Issue: Qualification//Leave-compensatory leave; holiday leave; retaliation/grievance activity participation; work conditions/other work condition; Compliance/grievance procedure/resolution steps; Ruling Date: February 23, 2006; Ruling #2006-1164; Agency: Department of Conservation and Recreation; Outcome; not qualified; agency in compliance

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Conservation and Recreation
Ruling Number 2006-1164
February 23, 2006

The grievant has requested a ruling on whether his August 18, 2005 grievance with the Department of Conservation and Recreation (DCR or the agency) qualifies for hearing. The grievant claims that the agency misapplied and/or unfairly applied policy and retaliated against him.[1] The grievant further alleges that the agency has failed to comply with the grievance procedure.

FACTS

The grievant is employed as an Environmental Specialist II with DCR. The grievant is a full-time exempt employee[2] and is permitted to work an alternative schedule; namely, the grievant works four ten-hour days, Monday through Thursday. The grievant received eight hours of holiday leave and pay for Monday July 4, 2005. However, because the grievant was scheduled to work ten hours rather than eight on the 4th of July, the agency advised the grievant that he would have to make up the time by either working an additional two hours sometime during that same week or by taking leave to cover the time.

As a result of attending a mandatory work-related meeting out of town, the grievant allegedly worked five hours beyond the required forty in the week preceding the 4th of July. As such, the grievant asked the agency if he could use two of those additional five hours worked to cover the two hours needed for the 4th of July holiday. The agency refused to allow the grievant to adjust his schedule in this manner and the grievant elected to take two hours of leave to cover the time.[3] The grievant subsequently challenged the agency's actions by initiating his August 18, 2005 grievance.

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[1] In his August 18, 2005 grievance, the grievant does not specifically claim that the agency has misapplied policy, but rather asserts that the agency has unfairly applied policy. This Department frequently views an unfair application of policy claim to include a misapplication of policy claim as well and as such, will do so for purposes of this ruling.

[2] An exempt employee is an employee that is not subject to the overtime provisions of the Fair Labor Standards Act. *See* DHRM Policy No. 3.10, page 1 of 5 (effective 09/16/93, revised 03/04) and DCR Human Resource Management Policy #308, *Fair Labor Standards Act (FLSA).*

[3] The grievant claims that he had to take leave to cover the two hours because by the time the agency correctly informed him of his options under policy and due to his prior personal commitments, the grievant was unable to work the additional two hours on another day within that same workweek.

DISCUSSION

Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[4] That process assures that the parties first communicate with each other about the purported noncompliance, and resolve any compliance problems voluntarily without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance. If the agency fails to correct the alleged noncompliance, the grievant may request a ruling from this Department. Should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance. In addition, the grievance procedure requires that all claims of noncompliance be raised immediately.[5] Thus, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance at a later time.[6]

In this case, the grievant challenges the second step-respondent's failure to notify him of his procedural options as required by the grievance procedure.[7] The grievant became aware of the alleged noncompliance when he received his second step-response on September 15, 2005. However, the grievant did not notify the agency head of the noncompliance and waited until the grievance had progressed through the qualification phase of the grievance process before raising an issue of noncompliance with this Department.[8] As a result, the grievant has waived his right to challenge the second step-respondent's alleged noncompliance.

Additionally, the grievant claims that the agency is out of compliance with the grievance procedure because it failed to return his grievance with all attachments at the qualification stage of the grievance process. The grievant, however, did not notify the agency head in writing of the alleged noncompliance but rather verbally informed the human resources office of the situation. The grievant was subsequently provided with the attachments that were allegedly omitted from his grievance packet. Given the grievant's failure to follow the proper procedure for party noncompliance and the fact that he

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[4] *See Grievance Procedure Manual* § 6.
[5] *Grievance Procedure Manual* § 6.3.
[6] *Id*.
[7] According to the grievance procedure, the second step-response "must address the issues and the relief requested and should notify the employee of his procedural options." *Grievance Procedure Manual* § 3.2.
[8] The grievant claims that he verbally notified his human resources office of the alleged noncompliance at the second management resolution step. However, a notice of noncompliance must be in writing and directed to the agency head. *See Grievance Procedure Manual* § 6.3.

received the documents omitted upon request, this Department finds no basis upon which to find the agency out of compliance with the grievance procedure.

