

<sup>17</sup> The Agency has already audited Grievant's leave and restored her sick leave taken.

<sup>18</sup> See, Rules for Conducting Grievance Hearings, Section VI(C)(1).

Grievant's leave balances and reduce her salary for the time period beginning November 17, 2010.

Grievant argued that the Principal installed a time clock in the main school building and implemented a new "Time Clock Policy" of which the Human Resource Officer did not have knowledge. At the time of the hearing, the Agency had removed the time clock. On January 24, 2011, the Agency reverted to its procedure of having employees sign in at the office door inside the school using the time on the clock above the sign in sheet. There is no basis for the Hearing Officer to grant Grievant relief with respect to the application of a Time Clock Policy.

Grievant argued that the Principal misapplied Agency policy because certain employees were permitted to sleep, ride on a golf cart during business hours, deliver mail, watch TV, smoke cigarettes, or enjoy up to three hours of leisure downtime per day without penalty of having annual or sick leave subtracted from their time records. Grievant argued that Agency Policy 2 – 4 states that each employee is responsible for completing a new entry in the logbook each time he or she enters or exits the Facility. She argued that the Principal violated this policy by allowing employees to have numerous undocumented smoking breaks. She argued that this practice discriminated against non-smokers and has denied her the same free time or break time afforded other employees.

Grievant presented sufficient evidence to show that some employees were taking longer breaks without sanction from the Agency. Although the Principal denied knowing about this behavior, sufficient evidence was presented to show that the Principal should have known of employees taking extended breaks. The Agency is ordered to consistently apply its practice governing employee breaks.

Grievant requested a third party audit for the time log for the time period between August 18, 2008 and December 16, 2010. The Agency conducted an audit of Grievant's time. There is no basis for the Hearing Officer to grant further relief.

Grievant argued that the Agency was acting contrary to DHRM Policy 1.25 by requiring employees to volunteer daily unpaid overtime of 10 – 15 minutes per day or approximately 1 hour per week. Grievant reached this conclusion based on the assumption that the DJJ gate clock was the only clock the Agency could use to calculate when an employee arrived to work. Because of Grievant's incorrect assumption that employees were at work when they arrived at the DJJ gate, Grievant's argument fails.

## DECISION

For the reasons stated herein, Grievant's request for relief are denied except that the Agency is **ordered** to restore Grievant's leave taken beginning November 17, 2010

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for being tardy and reduce her salary to account for the time she was tardy. The Agency is **ordered** to enforce its break policy at the school in a uniform manner.

## 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

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.<sup>19</sup>

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<sup>19</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of the  
Department of Correctional Education

August 2, 2011

The grievant has requested an administrative review of the hearing officer's decision in Case No. 9529/9530. The grievant has listed several reasons why she believes the hearing decision is inconsistent with policy. Of the reasons she listed, some were not policy related and were addressed in an administrative review by the Director of the Department of Employment Dispute Resolution. For the reasons stated below, we will not interfere with the application of this decision with respect to this decision. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer stated, in relevant part, the following:\*

On December 17, 2010, Grievant filed a grievance against the Agency alleging the misapplication or unfair application policy. On January 4, 2011, Grievant filed a grievance against the Agency alleging the misapplication or unfair application of policy. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On February 11, 2011, the EDR Director issued Ruling No. 2011-2900, 2011-2901 consolidating the two grievances for a single hearing. On March 2, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 23, 2011, a hearing was held at the Agency's office.

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In his FINDINGS OF FACT, the hearing officer stated the following:

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Correctional Education employs Grievant as a Guidance Counselor at one of its schools. The purpose of her position is to:

Provide overall coordination and support of student services in the areas of academic, personal/social, and career counseling, or selection, class scheduling, testing, orientation, and students scholastic records. Practice professional ethics with students and

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\* The references cited in the original hearing decision are not listed in this ruling.



student records.

