

Issues: Compliance - Grievance Procedure (other issue), Qualification – Performance (arbitrary/capricious evaluation), and Qualification – Management Actions (non-disciplinary transfer); Ruling Date: March 14, 2017; Ruling No. 2017-4507; Agency: Virginia Department of Fire Programs; Outcome: Agency Not in Compliance; Grievance Qualified in Full.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**COMPLIANCE AND QUALIFICATION RULING**

In the matter of the Virginia Department of Fire Programs  
Ruling Numbers 2017-4507  
March 14, 2017

The Virginia Department of Fire Programs (the “agency”) has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management to clarify the issues qualified for hearing in relation to the grievant’s December 19, 2016 grievance.

FACTS

On November 23, 2016, the grievant was issued two Group II Written Notices and suspended without pay for ten workdays. When he returned to work after the suspension, the grievant was transferred to a different position. On or about December 15, 2016, the grievant received his annual performance evaluation, with an overall rating of “Below Contributor.”

The grievant filed an expedited grievance on December 19, 2016, in which he disputes the issuance of the Written Notices, alleges that his performance evaluation was “[a]rbitrary and capricious,” asserts that he was transferred “for retaliatory or disciplinary purposes,” and requests that he “be reinstated to [his former] position at [sic] with all lost pay and benefits.” On February 2, 2017, the agency head marked and initialed the box on the Grievance Form A to qualify the grievance for a hearing in full. In a March 7, 2017 letter to EDR, the agency asserts, through its counsel, that the agency intended to qualify only the grievant’s challenge to the Written Notices for a hearing and disputes that the performance evaluation and transfer issues have been qualified for a hearing.

DISCUSSION

*Qualified Issues*

EDR has long recognized that the Grievance Form A is an official grievance document used by the parties to communicate throughout the grievance process and, as such, is of paramount importance during the grievance procedure. Because the grievant, agencies, and EDR rely on the Grievance Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly and accurately express their intentions on the Grievance Form A. However, in past

rulings, EDR has considered errors made on the Grievance Form A in different contexts and, in so doing, has recognized that evidence of a party's intent is relevant.<sup>1</sup>

In support of its position, the agency asserts that it believed the grievant referred to his performance evaluation and transfer in the grievance not to challenge those management actions, but rather as a means of demonstrating why the Written Notices were improperly issued. EDR's review of the Grievance Form A and attachments indicates otherwise. In the grievance, the grievant broadly alleges that he has been singled out "in retaliation for association and opposition to racially discriminatory management statements and actions" and for "reporting violations of department and state HR policy . . . ." More specifically, the grievant argues the agency has engaged in a "continuing series of actions" that are retaliatory and constitute a misapplication and/or unfair application of policy, including the issuance of the disciplinary actions and his transfer to a different position. The grievant further claims that his performance evaluation was arbitrary and capricious. A plain reading of the grievance shows that the grievant not only disputes the issuance of the two Group II Written Notices, but also challenges an allegedly "[a]rbitrary and capricious evaluation of [his] work performance" and "[i]nformal discipline effected through" his transfer to a different position.

In addition, the agency argues that the grievant's allegations about his performance evaluation and the transfer were not addressed during the management resolution steps to demonstrate that it believed the grievance disputed only the issuance of the Written Notices. Whether particular management actions raised in a grievance are directly addressed in responses from management is immaterial to the question of whether those actions have been raised in the grievance. To find otherwise would, in effect, allow agencies to decide what management actions an employee has chosen to grieve. Furthermore, the grievant explicitly noted on the Grievance Form A that the second step response was "more narrow than the scope of the grievance itself." That the grievant chose not to use the party noncompliance process to address the apparently incomplete response does not indicate that he agreed with the agency's characterization of the issues raised in the grievance.

