

Issue: Benefits/Leave (misapplication of policy); Hearing Date: 06/25/15; Decision Issued: 06/26/15; Agency: JYF; AHO: Carl Wilson Schmidt, Esq.; Case No. 10612; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10612**

Hearing Date: June 25, 2015

Decision Issued: June 26, 2015

#### **PROCEDURAL HISTORY**

On March 28, 2015, Grievant filed a grievance alleging the Agency incorrectly applied DHRM Policy governing the number of days she was supposed to work. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 1, 2015, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 25, 2015, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Representative  
Witnesses

#### **ISSUES**

1. Whether the Agency misapplied DHRM 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 Jamestown Yorktown Foundation employs Grievant as a Historic Interpreter. She has been working for the Agency for approximately 17 years. She is non-exempt under the Fair Labor Standards Act. In 2006, Grievant changed her status to a quasi-full-time salaried employee working ten consecutive months. Grievant’s ten month work period begins on February 25<sup>th</sup> and ends on December 24<sup>th</sup> of each year.

The Agency’s seven day work week begins at 12:01 a.m. on Sundays and ends at midnight on the following Saturday. Grievant works an eight hour shift beginning at 8:30 a.m. and ending at 5:15 p.m. with a 45 minute lunch period. Grievant works five days within a seven day work week but the five days are assigned by her supervisor depending on the Agency’s business needs.

### **CONCLUSIONS OF POLICY**

Grievant alleged the Agency misapplied or unfairly applied State Policy. Grievant has not identified any State policy that was misapplied or unfairly applied by the Agency. Accordingly, her request for relief must be denied.

DHRM Policy 1.25 defines a quasi-full-time salaried employee to include an employee who works 40 hours per week for 9, 10, or 11 consecutive months per year for at least 1560 hours per year.

Grievant argued that she should work only 217 days in a year but the Agency is requiring her to work 219 days. As a result, Grievant works an additional two days without additional compensation because of the Agency’s application of policy. Grievant determined the number of days she should work using several methods<sup>1</sup> including as follows:

A 12 month employee can work up to 260 days.  $10/12$ ths or  $5/6$ ths of that number is 216.67 which is rounded to 217 days.

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<sup>1</sup> Grievant also argued that a 12 month employee would have 2080 hours available for work and that  $5/6$ ths of that amount is 1733.33 hours. Dividing 1733.33 by eight hours equals 216.67 days which she rounded to 217 days.

Grievant counted the number of days she would have to work in 2015 if she began work on February 25, 2015 and ended her work on December 24, 2015. She concluded that number would be 219 days. Based on this analysis, Grievant argued that she was being treated differently from employees working 12 months.

The Agency's application of policy does not involve a calculation of the number of days or hours a quasi-full-time salaried employee should work. Instead, the Agency counts the number of consecutive months from one to ten with the first month beginning on February 25th and ending on March 24th, the second month beginning on March 25<sup>th</sup> and ending on April 24<sup>th</sup>, etc. The total number of days a quasi-full-time salaried employee works could vary depending on which months were selected by the Agency and how many workdays were in each month selected.

Grievant has the burden of proof and has not established that the Agency misapplied or unfairly applied State Policy. DHRM Policy 1.25 defines quasi-full-time salaried employees based on their working 9, 10, or 11 consecutive months. It does not define these employees based on working a specific number of days. The only reference to hours in the definition is 1560 which sets forth the minimum number of hours an employee must work to be considered quasi-full-time salaried employees. Grievant is alleging the Agency violated the policy because it exceeded the maximum number of days/hours permitted by policy. DHRM Policy 1.25 does not address the maximum number of hours or days an employee may work – it addressed the number of consecutive months of work.<sup>2</sup> Although Grievant's method of calculation may be reasonable and logical, the Agency's method is also reasonable and logical. Grievant's burden of proof requires her to show more than that her method is reasonable and logical. She must show that the Agency's method is contrary to policy or a misapplication or unfair application of policy. Grievant has not met this burden.

Grievant seeks to have the Hearing Officer compel the Agency to draft a policy consistent with her method of calculation and have that policy apply to all of the work sites for which the Agency utilizes quasi-full-time salaried employees. The Hearing Officer does not have the authority to order the Agency to draft a policy. The Hearing Officer does not have the authority to order the Agency to set the same begin work dates for its quasi-full-time salaried employees in other work units which may have different business needs.

Grievant argued that Unit S did not return to work until February 27, 2015<sup>3</sup> instead of February 25, 2015 as she did and, thus, she is entitled to an additional day off with pay. The Agency indicated it recognized this disparity and granted Grievant an additional day of paid time off from work.

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<sup>2</sup> DHRM Policy 1.25 addresses a seven day workweek but does not set a maximum number of weeks a quasi-full-time salaried employee may work.

<sup>3</sup> Unit S employees would have returned to work on February 26, 2015 but the Agency was closed due to inclement weather. Grievant did not work on February 26, 2015 as well.

## 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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

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

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative 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>4</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>4</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.