Grievant is Exempt under the Fair Labor Standards Act. In accordance with Grievant's Employee Work Profile she is expected to:

- Constantly follow established procedures for attendance and punctuality.
- Inform supervisor of all absences and schedule changes in a timely manner and in compliance with procedure.
- Timesheets and leave slips are completed in an accurate and timely manner.
- Arrives to work at scheduled time and remains until scheduled departure time unless otherwise discussed with supervisor.
- Inform supervisor of absences and submits timesheet/leave slips in a timely manner.

Grievant works at a school located within a juvenile correctional Facility under the exclusive control of the Department of Juvenile Justice. The Department of Correctional Education must operate its school in accordance with the restrictions imposed by the Department of Juvenile Justice. One of those restrictions includes the requirement that Agency employees working at the school must comply with DJJ security procedures in order to enter the Facility and then enter the school.

A security fence surrounds the DJJ Facility. DJJ has a security post with a Juvenile Correctional Officer located at an entryway of the fence. DCE keeps a log book at the security post and requires its employees to record their names and times of entry into and departure from the Facility. The Agency does not consider its employees to be at work simply because they have signed in at the DJJ gate. Agency employees must then pass through DJJ security procedures such as metal detecting machines that are designed to prevent individuals from bringing contraband into the Facility. It can take between three to ten minutes to pass from the DJJ gate and enter the main school building.

The Agency considers its employees to be at work at the time they reach the school building inside the DJJ gate. Once employees enter the school building, they must sign a login sheet and record the time they arrived. There is a clock within view of the log sheet inside the school. The log sheet can be viewed by students and other staff. The Principal periodically reviews the log sheet and highlights the names of employees who were tardy.

On March 4, 2009, the Principal sent Grievant and other employees at the school an email stating:

Employees must be at the workstation (inside the building) by 7:45 a.m. This will give you the opportunity to get ready for your class or the day and have students in the building by 8 a.m. as required by the MOA between DCE and DJJ and not be entering the building with students. As you know, your time has been docked if you have not been in the building by 7:45 a.m. It is important that you be ready for students when they enter the building.

In November 2010, the Principal installed a time clock in the main school building in order to establish with employees began working. Under the School's procedures:

- Each employee will have a separate timecard with last name and pay period on the card. Each time card allows for a 15 day period and allows for clocking in and out twice per day.
- Upon entry into the building, each employee will clock in using the assigned card. As has been directed by local policy, the time of work begins when the staff member is at the assigned workstation. In this case, inside the building is the assigned workstation.
- At lunch, each employee is expected to clock out when going to lunch and clock in again after lunch is complete. A 45-minute window will be allowed for staff members for lunch. This allows for staff members to attend meetings, complete work in the classroom, or prepare for the next class without taking a defined time for lunch, i.e. 11-11:45. However, as a general rule, all lunches must be completed before students arrive for afternoon classes.
- All teachers will again clock out at the end of the day prior to leaving.

The Principal did not forward his local operating procedures for the time clock to the Deputy Superintendent for review prior to implementing the time clock procedure. As a result of Grievant's December 17, 2010 grievance, the Agency ended use of the time clock effective January 21, 2011. The Agency implemented a tardy procedure effective January 25, 2011 in accordance with Local Policies and Procedures Policy Number 1 - 16 as follows:

Work Hours: 7:45 a.m. to 4:15 p.m., 30 minutes for lunch

Staff of [the school] should strive to be on time on a daily basis and be ready to have students began reporting to classrooms at 7:50 a.m. School is scheduled to begin at 8 a.m. daily with the morning announcements. The following tardy policy will be affected January 25, 2011.

- Staff shall sign in at the office based on the clock above the sign in sheet. No other time will be used. Names of staff members not present at 7:45 will be highlighted.
- Delays at the [DJJ] gate will not be an excuse for being late to your workstation. You should anticipate the possibilities of delays and plan accordingly.
- Staff will be allowed 3 tardies during a pay period. On the 4th tardy, staff members will receive a Needs Improvement notice.
- Failure to meet the conditions of the Needs Improvement Plan will result in a violation of the Standards of Conduct and staff may receive a Group Notice.
- All staff shall sign in and out for lunch whether leaving the building or eating in the building. All staff must take a 30 minute lunch break.
- Tardies from lunch will count against total tardies for the pay period.
- An eight hour work day is required, if not, a salary timesheet and leave slip must be submitted.
- Time will not be made up at the end of the day.