This Department's rulings on matters of compliance are final and nonappealable.[9]

Qualification

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[10] Thus, claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out 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 and/or agency policy may have been misapplied and/or unfairly applied.[11] In this case, the grievant asserts that DCR misapplied and/or unfairly applied policy and procedure and retaliated against him when it required him to either work additional hours on another day or take leave to cover the two hours he was scheduled to work on the 4th of July holiday, even though he had worked an additional five hours over the required forty during the previous week.

Misapplication of Policy

For a misapplication of policy claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision. The applicable policies in this case are Department of Human Resource Management (DHRM) Policy Nos. 1.25, *Hours of Work*; 4.25, *Holidays*; and 3.10, *Compensatory Leave* as well as DCR Human Resource Management Policies #306, *Hours of Duty/Work Schedule* and #309, *Compensatory Leave.*

Both state and agency policy permit eligible employees to work alternative work schedules, including four ten-hour days.[12] However, full-time employees who work alternate work schedules are entitled to receive only eight hours of pay for each state holiday.[13] As such, if the employee's alternative work schedule requires that he work a ten-hour day, as is the case here, for eight-hour holidays he must make up the additional two hours on another day or charge them to leave.[14] Accordingly, in this case, the agency

[9] *See* Va. Code § 2.2-1001(5).
[10] *See* Va. Code § 2.2-3004(B).
[11] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).
[12] *See* DHRM Policy No. 1.25, page 1 of 5 (effective 9/16/93, revised 11/10/04); and DCR Human Resource Management Policy #306.
[13] *See* DHRM Policy No. 4.25, pages 2 and 3 of 6 (effective 08/16/93, revised 05/04) and DCR Human Resource Management Policy #306.
[14] *See* DHRM Policy No. 4.25, page 3 of 6 (effective 08/16/94, revised 05/04). Unlike DHRM Policy No. 4.25, DCR Human Resource Management Policy #306 does not provide the grievant the option of working the additional hours on another day, but rather states that if an employee's alternative schedule requires him

did not misapply policy when it required the grievant to either make up the additional two hours he was scheduled to work on the 4th of July holiday or charge the additional two hours to leave.

Further, to the extent the grievant is arguing that he is entitled to compensatory leave, this Department concludes that the agency was not obligated under either state or agency policy to provide the grievant with compensatory leave to make up for the additional five hours he allegedly worked beyond the required forty during the week preceding the 4th of July. In particular, the grievant has not provided any evidence to suggest that the additional hours he worked during the week preceding the 4th of July, were either required, or approved in advance, by the agency head or his designee, as policy requires.[15]

Finally, it should be noted that while there is both a state and agency policy that addresses management's ability to adjust an employee's schedule, these policies do not appear to expressly address or prohibit the type of schedule adjusting sought by the grievant in this case.[16] Moreover, DHRM, the agency charged with promulgating and interpreting policy, confirmed with this Department that because there is no express prohibition, the type of schedule adjusting sought here may, but need not, be approved by management. Accordingly, management does not violate any mandatory policy provision(s) by refusing to adjust an employee's schedule in the manner sought by the grievant.

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to work more than an eight-hour day he must take leave to cover the additional hours. As such, agency management initially told the grievant that he must take leave to cover the two hours he was scheduled to work on the 4th of July holiday. However, the agency subsequently recognized that DCR Human Resource Management Policy #306 was inconsistent with DHRM Policy No. 4.25 and advised the grievant that he had the option of either making up the additional hours sometime during that same week or charging the hours to leave.

[15] *See* DHRM Policy No. 3.10, page 3 of 5 (effective 9/16/93, revised 03/04) (exempt employees "may be awarded compensatory leave when the employee is required by the agency head or his/her designee to work more hours in a workweek than the agency head or his/her designee believes is reasonably expected for the accomplishment of the position's duties." Further, "[t]he requirement to work additional hours must be specifically authorized by the agency head or his/her designee" and "do not include extra hours that an exempt employee independently determines is necessary to carry out his or her job responsibilities.")(emphasis in original). In other words, an employee is not entitled to compensatory leave when he unilaterally determines that it is necessary for him to work more than 40 hours in a workweek to accomplish his job duties. *See also* DCR Human Resource Management Policy #309 ("[e]mployees must be required to work extra hours by their immediate supervisor in writing prior to the time being worked in order to earn compensatory leave.")

