

Issues: Qualification – Compensation (Other), Discipline (Other), and Management Actions (Recruitment/Selection); Ruling Date: April 5, 2013; Ruling No. 2013-3544; Agency: Department of Corrections; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2013-3544
April 5, 2013

The grievant has requested a ruling on whether his November 26, 2012 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On November 26, 2012, the grievant initiated an expedited grievance challenging four issues. He alleges 1) he was denied the December 1, 2012 three percent state employee bonus; 2) was denied a transfer to another agency facility because of a prior active disciplinary action; 3) he alleges the agency inconsistently applied the Department of Human Resource Management (“DHRM”) Policy 1.80, Workplace Violence; and 4) he alleges that another employee, who was allegedly equally involved in the prior incident that resulted in the grievant’s current active written notice, had his written notice expunged and his wages returned to him. After the parties failed to resolve the grievance during the second management resolution step, the grievant advanced his grievance to the agency head. The agency head denied the grievant’s request for a hearing on February 4, 2013.

In a February 22, 2013 e-mail from the grievant to the Office of Employment Dispute Resolution (“EDR”) at DHRM, the grievant has requested a qualification ruling by EDR. The grievant also alleges that he “didn’t get a hearing in the third resolution step,” nor did he receive a response from the third resolution step-respondent. Moreover, he alleges the agency has since retaliated against him since he has filed the November 26, 2012 grievance.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.¹ Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as to the methods, means, and personnel by which work activities are to be carried

¹ See *Grievance Procedure Manual* § 4.1 (a) and (b).

² See Va. Code § 2.2-3004(B).

out generally do not qualify for a 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 or unfairly applied.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."³ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁴ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁵

Three Percent Bonus

In this case, the grievant claims that he was not eligible for the December 1, 2012 three percent state employee bonus. The agency, to the contrary, states the employee received the bonus "because the [January 25, 2011] disciplinary action was not in the performance year from October 25, 2011 to October 24, 2012." Therefore, this issue is moot and does not qualify for a hearing.

Inconsistent Discipline

The grievant asserts that another employee, who was allegedly equally involved in the prior incident that resulted in the grievant's current active Group III Written Notice, had his written notice expunged and his wages returned to him. In short, the grievant alleges the agency was not consistent in the treatment of other similarly situated employees. The agency states the grievant received a Group III Written Notice on January 25, 2011, and the grievant did not timely file a grievance on that matter. The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he or she knew or should have known of the event or action that is the basis of the grievance.⁶ When an employee initiates a grievance beyond the 30 calendar day period without just cause, the grievance is not in compliance with the grievance procedure and may be administratively closed. A grievance initiated in November 2012 is untimely to challenge the Group III Written Notice issued on January 25, 2011 absent extraordinary circumstances of just cause, which are not present in this case. Hence, the grievant is untimely to raise potential mitigating circumstances, such as inconsistent discipline, after 30 calendar days have lapsed from the date he received the Group III Written Notice. As a result, this issue is moot and does not qualify for a hearing.

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁵ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁶ Va. Code § 2.2-3003(C); *Grievance Procedure Manual* §§ 2.2, 2.4.

Inconsistent Application of DHRM Policy 1.80

The grievant alleges the agency has inconsistently applied DHRM Policy 1.80, Workplace Violence, to its administrative staff. Specifically, he alleges that he is accountable for his actions under DHRM's Standards of Conduct, but the agency's administration is not held equally responsible to the same rules of conduct. The grievant does not, however, claim that the agency has taken any tangible action against him. More specifically, he does not assert that he was disciplined, dismissed, demoted, or otherwise subject to an agency action resulting in a significant change in employment status or a change in the terms, conditions, or benefits of his employment. In the absence of such claims, the grievance does not qualify for a hearing on this issue.

Transfer

The grievant also alleges the agency inconsistently applied policy when it denied the grievant's request to transfer to another agency facility because of his January 25, 2011 active Group III Written Notice. For an allegation of misapplication of policy 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. In this case, the facts do not raise such a question.

When questioned by EDR about why the grievant was denied the lateral transfer, the agency's employee relations manager stated the grievant's transfer request was actually a position that was open to the agency's competitive selection process and was managed through the agency's Recruitment, Selection, and Appointment Operating Procedure 170.1.⁷ The Recruitment, Selection, and Appointment Operating Procedure states:

The Appointing Authority or designee must make the final decision based on interviews, related education and experience, related KSAs, panel recommendation (if applicable), references and, if available for DOC employees, performance evaluations, active disciplinary actions, and recommendations. Normally, the position should be offered within 50 days of the position's closing date.⁸

The agency further asserts that the grievant's January 25, 2011 active disciplinary action was for workplace violence. Specifically, the agency states the grievant had "engaged in a verbal and physical altercation with the Watch Commander." Moreover, the agency states the warden had the authority to make the final hiring decision and he decided not to hire the grievant. Based upon a review of agency policy, it appears the agency could properly consider the grievant's active disciplinary action in making its final hiring decision. Therefore, there is insufficient evidence that the agency misapplied policy and this issue does not qualify for hearing.

⁷ Department of Corrections Operating Procedure 170.1, Recruitment, Selection, and Appointment, effective July 1, 2012.

⁸ *See id.* at § IV(M)(2).

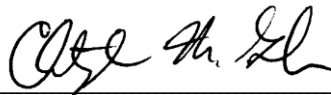
Noncompliance with Grievance Procedure

In his February 22, 2013 e-mail to EDR, the grievant alleges that he “didn’t get a hearing in the third resolution step,” nor did he receive a response from the third resolution step-respondent. We note, however, that although the grievant used a Grievance Form A to initiate his November 26, 2012 grievance, he specifically requested the agency to expedite the grievance “due to loss wages.” It appears that the agency used the expedited grievance process: the first resolution step box on the Grievance Form A is marked “N/A,” the third resolution step box on the Grievance Form A is blank, and the agency head considered whether to qualify the grievance for hearing after the grievant’s second resolution step. Section 2.4 of the *Grievance Procedure Manual (Manual)* states there is only a single management step when an employee elects to use the expedited process.⁹ After the second step-respondent issues the second resolution step response, the grievant then has five workdays to request the agency head to qualify the grievance for hearing.¹⁰ Hence, a third resolution step does not exist in the expedited process. As such, the grievant’s claims of agency noncompliance with the third resolution step are moot and do not qualify for hearing.

Retaliation

The grievant also raises an additional issue of alleged retaliation in his February 22, 2013 e-mail to EDR. Pursuant to Section 2.4 of the *Manual*, “[o]nce the grievance is initiated, additional claims may not be added.”¹¹ The alleged acts of retaliation occurred after the filing of the November 26, 2012 grievance and, therefore, cannot be added to this grievance. As such, we will not address this issue in this ruling, nor does this claim qualify for hearing.¹²

EDR’s qualification rulings are final and nonappealable.¹³



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⁹ See *Grievance Procedure Manual* § 2.4.

¹⁰ *Id.*

¹¹ *Id.*

¹² This ruling does not prevent the grievant from attempting to contest the merits of the agency’s actions through a subsequent grievance challenging the alleged retaliation.

¹³ Va. Code § 2.2-1202.1(5).