Exceptions:

Tardies during inclement weather conditions (snow *and/or* ice) will not count against the tardies to receive a Needs Improvement Plan. (Conditions: Area schools are delayed or closed)

Traffic Accidents: Staff will be allowed 2 tardies during the pay period for traffic accidents. Delays must be reported to the Principal or the Assistant Principal.

The Principal determined whether employees were tardy by granting employees an additional five minutes beyond the start time of their shifts. For example, if an employee's shift was to begin at 7:45 a.m., the employee would be considered on time if the employee arrived at the school by 7:50 a.m. If the employee arrived at the school at 7:51 a.m. the Principal would record the employee as being six minutes late. The Principal would "dock" the time of an employee who was tardy by the amount of time the employee was tardy. The Principal would force the employee to use available leave balances to cover the amount of time the employee was tardy. For example, if an employee was tardy by one half hour, the Principal would require the employee to use a half hour of available leave such as annual leave.

The Principal would not permit Exempt employees to use additional hours worked in an eight hour day or additional hours worked in a 40 hour work week to substitute for the time an employee was tardy." For example, if Grievant was one hour late for work but worked one hour past the end of her scheduled shift, the Principal would not permit Grievant to use the one hour of extra time worked to offset her one hour of being late. If Grievant was late by one hour on a Monday but worked an additional hour beyond the end of her shift on Friday, the Principal would not permit Grievant to use the additional hour worked on Friday to cover the hour Grievant was late on Monday.

On February 16, 2011, Grievant sent the Principal an email stating, in part:

We have had this discussion before. However I am respectfully requesting that you enter the exact, actual, and correct number of hours that I work rather than round the time down to a flat "estimate" of 8 hours. Even though I am an exempt employee and my overtime is not paid, I still maintain that under reporting my total hours worked is falsification of my time sheet. Is this a practice you use for both exempt and nonexempt employees or is this practice reserved only for exempt employees? I have shared with you before that I feel uncomfortable signing a time sheet to certify that it is accurate when I know it is not. You round up tardies and you round down over time. This creates a false report of my time and creates a skewed picture of my attendance. For example, I left work yesterday at 4:30. My time sheet should read 8.25 hours, not 8.

On February 16, 2011, the Principal said Grievant an email stating:

A great deal of time is being spent on this time issue and I am aware of your concerns. As I have explained, the Commonwealth of Virginia does not

recognize more than 8 hours of work per day. The 8 hours reported is a reflection of the workday although I am very much aware of the extra time that you spend working. I have requested from HR an audit of your time in order to answer your questions.

On February 16, 2011, Grievant sent the Principal an email stating:

Thank you. That is all I have ever asked is an audit. Thank you.

On March 15, 2011, Ms. R, acting on behalf of DHRM, sent Grievant an email stating:

We met with [Human Resource Director] regarding your complaints and are satisfied that the Department of Correctional Education (DCE) is taking proactive steps to address your concerns: In addition to auditing your leave records, we are aware that the DCE Human Resources staff has broadened their review and plan to audit records of other employees at [Grievant's school] as well as other DCE schools.

It is important to note that all exempt employees in state government are required to fulfill their 40 hour work week. This is an obligation we will fulfill to the taxpayers of the Commonwealth of Virginia. The Fair Labor Standards Act provides this accommodation for public employees which allows for the loss of work hours to be replaced with paid or unpaid leave for public-sector employees working in exempt-level positions. I am attaching an exempt form Title 29 CFR 541.710 which provides the salary deduction exemptions for public-sector employees. As a state employee, you are required to either work a 40 hour work week or as an alternative supplement any time lost with available leave balances or have your pay docked for the respective wages equivalent to the lost time. Your exempt status as a teacher is not jeopardized by the actions taken by management to use your leave balances in order to supplement lost time due to tardiness.

