

Summary: Qualification-Discrimination (religion), Methods/Means-Hours of Work – Shifts; Ruling Date: May 20, 2002; Ruling #2002-035; Agency: Department of Corrections; Outcome: Not qualified. Appealed to the First Judicial Circuit Court of Virginia; Appeal File Date: June 4, 2002; Case #CH02-74; Judge’s decision entered on August 26, 2002; EDR ruling affirmed.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Corrections/ No. 2002-035  
May 20, 2002

The grievant has requested a ruling on whether his October 30, 2001 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that the agency misapplied policy and subjected him to religious discrimination when it changed his rest days from Sunday and Monday to Friday and Saturday.<sup>1</sup> For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a lieutenant with DOC. On September 5, 2001, the facility in which the grievant works opened a security ward at the local hospital, assigning some of its personnel to cover this new area. As a result, the institution reorganized the work schedules of the remaining staff. One lieutenant at the facility was reassigned to the hospital, and another employee, Lieutenant A, was reassigned to cover the vacancy. Prior to this change, the first officer had Fridays and Saturdays as rest days, while Lieutenant A had Saturdays and Sundays. The grievant's rest days were Sunday and Monday.

After the reorganization, on September 25, 2001, the grievant learned that his rest days would be changed to Fridays and Saturdays, and Lieutenant A's rest days would be changed to Sundays and Mondays. The grievant, a religious man, is heavily involved in activities with his church, and objected to having his rest days changed. His Captain explained that Lieutenant A has more seniority than the grievant, and also desired to have Sundays free for participation in church activities. The grievant claims that it is unfair to use seniority to justify the change in rest days, because the DOC policy does not clearly define what is meant by "seniority" and notes that he is more senior than Lieutenant A for purposes of requesting vacation time. He states that seniority can be determined in more than one way -- by time at DOC or by time in position -- and that the system is subject to

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<sup>1</sup> In attachments to this grievance, the grievant also raises concerns about his transfer to a different shift. However, his shift change was not addressed in the original grievance and will not be addressed in this ruling. According to the *Grievance Procedure Manual*, "once the grievance is initiated, additional claims may not be added." *Grievance Procedure Manual* § 2.4, page 6.

misuse and differential treatment. Moreover, the grievant asserts that the agency has discriminated against him, because it accommodated the religion of another employee but failed to accommodate his religious needs.<sup>2</sup>

### DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Therefore, claims relating to issues such as the methods, means, and personnel by which work activities are carried out (such as the scheduling of rest days) generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied.<sup>4</sup> In this case, the grievant claims misapplication of policy and religious discrimination.

#### *Misapplication of Policy*

For a claim of misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Under state policy, DOC has been granted complete discretion to establish schedules for employees according to its perceived needs.<sup>5</sup> This discretion is limited only by DOC's own policies and procedures. DOC policies clearly establish that management has the prerogative to adjust schedules.<sup>6</sup>

The grievant claims that management violated scheduling policy because its application of the seniority system at the institution is inconsistent. Both parties acknowledge that there is no DOC policy that defines what is meant by "seniority," but it is often used as one factor in assigning duties and schedules. Management asserts that assignments are made to meet the needs of the institution first, and if possible, to meet the personal needs of its employees. In this case, management was aware that both the grievant and Lieutenant A desired to have Sundays as rest days. There is evidence that DOC gave them an opportunity to work out a compromise, but when they could not agree, the Captain made the decision to grant Lieutenant A the first choice of rest days. DOC claims that the decision was based, in part, on seniority, because he has been a lieutenant at the facility longer than the grievant.

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<sup>2</sup> The grievant claims that management said it gave Lieutenant A Sundays as rest days to suit his religious aspirations. Management, however, says it gave him first choice for rest days based on seniority, and his personal reasons for wanting Sundays off just happened to be based on his religion. DOC claims that religion played no part in its decision.

<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(c), page 11.

<sup>5</sup> DHRM Policy No. 1.25 "Hours of Work."

<sup>6</sup> DOC Policy 5-12.7.

The grievant claims that he is the more senior officer, because he has been with the agency for a longer period of time. As evidence of his seniority, he notes that he has first choice of vacation days. However, DOC notes that a different seniority system is used for vacation, because it is based on an individual's entire career, not just his time at the institution or at a certain rank.<sup>7</sup> During this Department's investigation, management also emphasized that seniority is only one of several factors used when making business decisions, and thus is not solely determinative of the outcome. For example, more senior individuals may be assigned to a less desirable shift because of the need to blend senior and junior individuals on each shift. This grievance provides no evidence that DOC has violated any written policy. Furthermore, there is no evidence that the agency's use of "seniority" as a factor in determining the grievant's rest days was unreasonable or arbitrarily applied. Accordingly, this issue does not qualify for a hearing.

### *Religious Discrimination*

The existence of a seniority system does not relieve an employer of its duty to accommodate an employee's religious needs.<sup>8</sup> However, to qualify a claim of religious discrimination for a hearing, there must be more than a mere allegation that discrimination has occurred. A grievance must present facts that raise a sufficient question as to whether the actions described were the result of the prohibited discrimination based on the grievant's religious beliefs, in other words, as to whether the grievant was treated differently than other "similarly-situated" employees due to his religious beliefs.

To meet this burden, the grievant must come forward with evidence that (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he has informed the agency of this conflict; and (3) the agency nevertheless maintained the conflicting employment requirement.<sup>9</sup> Once he has produced this evidence, the agency has an obligation to reasonably accommodate his beliefs or prove that it cannot reasonably accommodate him without undue hardship.<sup>10</sup> If an undue hardship is established, DOC does not have an obligation to provide an accommodation.

In this case, the grievant alleges that his revised work schedule violates his religious practices. Moreover, he claims that the DOC considered the religious needs of Lieutenant A, while ignoring his needs. It is undisputed that the grievant has sincere religious beliefs requiring his adherence to a six-day work schedule in observance of

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<sup>7</sup> The agency reasons that because annual leave accrues based on total service with the Commonwealth, leave should also be granted based on the same criteria: total service with the commonwealth.

<sup>8</sup> *Balint v. Carson City*, 180 F.3d 1047 (9<sup>th</sup> Cir. 1999). However, the duty to reasonably accommodate does not require an employer to disrupt its neutral seniority system. *Id.* at 1054. Employers are required to attempt accommodations that are consistent with their seniority systems and impose no more than a de minimis cost. *Id.* at 1053.

<sup>9</sup> *See Chalmers v. Tulon Co.*, 101 F.3d 1012, 1019, (4<sup>th</sup> Cir. 1996).

<sup>10</sup> *Id.*

Christian principles. Thus, the agency is required to either provide a reasonable accommodation for his religious beliefs or to show that such an accommodation would pose an undue hardship to the agency. It is undisputed that there are only two lieutenants on the day shift -- the grievant and Lieutenant A -- and that one of them must work on Sundays to meet the operational needs of the institution. Furthermore, DOC has offered to have the grievant and Lieutenant A alternate taking Sundays off. In light of these undisputed facts, this grievance fails to raise a sufficient question as to whether the agency discriminated against the grievant or failed to reasonably accommodate his religious beliefs. Indeed it would appear that a reasonable accommodation has been offered. Thus, this issue does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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Director

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