Issue: Compliance and Qualification- Consolidation of grievances, Retaliation and Misapplication of Policy; Ruling Date: August 27, 2002; Ruling #2002-104 and 116; Agency: Department of Corrections; Outcome: Grievances consolidated, and all issues qualified for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Department of Corrections
Ruling Numbers 2002-104 & 116
August 27, 2002

The grievant has requested rulings on whether his March 7 and April 4, 2002 grievances with the Department of Corrections (DOC) qualify for hearing. The grievant has also asked that his grievances be consolidated.

The March 7, 2002 grievance asserts that the warden's instructions to the grievant that he (1) not use office time nor equipment[1] during his representation of employees in grievance proceedings and (2) must use approved annual leave while doing so, constitutes a misapplication of policy. The grievant further claims that the warden's actions are in retaliation for the grievant's past success in representing employees in grievance proceedings.[2]

The April 4, 2002 grievance alleges that policy was misapplied when he was required to use annual leave while representing an employee in a grievance hearing on March 15, 2002.

For the reasons discussed below, the grievances are consolidated. Both the issues of misapplication of policy and retaliation are qualified for hearing.

FACTS

The grievant is employed as an Inmate Hearings officer. In addition to the performance of his primary duties, he has volunteered to serve as a party representative in employee grievance proceedings. During calendar year 2001 and the first quarter of

[1] Tasks precluded during office time included: (1) interviewing and preparing clients and witnesses; (2) making conference calls; (3) preparing questions; (4) drafting documents; and (5) conducting research. The prohibited use of office equipment and materials included: (1) fax machines; (2) paper; (3) copying machines; (4) phones; and (5) computers.

[2] On the appendix to his Form A, the employee states "I think that this is a personal issue, because no other person that represents employees was told this." During the investigation of this matter, the grievant provided clarification of his statement to mean that he had been singled out for censure because of his past success in representing employees in grievance proceedings.

2002, the grievant represented four employees during grievance proceedings, two at his assigned correctional complex and two at another correctional facility.[3] In two of the four cases, employees represented by the grievant received favorable hearing decisions granting full or partial relief.

On March 1, 2002, the warden issued written instructions to the grievant prohibiting him from using office time or equipment in his representation of employees during grievance proceedings. Additionally, the warden advised the grievant that his failure to comply with these instructions could result in disciplinary action. On March 15, 2002, the grievant represented an employee during a grievance hearing. In doing so, he was required to use four and one-half hours of his annual leave.

DISCUSSION

Consolidation

This Department has long held that by mutual agreement of the parties, grievances may be consolidated to move simultaneously through the resolution steps unless the surrounding facts and circumstances render consolidation impracticable. Under the grievance procedure, however, only the Director of this Department has the authority to assign and consolidate grievances for hearing. This Department strongly favors consolidation and will grant consolidation if more than one grievance is pending involving the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[4] In this case, the parties agree to consolidation, and it appears that consolidation would not lead to impracticable results. Accordingly, the grievances (which, as discussed below, have been qualified for hearing) are consolidated for hearing.

Qualification

1. Misapplication of Policy

The March 1 and April 3, 2002 grievances claim, in part, that the agency has misapplied policy. For an allegation of policy misapplication 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.

DHRM policy states that employees who serve as representatives of grievants *will* be granted *reasonable* amounts of administrative leave, to include travel time, to

[3] During the investigation of this matter, the agency provided the name of an additional case in which the grievant allegedly provided representation. This assertion, however, was denied by the grievant and could not be verified through grievance records.
[4] Grievance Procedure Manual § 8,5, page 22.

participate in grievance proceedings.[5] Grievance proceedings are further defined as management step meetings, hearings, and related court appearances. The Grievance Procedure Manual (GPM) states that employees *are* to be granted administrative leave to serve as a representative for an employee within the agency and to participate in the steps of the grievance process.[6] DOC policy states that "Employees *shall* be granted administrative leave . . . to serve as a representative for an employee within the agency.[7] Further, all three policies grant the parties *reasonable* use of agency equipment in processing their grievances.[8]

Under both the DHRM policy and the grievance procedure, management has clearly been granted the discretion to limit the amount of work time which an employee may devote to grievance related matters. In contrast, the DOC policy could be read as mandating that employees be granted administrative leave (although it would be reasonable to expect that DOC's policy contemplates that management could exercise at least some degree of discretion on a case by case basis). In this instance, however, management has summarily denied the grievant use of administrative leave and office equipment for any grievance-related proceeding. In light of all the above, this grievance raises a sufficient question as to whether the warden's prohibitions with respect to the grievant are in direct contravention to the provisions of DOC and DHRM policy, as well as to the grievance procedure. Therefore, this issue qualifies for hearing.

2. Retaliation

The grievant asserts in his March 7 grievance that management's decision to deny him the use of administrative leave was intended to retaliate against him for his past success in representing agency employees.

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 causal 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, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency' stated reason was a mere pretext or excuse for retaliation.[9]

In this case, the grievant engaged in a protected activity (participation in grievances) and could be viewed as having suffered an adverse employment action (loss of annual leave). Further, management's stated business reason for denying the grievant the use of administrative leave is that he had abused this privilege by the excessive

[5] *See* DHRM Policy, 4.05 V (A).
[6] *See* Grievance Procedure Manual, § 8.6, page 22.
[7] *See* DOC Procedure 5-17.20.
[8] Agency office equipment, which may be used, includes computers, copies, fax machines, and telephones.
[9] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).

number of grievants represented and the amount of state time used to represent grievants. However, the agency could only identify four cases in which the grievant had provided representation during the 15-month period from January 2001 to March 2002, and there was little documentation of the amount of time involved. Moreover, management's decision that the grievant must use annual leave in lieu of administrative leave could be perceived by a fact-finder as undermining the agency's claim that the grievant's absence from work adversely impacted his job performance. First, the grievant's absence from work, whether on administrative or annual leave, would appear to have the same job impact. Further, the grievant's 2001 annual performance evaluation reflects an overall rating of **Contributor,** with no associated comments regarding the grievant's alleged excessive use of administrative leave or abuse of state time. Likewise, an interim evaluation for his first quarter performance dated April 15, 2002 reflects that he had excelled in job performance during the cited period. Thus, this grievance raises a sufficient question as to whether management's stated business reason for the denial of administrative leave was based upon operational requirements or a retaliatory intent. Accordingly, the issue of retaliation is also qualified for 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. Please also note that our qualification ruling is not a determination that the agency misapplied or unfairly applied policy and/or retaliated against the grievant. Rather, this ruling simply reflects that there are sufficient questions such that further review by a hearing officer is justified. If a hearing officer determines that DOC has misapplied or unfairly applied policy, he may only order that the agency reapply the policy as mandated or in a manner in keeping with the intent of the applicable policy. If a hearing officer determines that retaliation has occurred, he may order that the agency create an environment free from retaliation, or take corrective actions necessary to cure the violation and/or minimize its reoccurrence.

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Claudia T. Farr
Director

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