In addition, your reference to working and earning overtime in your position is not relevant for exempt-level employees. The Department of Correctional Education is not obligated under the Fair Labor Standards Act to provide compensation for additional time worked in excess of 40 hours in a given work week to employees in exempt level positions. As a professional, there may be occasions when your work may require additional time. That is a standard expectation for many individuals both in the private sector and public sector who work in professional exempt positions.

As you've discussed with several consultants and DHRM, the agency is responsible for determining an acceptable arrival/departure standard, meaning it is up to DCE to identify when an employee is considered to be tardy at the DJJ schools. Given the requirements of the correctional facilities' policies and procedures, DCE must take into account the need for teachers to be in their classrooms prior to the arrival of the students. From DHRM's perspective, we find that it is a reasonable expectation provided there is some allowance for an occasional unpredictable circumstance on the grounds at the gate area.

However, we do not support the contention that employees' arrivals to the outer or inner gates should be considered as the start of the workday for teachers unless a teacher is required to perform functional responsibilities upon entering the gate. At this point, no information has been provided that indicates DCE teachers are performing any duties or functions until they reach their relevant classrooms which is when your workday begins.

### CONCLUSIONS OF POLICY

DHRM Policy 1.25 "provides guidelines for agencies to schedule reasonable and flexible work hours for employees as well as to provide convenient and consistent hours for citizens to transact business with the Commonwealth." Full-time salaried employees "work the equivalent of 40 hours per week for 12 months per year." The Standard Work week "consists of a five-day, 40-hour per week schedule for every seven calendar-day period." "Management reserves the right to establish and adjust the work schedules of employees in the agency, being mindful of the hours of public need." Employees are expected to:

- adhere to their assigned work schedules,
- take breaks and lunch periods as authorized,
- notify management as soon as possible if they are unable to adhere to their schedules, such as late arrivals or early departures, and
- work overtime hours when required by management.

An employee taking approved annual or sick leave during the week may also be asked to work additional hours during the same week. With the approval of the employee, the agency may substitute the additional hours worked for the hours of leave, thus reducing or eliminating the need for the employee to use leave. Agencies should be cautious when changing the kind of leave requested by an employee and approved by the supervisor, and should ensure that employees are able to use their leave as intended within the business demands of the agency. For example, it is not acceptable for an agency to substitute compensatory leave for sick or annual leave without the employee's permission." (Emphasis Added.)

Agency Policy 2-4 governs Documentation for Entering/Exiting Facilities. Agency Policy 2-4 is:

The policy of the Department of Correctional Education to maintain an accurate log of DCE employees' presence within a facility in order to provide notification to the Department of Corrections (DOC) or to the Department of Juvenile Justice (DJJ) for safety procedures. It is also the policy of DCE to provide an accurate record of who is present at each DCE school.

Under this policy "Entering/Exiting" is defined as Entering or leaving the particular facility's grounds." The policy sets forth certain procedures:

- A. Log sheets are to be present at the front gate and/or primary entrance used by DCE employees of every facility operated by DOC or DJJ in which DCE operates a school.

- B. The log sheet attached is the only official document to be used by each DCE school. No other log shall be used at the front gate and/or primary entrance used by DCE employees.
- C. Upon entering or exiting the facility, each DCE employee is required to complete an entry on the log by:
  - 1. Writing the time when he or she enters or exits the facility,
  - 2. Printing his or her name, and
  - 3. Signing the form.

When completing the entry, the employee will fill out the first available open line on the log sheet. The time reported on the log is the official time the employee enters the facility.

- D. Each DCE employee is responsible for completing a new entry each time he or she enters or exits the facility. It will be presumed that the employee is not present at the facility if he or she has not completed an entry on this log.
- E. Each Principal or his or her designee is responsible for ensuring that there are a sufficient number of logs available at the front gate of the facility. Each Principal or his or her designee will collect these forms weekly and maintain them in a secure location within the school. The log sheets are to be removed only by the principal or his or her designee. The log sheets are official records and as such, are to be kept for five years.
- F. Principals may maintain their own attendance policies and procedures within the school facilities to account for *staff* members' presence in the school, in addition to this policy.
- G. DCE Central Office personnel are required to note their entrance and exit from Central Office on the forums maintained at the receptionist's desk.

