Issue: Qualification: Multiple Compensation/Leave; Ruling Date: July 24, 2002; Ruling #2002-098; Agency: Department of Corrections; Outcome: not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2002-098
July 24, 2002

The grievant has requested a ruling on whether his March 6, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that by forcing him to take annual and compensatory leave at a time not of his choosing, DOC misapplied policy and retaliated against him for expressing his concerns to the warden about adjustments to his overtime pay. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Corrections Officer. The DOC facility where the grievant works has implemented a "2-2-3 day" work schedule in which corrections officers typically work two consecutive 12-hour days and are then off-duty for two consecutive days, followed by three consecutive 12-hour days. Employee work schedules are based on a 28-day cycle and employees are routinely awarded compensatory leave to keep the total hours worked during any given cycle from exceeding the level that requires overtime pay. The agency routinely schedules the compensatory leave.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out, and the transfer, reassignment, or scheduling of employees within the agency 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.[2] The grievant has not claimed the existence of nor presented any evidence of improper discrimination or disciplinary actions. His claims regarding misapplication of policy and retaliation are addressed below.

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A) and (C); Grievance Procedure Manual § 4.1(b) and (c), pages 10-11.

Misapplication of Policy

To qualify for a hearing, a grievance claiming that a policy or procedure was misapplied must be supported by evidence raising a sufficient question as to whether management violated a policy or procedural mandate, or acted in a manner so unfair as to amount to an abuse of discretion under the applicable policy or procedure.

Under state policy, DOC has been granted complete discretion to establish schedules for employees according to its perceived needs.[3] DOC has concluded that to ensure that facilities are fully manned and that no employee will lose accrued compensatory leave,[4] the agency may schedule when Corrections Officers are to use their accrued compensatory leave. While this practice is not expressly endorsed in state or agency policy manuals, the Department of Human Resource Management (DHRM), the state agency charged with the development and interpretation of state personnel policy, stated in a January 24, 1997 correspondence to the Director of this Department that DOC may schedule compensatory leave without violating state policy.[5] Here, the agency exercised its right to direct the grievant to take compensatory leave to avoid an excessive accumulation of leave. Because the agency's action was in accordance with policy, this issue does not qualify for a hearing.[6]

Retaliation

The grievant claims that on February 5, 2002, management directed that he take ten days of annual leave[7] and nine days of compensatory leave in retaliation for his seeking the warden's assistance in resolving issues concerning alleged unfair adjustments to his overtime pay.

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; and (3) a casual link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action,

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[3] *See* DHRM Policy No. 1.25(III)A.

[4] Compensatory leave is lost if not used within 12 months of when earned. DHRM Policy No. 3.10(IV) (B).

[5] DHRM reaffirmed its position on May 3, 2001, during this Department's investigation of this issue in a similar grievance.

[6] The grievant also alleges that the agency violated the annual leave policy. However, the grievant concedes in his ruling request to this Department that he was never forced to use annual leave. Thus, the issue of misapplication of the annual leave policy is not qualified for hearing.

[7] The directive to take unscheduled annual leave was countermanded prior to the grievant actually taking leave. Therefore, the issue of unscheduled annual leave is moot and will not be further addressed in this ruling.

the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[8]

Only the following activities are protected activities under the grievance procedure: (1) participating in the grievance process, (2) complying with any law or reporting a violation of such law to a governmental authority, (3) seeking to change any law before the Congress or the General Assembly, (4) reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or (5) exercising any right otherwise protected by law.[9] Here the grievant has presented no evidence that he engaged in any of the protected activities above -- requesting the warden's assistance in resolving overtime issues is not a protected activity.[10] Furthermore, the agency has presented a non-retaliatory reason for its action - it wanted to avoid an excessive accumulation of leave. The grievant has not presented evidence that the agency's stated reason for its action was pretextual. Accordingly, the issue of retaliation does not qualify for a hearing.

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, the grievant 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 wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

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June M. Foy
Senior Employee Relations Consultant

[8] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).
[9] Grievance Procedure Manual § 4.1(b), page 10.
[10] *See* 29 U.S.C.215(a)(3) (addressing protected activity under the Fair Labor Standards Act).