

Issue: Qualification-Performance-Interim Evaluation, Methods/Means-Assignment of Duties, Work Conditions/ Management Practices-Records, Confidentiality, Access to Policy; Ruling Date: February 21, 2002; Ruling #2001-209, 2001-216, 2002-025; Agency: Department for the Blind and Vision Impaired; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department for the Blind and Vision Impaired
Ruling Nos. 2001-209, 2001-216 & 2002-025
February 21, 2002

The grievant has requested a ruling on whether her grievances of August 18, 2001, September 21, 2001 and November 8, 2001 with the Department for the Blind and Vision Impaired (agency) qualify for a hearing. All three of her ruling requests will be addressed together, as they involve claims against her supervisor.¹ The August 18, 2001 grievance challenges various alleged behaviors by her supervisor, including the issuance of an improper Notice of Improvement Needed/Substandard Performance, unfair case management and threats of disciplinary action. The September 1, 2001 grievance challenges her supervisor's adjustment of her leave and alleged unequal treatment of the field staff members in the Regional Office (RO). The November 8, 2001 grievance challenges the issuance of a Notice of Improvement Needed/Substandard Performance and losing office privileges at another agency's office. For the reasons set forth below, none of the issues in the three grievances are qualified for a hearing.

FACTS

The grievant is a Rehabilitation Teacher who has worked for the agency for over 17 years. The grievant received a Notice of Improvement Needed/Substandard Performance on June 6, 2001. The grievant requested her supervisor to provide written responses to her written questions about her performance, but her supervisor refused. She filed a grievance on August 18, 2001, seeking as relief "truth and accuracy" from the supervisor; written answers to her questions; and a response regarding break time given to state employees. Management upheld the actions of the supervisor, stated that communications about performance would be both oral and written, and defined its expectation regarding hours of work and break times. Further, management encouraged the grievant to establish a positive working relationship with her supervisor.

On August 24, 2001, the grievant emailed her supervisor that she would be working the following Saturday with a customer. Her supervisor directed her to

¹ The grievant marked the area of "Discrimination or Retaliation" on her August 18, 2001 and September 1, 2001 Form A's. During this investigation, however, the grievant stated that she had no evidence to support these claims. Consequently, these issues will not be discussed in this ruling.

document every visit with a customer, and advised that permission to work on Saturdays would not be indefinite. During that month, the grievant also questioned why her supervisor treated her and another staff member differently regarding the handling of a case.

The grievant filed her second grievance on September 21, 2001 seeking relief, to include restoration of adjusted leave for Saturday work and fairness to all RO staff. Management upheld the supervisor's actions regarding her leave and scheduling and encouraged the grievant to work toward developing a productive working relationship with her supervisor.

On October 12, 2001 the grievant was notified that she would no longer be allowed to use an office at another agency as of October 15, 2001. The grievant claims this would disrupt her customer service as her service area is a significant distance from her agency office. On October 30, 2001 the grievant received a Notice of Improvement Needed/Substandard Performance regarding her purported release of confidential information. The grievant claims she had the customer's permission to release the information and was unaware of required additional agency procedures. The grievant filed her third grievance on November 8, 2001, seeking as relief the restoration of office privileges at another agency and the removal of the Notice. Management upheld the actions of the supervisor, asserting the grievant was now given the same office arrangement as all other field staff, including the use of a laptop and telephone access at a local agency.

The agency head denied qualification of the August 18, 2001, September 21, 2001, and November 8, 2001 grievances. The grievant subsequently requested that the Director of this Department qualify the grievances.

DISCUSSION

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. For example, while grievable through the management resolution steps, claims of supervisory harassment qualify for a hearing only if an employee presents sufficient evidence showing that the alleged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex, or violate established policy.² The grievant asserts that the actions of her supervisor constitute a misapplication and/or unfair application of policy.

First, the grievant asserts that her supervisor's issuance of the Notice of Improvement Needed/Substandard Performance (Notice) on June 6, 2001 was

² Va. Code § 2.2-3004(A)(iii).

unwarranted based on her past performance. She does not agree with the items listed on her Notice or with her supervisor's approach to client services. Further, the grievant asserts that her supervisor's issuance of the Notice on October 30, 2001 was unwarranted as she had received the required permission from the customer to release information and was unaware of other procedural requirements. The grievant claims the denial of her office privileges at another agency resulted from this same incident.

The applicable policy is Department of Human Resource Management (DHRM) Policy No. 1.40, Performance Planning and Evaluation.³ DHRM has sanctioned the issuance of Notices of Improvement Needed/Substandard Performance as a formal means of communicating management's assessment of problems in performance. Indeed, such Notices are akin to interim evaluations. This Department has long held that unlike annual performance evaluations, interim evaluations, regardless of their actual merit, cannot be qualified for hearing, unless there are facts that raise a sufficient question as to whether retaliation, discrimination, discipline, or a misapplication of policy occurred.⁴ Such facts are not present in this case.

Here, the supervisor issued the Notices in accordance with applicable policy. Additionally, the statement in the Notice referencing the possible consequences of not improving work performance virtually mirror state policy, and thus cannot be viewed as improper threats.⁵ Regarding the grievant's claims of unfair case management and being denied the use of another agency's office, the facts cited in support of her claim can best be summarized as her disagreement with management's judgement. Although the grievant and her supervisor may disagree on how cases should be managed or what offices she can use when in the field, the grievance statutes reserve to management the authority to manage agency operations.⁶

The grievant also appears to assert that her supervisor cannot ask for additional documentation in order for her to receive approval for Saturday work. In support of this position, the grievant states that in the past she had always been able to adjust her leave for Saturday work, and without additional documentation. She states, further, that her Saturday work is based on student plans written for the year, to accommodate student work schedules, and that she is current with program guidelines for documentation.

The applicable policy here is DHRM Policy 1.25, which states that "agency heads, or their designees, shall set and adjust the work schedules for employees in the agency, being mindful of the hours of public need."⁷ Management's decision regarding her work schedule and supporting documentation is entirely consistent with its authority

³ See DHRM Policy 1.40 revised 8/01/01.

⁴ See *Grievance Procedure Manual* § 4.1, page 11.

⁵ See DHRM Policy 1.40, Attachment E (Notice of Improvement Needed/Substandard Performance Form).

⁶ See Va. Code § 2.2-3004 (B).

⁷ See DHRM Policy 1.25 (A) (9/16/93).

to exercise its judgement under Policy 1.25. While the grievant and management may have different views on how best to set, adjust, and document work hours, under Policy 1.25, the grievance statutes and procedures recognize that ultimately, such decisions are management's to make.

In conclusion, the facts cited in support of the grievant's claim can best be summarized as describing significant conflict between the grievant and her supervisor concerning management's decisions and actions surrounding her work performance. Such claims of supervisory conflict, while grievable through the management steps, are not among the issues identified by the General Assembly that may qualify for a hearing. Accordingly, this issue does not qualify for a hearing.

Additionally, in light of the conflict apparent between grievant and her supervisor, we wish to note that mediation may be a viable option to pursue. EDR's mediation program is a voluntary, confidential process in which two mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved. EDR also offers interactive training sessions on conflict resolution that may benefit both parties.

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, she 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 notifies the agency that she does not wish to proceed.

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