Grievant argued that the Principal has consistently misapplied the Agency's sign-in policy. She argued that the Principal incorrectly calculated her attendance and leave by using the sign-in sheet located in the main school office instead of using sheet located at the Facility gate. Grievant argued that her actual job responsibilities began at the DJJ front gate where the "official log" was kept.

Grievant's argument fails. The Purpose of Agency Policy 2-4 is "to maintain an accurate log of DCE employees' presence within a facility in order to provide notification ... to the Department of Juvenile Justice". The log sheet at the DJJ front gate serves as the "only official document" for the purpose of determining whether an employee is present within the facility. Agency Policy 2-4 does not defined when an employee is considered at his or her work station. The Policy specifies that "[p]rincipals may maintain their own attendance policies and procedures within the school facilities to account for staff members' presence in the school, in addition to this policy." (Emphasis Added).

The Agency considers an employee to be at work when he or she is at the school building inside the DJJ facility. An employee is not yet at work when the employee reaches the outer security gate under the control of DJJ employees. Grievant has not presented any policy prohibiting this practice. Grievant complained that she is obligated to go through DJJ security procedures which can delay her

arrival times if there are a significant number of employees at the DJJ gate attempting to enter at the same time. The Agency has not violated any policy by requiring its employees to plan to arrive at the front gate with sufficient additional time to enable them to pass through security and arrive on time at the main school building. Expecting employees to plan sufficient time to pass through DJJ security procedures is not materially different from an agency expecting employees to plan sufficient time to commute to work and arrive on time.

Grievant objected to the location of Agency's sign-in log inside the school. She complained that the log was located in an area easily accessible by students and that students had sometimes changed the entries made by teachers. The evidence showed, however, that any time Grievant complained that her entries in the school log book had been changed, the Principal took her word that a change had been made and used the time Grievant told him she entered in the book.

Grievant has not identified any policy that would prohibit the Agency from locating a sign-in sheet in an open area of the school. Although the logic of Agency's practice may be subject to question, unless it is shown to be contrary to policy, the Hearing Officer will not interfere with the Agency's practice.

Grievant objected to the Principal's practice of listing on the Salaried Employees' Timesheet and Leave Slip 10 the number of hours she worked as only eight hours even on those day she work more than eight hours. The Principal testified that he listed only eight hours on the timesheets because Grievant was obligated to work eight hours and any hours more than eight hours in a day was not of significance to the Agency because Grievant was not entitled to receive overtime pay without prior approval. When Grievant worked more than eight hours in a day, the Principal considered the additional hours to be irrelevant because the Agency would not compensate Grievant for the additional hours she chose to work. Grievant has not presented any policy that would require the Principal to write down every hour an employee worked beyond eight hours in a day. There is no basis for the Hearing Officer to interfere with the Principal's practice.

Grievant argued that the Principal did not have the authority to "dock" her leave when she was late to work. She argued that the Principal's practice of taking employee leave without an employee request and without a Leave Request Slip was not sanctioned by policy.

Under DHRM Policy 1.25, Grievant is obligated to work a standard work week consisting of five days, 40 hours per week for every seven calendar day period. The Agency had the authority to set a time at which Grievant's eight hour shift began and establish her shift as eight hours per day. If Grievant failed to arrive in her workstation on or before the beginning of her work shift, she was tardy. If Grievant was scheduled to begin her shift at 7:45 a.m. but was not at her workstation until 7:46 a.m., she was tardy by one minute. The Agency had the discretion to disregard that one minute or any number of minutes Grievant was late so long as it did so in a uniform manner. In this case, the Principal ignored Grievant's tardiness until she was more than five minutes late. The Principal had the authority to make that decision.