Having considered all the information provided by the parties, as well as the unique circumstances in this case, EDR concludes that the grievance was qualified for a hearing in full by the agency, and must remain so.<sup>2</sup> In reaching this result, EDR notes that the agency head marked the box on the Grievance Form A to qualify the grievance in full. There is no attachment or other explanation of the agency head's qualification decision that would demonstrate confusion as to the nature of the decision or the agency's understanding of the issues challenged in the grievance. The Grievance Form A allows an agency head the option to qualify a grievance in part.<sup>3</sup> If there were any confusion or misunderstanding as to the nature of the grieved management actions in this case, the agency could have partially qualified the grievance and/or included an attachment describing the issues that were qualified. No such action occurred here. Accordingly, and for the reasons discussed above, EDR finds that the agency qualified the

---

<sup>1</sup> See EDR Ruling No. 2016-4239; EDR Ruling No. 2011-3014; EDR Ruling No. 2011-2970.

<sup>2</sup> This is similar to the decisions EDR has reached in similar situations in the past. *See id.*

<sup>3</sup> *Grievance Procedure Manual* § 4.2.

grievance for a hearing in full, and it is not permissible to now limit the scope of that determination.

### *Procedural Guidance*

Given the nature of the management actions challenged in this case, EDR provides the following procedural guidance regarding how the issues should be addressed and considered at the hearing. As with all cases involving the issuance of disciplinary action, the agency will have the burden of proving that the Written Notices were “warranted and appropriate under the circumstances.”<sup>4</sup> The grievant will have the burden of raising and establishing any affirmative defenses, as well as any evidence of mitigating circumstances.<sup>5</sup>

With regard to the grievant’s challenge to his performance evaluation, the grievant will have the burden of proving that the evaluation was arbitrary or capricious or otherwise inappropriate.<sup>6</sup> If the hearing officer finds that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure.<sup>7</sup>

In its correspondence with EDR, the agency’s counsel asserts that the grievant has “returned to” his former employment with the agency and, thus, his challenge to the transfer is moot. The grievant’s counsel disagrees with this characterization and argues that the grievant continues to work in a different position than the one he held before the Written Notices were issued. As the matter of the grievant’s transfer appears to be still in dispute, EDR finds that the grievant’s allegations relating to the transfer must be considered by the hearing officer. At the hearing, the grievant will have the burden of proving that his transfer to a different position was adverse and disciplinary.<sup>8</sup> If the hearing officer finds that it was, the agency will have the burden of proving that its decision was reasonable, based in fact, and carried out in accordance with the discretion granted to the agency under policy. Should the hearing officer find that the change in his duties was adverse, disciplinary, and unwarranted and/or inappropriate under this standard, he or she may order the agency to restore the grievant to his former position, just as he or she may rescind any formal disciplinary action.<sup>9</sup>

To the extent the grievant believes any of the challenged management actions were motivated by discrimination or retaliation, or that they constituted a misapplication and/or unfair application of policy, he may raise these alternative theories and claims to support his argument that the Written Notices, the performance evaluation, and the transfer were unwarranted, not supported by the facts, or otherwise improper. This ruling in no way determines whether the agency’s actions were proper or improper, or whether any of the grievant’s claims are supported by the evidence.

---

<sup>4</sup> *Id.* § 5.8.

<sup>5</sup> *Id.*

<sup>6</sup> *Rules for Conducting Grievance Hearings* § VI(C).

<sup>7</sup> Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

<sup>8</sup> *Rules for Conducting Grievance Hearings* § VI(B)(1).

<sup>9</sup> *See, e.g.*, EDR Ruling No. 2002-127.

CONCLUSION

As the agency has qualified the grievant's December 19, 2016 grievance for a hearing in full, as well as already requested the appointment of a hearing officer using the Grievance Form B, a hearing officer will be appointed in a forthcoming letter. EDR's rulings on matters of compliance and qualification are final and nonappealable.<sup>10</sup>



---

Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>10</sup> Va. Code § 2.2-1202.1(5).