

Summary: Qualification-Discipline/Suspension Pending Investigation or Court Action;  
Ruling Date: May 14, 2002; Ruling #2001-201; Agency: Department of Corrections;  
Outcome: Not qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections  
Ruling Number 2002-201  
May 14, 2002

The grievant has requested a ruling on whether his August 26, 2001 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that policy was misapplied or unfairly applied when he was suspended pending court action, and that the hearing decision in his prior grievance has not been implemented. For the reasons set forth below, the grievance is not qualified for hearing.

FACTS

The grievant is employed as a Corrections Officer Senior. In March 2001, Internal Affairs launched an investigation of alleged drug use by inmates and drug trafficking by the grievant and a total of nineteen officers at the grievant's institution. An inmate claimed during the investigation that in March 2001, the grievant had delivered illegal drugs to him for a payment of \$200. The Warden expected that criminal charges would be brought against the grievant by early May 2001, and he transferred the grievant to a less security-sensitive post pending that action.

When no charges were brought by May, the Warden decided to proceed with disciplinary action against the grievant. On May 14, 2001, the grievant was issued a Group III Written Notice and terminated for "fraternization with inmates ... by delivering contraband into the institution." The grievant initiated a grievance challenging the Written Notice and termination, and a hearing was held. The hearing officer's August 3, 2001 decision reversed the Written Notice and termination, and ordered the grievant reinstated with full back pay and benefits. The hearing officer acknowledged that the agency had chosen not to present much of its material evidence because doing so might jeopardize the forthcoming criminal indictments. However, the decision stated that "a hearing officer

cannot base his decision on veiled allegations, innuendo, or hints about non-proffered evidence and alleged witnesses who were not presented.”<sup>1</sup>

A few days after the hearing, the Warden received a letter from the local Commonwealth’s Attorney, dated August 8, 2001, confirming that one or more felony indictments against the grievant would be presented to the next grand jury when it convened on September 4, 2001. In light of this, the agency determined that it must reinstate the grievant per the hearing decision, but should immediately suspend him pending the ongoing law enforcement investigation and grand jury proceedings. Accordingly, the agency notified the grievant in an August 13, 2001 letter that he was reinstated with his full back pay and benefits restored. In addition, by a separate letter dated August 13, 2001, the Warden notified the grievant that he was immediately suspended without pay pending court action, attaching the August 8<sup>th</sup> letter from the Commonwealth’s Attorney by way of explanation. In an August 24, 2001 letter to the grievant’s attorney, the agency confirmed that his back pay award had been carried out, with the restoration of his benefits and payment of his salary for the period of his first suspension. Subsequently, on September 10, 2001, the grievant was criminally charged in circuit court with the distribution of heroin, and a trial date was set for April 30, 2002.

The grievant claims that the agency: (1) misapplied or unfairly applied policy by suspending him under the *Standards of Conduct* based on facts already adjudicated at the August 2, 2001 grievance hearing; and (2) failed to implement the hearing officer’s August 3, 2001 decision ordering that he be reinstated to his former position.

## DISCUSSION

Management has the exclusive right to manage the affairs and operations of state government.<sup>2</sup> Inherent in this authority is the responsibility and discretion to remove employees from the worksite if there is sufficient evidence that criminal activity may have occurred. While employees may challenge the substantive merits of a suspension pending investigation or court action through the management steps of the grievance procedure, such a suspension, without more, generally does not qualify for a hearing. The General Assembly has limited the types of issues that may be qualified for a grievance hearing.<sup>3</sup> Formal disciplinary actions (Group I, II, or III Written Notices under the *Standards of Conduct*<sup>4</sup>) automatically qualify for hearing.<sup>5</sup> Furthermore, a grievance should be qualified for a hearing if there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy has occurred.<sup>6</sup> The grievant here

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<sup>1</sup> Grievance No. 5253, August 3, 2001 Hearing Decision, pp. 5 & 6.

<sup>2</sup> Va. Code § 2.2-3004(B).

<sup>3</sup> Va. Code § 2.2-3004.

<sup>4</sup> Department of Human Resource Management (DHRM) Policy 1.60(V)(B).

<sup>5</sup> *Grievance Procedure Manual*, § 4.1 (a) p. 10.

<sup>6</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1 pp. 10-11.

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objects to his suspension as disciplinary, as a misapplication of policy, and as a failure by the agency to implement the hearing officer's reinstatement order.

*Discipline*

The Department of Human Resources Management (DHRM) does not recognize a

ten day suspension limit does not apply where the investigation involves alleged criminal misconduct or misconduct of such a nature that to retain the employee in his position could constitute negligence of the agency's duty to the public and other state employees.<sup>11</sup> When the investigation by a law enforcement agency or the court action is concluded, the agency may impose disciplinary action.<sup>12</sup> If the agency chooses not to discipline the employee, then the employee must be reinstated with full back pay.<sup>13</sup>

In this case, there is no evidence that the agency misapplied or unfairly applied policy. The *Standards of Conduct* requires only that the agency determine that a law enforcement investigation or court action is pending before imposing this type of suspension. It does not require that the agency (or this Department by way of qualification ruling) consider the merits of the grievant's ultimate theory or theories of his case (e.g., that he is not guilty of the charges, or that the fact-finding of the grievance hearing officer is entitled to preclusive effect in the courts). The record evidence shows that from August 8<sup>th</sup> through September 3<sup>rd</sup>, when the grand jury had yet to convene, the matter of the alleged drug distribution was under law enforcement investigation and "pending court action". Furthermore, because the charges are still pending against the grievant, the agency is permitted under policy to keep him suspended without pay until the final disposition of the charges. In sum, there is no evidence that the agency violated any mandatory policy or that its actions were so unfair as to amount to a disregard of policy.

#### *Implementation of Hearing Decision*

The grievant also asserts that "the agency has refused to reinstate me as ordered" in the August 3, 2001 hearing decision of his prior grievance. As this claim is an express challenge to the agency's implementation of the hearing decision in grievant's August 6, 2001 grievance the proper avenue for the grievant is to petition the circuit court for an order that the agency properly implement the hearing decision. It appears, however, that the agency did implement the decision properly by reinstating the grievant with full back pay and benefits on August 13, 2001. The agency's suspension of the grievant on the basis that a felony indictment would be presented to a grand jury appears to be a separate management action that would not be precluded by the hearing officer's August 3, 2001 decision.

#### 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. If the grievant wishes to appeal this determination to the circuit court, he 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

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<sup>11</sup> DHRM Policy 1.60(VIII)(B)(6).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

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appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

Sincerely,

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Claudia T. Farr  
Director

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Jeffrey L. Payne  
Employment Relations Consultant