When Grievant failed to complete an eight hour shift as required by the Agency, the Agency was authorized to reduce her compensation.

Grievant argued that if she was tardy on a particular day but worked beyond the end of her shift by an amount of time equally the amount of time she was tardy, she should received credit for having worked an eight hour shift. Grievant has not presented any policy requiring the Agency to adopt this approach. Under DHRM Policy 1.25, the Agency has the authority to establish the beginning and end of Grievant's shift and expect her to work that shift. Although the Agency has the discretion to apply additional time worked beyond the end of an employee's shift to offset the time an employee was tardy to work, the Agency is not obligated to exercise that discretion. No evidence was presented that the Principal inconsistently applied that discretion or otherwise singled out Grievant for harsher treatment.

Grievant argued that the Agency should be obligated to calculate her time based on a 40 hour period. Under Grievant's approach, she could be late to work on a Monday by three hours but if she worked an additional three hours during the week and the total number of hours she worked in a week totaled 40 hours, she would not be docked for being tardy. Grievant has not presented any policy that would require the Agency to calculate her work time in the manner she prefers. If the Agency adopted her approach, it would have the effect of permitting her to adopt a flexible schedule based on the work hours she would prefer to work in any given week. Nothing in policy supports this approach.

On those days Grievant was late to work, the Agency was not obligated to pay her for the time she was not working. The Agency had the authority to reduce Grievant's compensation for the time she missed from working her schedule shift because she was late to work.

Rather than reducing Grievant's salary, the Agency compelled Grievant to use her annual or other leave. Grievant asserted that the Agency lacked the authority to compel her to use annual or other leave to cover the time she was tardy. Grievant's assertion is correct. DHRM Policy does not authorize the Agency to reduce leave balances against her will. Although it is likely that most employees would prefer to have their leave balances reduced rather than receive a lower paycheck, the Agency cannot compel an employee to accept that choice. Because Grievant has not authorized the Agency to offset her time absent from work due to tardiness, the Agency must restore Grievant's leave taken for that time and reduce Grievant's salary to reflect her absence from work. The Agency must restore to Grievant any leave taken from her to cover the time she was tardy. The Hearing Officer's authority to order a remedy is limited to 30 days prior to the filing of a grievance.<sup>18</sup> In this case, the Agency must restore Grievant's leave balances and reduce her salary for the time period beginning November 17, 2010.

Grievant argued that the Principal installed a time clock in the main school building and implemented a new "Time Clock Policy" of which the Human Resource Officer did not have knowledge. At the time of the hearing, the Agency had removed the time clock. On January 24, 2011, the Agency reverted to its procedure of having employees sign in at the office door inside the school using the time on the clock



above the sign in sheet. There is no basis for the Hearing Officer to grant Grievant relief with respect to the application of a Time Clock Policy.

Grievant argued that the Principal misapplied Agency policy because certain employees were permitted to sleep, ride on a golf cart during business hours, deliver mail, watch TV, smoke cigarettes, or enjoy up to three hours of leisure downtime per day without penalty of having annual or sick leave subtracted from their time records. Grievant argued that Agency Policy 2 - 4 states that each employee is responsible for completing a new entry in the logbook each time he or she enters or exits the Facility. She argued that the Principal violated this policy by allowing employees to have numerous undocumented smoking breaks. She argued that this practice discriminated against non-smokers and has denied her the same free time or break time afforded other employees.

Grievant presented sufficient evidence to show that some employees were taking longer breaks without sanction from the Agency. Although the Principal denied knowing about this behavior, sufficient evidence was presented to show that the Principal should have known of employees taking extended breaks. The Agency is ordered to consistently apply its practice governing employee breaks.

Grievant requested a third party audit for the time log for the time period between August 18, 2008 and December 16, 2010. The Agency conducted an audit of Grievant's time. There is no basis for the Hearing Officer to grant further relief.