[16] *See* DHRM Policy No. 1.25, page 2 of 5 (effective 9/16/93, revised 11/10/04) ("[m]anagement can adjust an employee's work schedule temporarily within a workweek to avoid overtime liability or to meet operational needs" and may adjust an employees' schedule to meet the employees' personal needs."). *See also* DCR Human Resource Management Policy #306 ("[m]anagement reserves the right to adjust employees work schedules and duty hours temporarily for bonafide business necessity such as, but not limited to, strategic planning; individual or organizational meetings or training; and to accommodate temporary and reasonable employee requests where to do so may be clearly in the interest of the Department's business.")

Unfair Application of Policy

The grievant also claims that regardless of the agency's compliance with specific policy requirements, the agency's actions were nevertheless unfair. In particular, the grievant claims that while he was required to either work or use leave to cover the two hours he was scheduled to work on the 4th of July holiday, other employees at DCR are permitted to adjust their schedules. More specifically, the grievant alleges that if another exempt DCR employee works more than the required forty hours in a previous or current workweek, that employee is permitted to adjust his schedule by using the additional hours worked to decrease the number of hours he must work on a subsequent day.

In support of his claim, the grievant presented this Department with weekly schedules of various DCR employees. These weekly schedules suggest that several DCR employees are permitted to adjust their schedules as the schedules actually indicate that the employee was allowed a "schedule adjustment" on a particular day. Further, it appears that some of the stated schedule adjustments in these documents were approved in order to offset additional hours worked at some earlier time.[17] However, despite the grievant's documented evidence of schedule adjusting within DCR, the grievant has failed to show that the employees benefiting from such schedule adjustments are similarly situated to the grievant. In particular, all of the work schedules provided were for DCR employees that do not work under the same manager as the grievant.[18] Thus, allowing these employees to adjust their schedules and not the grievant would not appear to amount to an unfair application of policy.[19]

The grievant did supply this Department with names of individuals working within his office whom he asserts were permitted to adjust their schedules. All of the named employees were contacted during this Department's investigation and all either denied ever adjusting their schedules in the manner described by the grievant and/or stated that they had adjusted their schedule, but within the same workweek.[20] The employee who was permitted to adjust his schedule within the same workweek would not be similarly situated to the grievant, because the grievant desired to adjust his schedule by using extra hours worked in a previous week to take time off in a subsequent week. One of the employees contacted from the grievant's office stated that although he

[17] For example, on one of the schedules provided, it appears that because a DCR employee attended a 7:00 p.m. meeting on a Thursday evening, he was allowed a schedule adjustment for the next day (i.e. the employee had Friday afternoon off).
[18] These employees are, however, a part of the same division within DCR as the grievant.
[19] During this Department's investigation, DHRM informed this Department that managers within an agency can have contrary management practices so long as those management practices do not violate policy and the manager treats all those employees within his or her scope equitably. The effect is that employees within the same agency, division or office may be treated differently depending on his or her manager.
[20] In particular, one employee stated that he worked three hours beyond his normal work day and as such left early the following day.

personally has never adjusted his schedule in the manner described by the grievant, he believes it happens "unofficially." This employee's "belief," however, is insufficient to demonstrate an unfair application of policy within the grievant's office.

Based on all the above, this Department concludes that this grievance fails to raise a sufficient question as to whether policy has been unfairly applied and as such, the grievant's claim of unfair application of policy does not qualify for hearing.

Retaliation

The grievant also claims that the agency's actions are based on its desire to retaliate against the grievant for previous grievance activity.[21] 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;[22] (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.[23] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[24]

By participating in the grievance process, the grievant engaged in a protected activity. However, assuming without deciding that the agency's actions constitute an adverse employment action, the issue of retaliation does not qualify for hearing because the grievant has failed to provide sufficient evidence demonstrating a causal link between the agency's actions in this case and his October 28, 2003 grievance. Accordingly, the issue of retaliation does not qualify for hearing.

APPEAL RIGHTS, AND OTHER INFORMATION

[21] On October 28, 2003, the grievant initiated a grievance challenging a Group II Written Notice for insubordination and failure to follow written policy. The grievance subsequently proceeded to hearing and in a February 5, 2004 hearing decision the hearing officer reduced the Group II Written Notice to a Group I Written Notice for inadequate or unsatisfactory work performance. *See* Decision of Hearing Officer Case Number 492, issued February 5, 2004.

[22] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

[23] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty, 145 F.3d 653, 656 (4th Cir. 1998).

[24] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

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 the qualification 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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