

Issue: Qualification – Separation from State (unable to meet work conditions); Ruling
Date: November 3, 2015; Ruling No. 2016-4243; Agency: Department of
Corrections; Outcome: 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 2016-4243
November 3, 2015

The grievant has requested a ruling on whether his August 28, 2015 grievance with the Department of Corrections (“agency”) qualifies for a hearing. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

In early 2015, the grievant, who is under the traditional sick leave policy,¹ went out on an extended period of medical leave. The agency sought verification of his use of sick leave by the grievant’s physician. In addition, the agency asked the grievant to provide information from his physician regarding his ability to perform his job duties. In response, the grievant’s physician wrote the agency on April 10, 2015. In his letter, the grievant’s physician indicated that the grievant had 8 conditions that “influenc[ed]” the grievant’s “health and fitness for his current job,” and opined that “[m]ost if not all of these symptoms are related to an impaired work environment.” The physician indicated that the grievant was “unable to perform any of the assigned work” until July 2015. The physician subsequently provided an additional note taking the grievant out of work through August 1, 2015.

On July 20, 2015, the agency mailed the grievant a letter stating, in effect, that the grievant was either to return to work on or before August 1, 2015, request reasonable accommodations or another placement, apply for a new position either inside or outside the agency, or apply for disability retirement.² This letter was sent by certified mail.³ United States Postal Service tracking records show that a notice was left for the grievant regarding the certified letter on July 22, 2015 and that the grievant picked up the letter on Saturday, August 1, 2015. Agency email indicates that the grievant came to the facility on Monday, August 3, 2015, but was apparently told that he was separated from employment effective August 1, 2015.

On August 28, 2015, the grievant initiated a grievance challenging his separation. After the parties failed to resolve the grievance during the resolution steps, the grievant requested qualification for hearing. The agency head denied the grievant’s request, and the grievant has appealed.

¹ DHRM Policy 4.55, *Traditional Sick Leave*.

² Although the letter was dated July 17, 2015, United States Postal Service tracking indicates that it was not received by the Post Office until July 20, 2015.

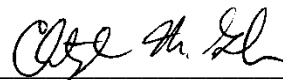
³ The agency has not presented evidence that would show the letter was sent by other means as well, such as first-class mail or email.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.⁴ Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried 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 influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case challenging his separation, the grievant asserts that the agency's actions have denied him due process and are a misapplication of policy, harassment and retaliation. The agency asserts that the grievant was appropriately separated from employment due to his inability to perform his job, and as such, his grievance does not qualify for hearing.

A grievance challenging separation for an inability to perform a job, though an adverse employment action,⁵ can qualify for a hearing but does not automatically qualify.⁶ In many situations where separation occurs for such reasons, there are no factual or policy questions to be resolved by a hearing officer, and, thus, a hearing is unnecessary. This, however, is not such a case. To the contrary, this grievance raises a number of sufficient questions appropriate for a hearing officer to resolve. Among these issues are (1) whether the agency acted in accordance with law and policy with respect to any duty to accommodate the grievant under the Americans with Disabilities Act; (2) whether the agency gave sufficient notice to the grievant of its August 1, 2015 deadline prior to separating him from employment; (3) whether the agency acted appropriately in separating him from employment notwithstanding the grievant's lack of actual notice of the August 1, 2015 deadline rather than granting him a short extension to comply; and (4) whether the agency's actions were disciplinary in nature, based on the grievant's failure to comply with the agency's instructions regarding the August 1, 2015 deadline. Because of these potential questions, there is at least a sufficient question raised as to multiple bases for qualification, including discrimination, misapplication and/or unfair application of policy, and, arguably, discipline.⁷

For these reasons, the grievant's August 28, 2015 grievance is qualified for hearing. As this is not clearly a disciplinary termination, the burden of proof at hearing will be on the grievant.⁸ Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.



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⁴ Va. Code § 2.2-3004(B).

⁵ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁶ See *Grievance Procedure Manual* § 4.1(b).

⁷ See *Grievance Procedure Manual* § 4.1(b).

⁸ See *Grievance Procedure Manual* §5.8(3).