Grievant argued that the Agency was acting contrary to DHRM Policy 1.25 by requiring employees to volunteer daily unpaid overtime of 10 - 15 minutes per day or approximately 1 hour per week. Grievant reached this conclusion based on the assumption that the DJJ gate clock was the only clock the Agency could use to calculate when an employee arrived to work. Because of Grievant's incorrect assumption that employees were at work when they arrived at the DJJ gate, Grievant's argument fails.

## DECISION

For the reasons stated herein, Grievant's request for relief are denied except that the Agency is **ordered** to restore Grievant's leave taken beginning November 17, 2010 for being tardy and reduce her salary to account for the time she was tardy. The Agency is **ordered** to enforce its break policy at the school in a uniform manner.

## DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department

has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In her request to this Department for an administrative review, the grievant raised six concerns. Of the six concerns, EDR reviewed four of those. While EDR offered opinions on the remaining two, EDR deferred to DHRM for a final ruling. DHRM addresses those items below:

1. *By failing to accurately document hours worked over forty during a work week by an exempt employee, is the agency violating their right to require straight time pay or compensation as outlined within DHRM guidelines, which provides the option for exempt employees to request straight time pay or compensation time with proper documentation?*

Exempt employees are not eligible to receive any credit for hours worked beyond forty unless the supervisor pre-approves such. That being said, as a state employee, you are required to either work a 40 hour work week or as an alternative supplement any time lost with available leave balances or have your pay docked for the respective wages equivalent to the lost time. Thus, the remedy made by the hearing officer in this part of the hearing decision is consistent with policy.

2. *Does the hearing officer have authorization to override DHRM's policy as dictated within the Statement of Public Accountability, which strictly prohibits the deduction or docking of exempt employees pay for periods of absences less than one day?*

No, the hearing officer has no authority to overrule DHRM policy. DHRM policies establish guidelines for agencies to follow in managing the state's work force while ensuring that the business of the Commonwealth is carried out. For the hearing officer to override any policy is to create new policy and that is beyond his authority.

As per the **Statement of Public Accountability** from the Employee Handbook:

State agencies are public institutions supported by the Commonwealth of Virginia, a public employer committed to serving the interests of the taxpayers and accountable to them for the effective use of public funds. Therefore, it is the policy of the Commonwealth that employees are not paid for time that they do not work, unless they use leave time, such as annual leave or sick leave, accrued under human resource policies. You will be placed on Leave Without Pay, and your paycheck for that pay period will be reduced, if you are absent from work for personal reasons or because of illness or injury, even for periods of less than one day, if you do not use accrued leave because (1) you do not request use of accrued leave or your request is denied, (2) your accrued leave has been exhausted, or (3) you request leave without pay.

If your position is exempt from the overtime provisions of the Fair Labor Standards Act (FLSA), there will be no deductions from your compensation for periods of absence from work of less than one day, except for the reasons and circumstances specifically described in the preceding paragraph or for infractions of safety rules of major significance.

In the instant case the hearing officer stated the following:

“Under DHRM Policy 1.25, Grievant is obligated to work a standard work

week consisting of five days, 40 hours per week for every seven calendar day period. The Agency had the authority to set a time at which Grievant's eight hour shift began and establish her shift as eight hours per day. If Grievant failed to arrive in her workstation on or before the beginning of her work shift, she was tardy. If Grievant was scheduled to begin her shift at 7:45 a.m. but was not at her workstation until 7:46 a.m., she was tardy by one minute. The Agency had the discretion to disregard that one minute or any number of minutes Grievant was late so long as it did so in a uniform manner. In this case, the Principal ignored Grievant's tardiness until she was more than five minutes late. The Principal had the authority to make that decision. When Grievant failed to complete an eight hour shift as required by the Agency, the Agency was authorized to reduce her compensation.”

As relief, the hearing officer directed the DCE to restore the grievant’s leave hours for which she was tardy and to reduce her pay accordingly. That decision is within the authority of the hearing officer and does not violate any DHRM policy.

This Agency concurs with the hearing decision thus has no basis to interfere with its application.

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Ernest G. Spratley, Assistant Director  
Office of Equal Employment Services