Issue: Qualification/Performance/Misapplication of Policy; Ruling Date: August 22, 2002; Ruling #2002-011; 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 2002-011
August 22, 2002

The grievant has requested a ruling on whether his six grievances initiated on September 25th, October 11th and 18th, 2001 with the Department of Corrections (DOC or the agency) qualify for hearing.[1] The agency head combined all six grievances in his response at the qualification step; accordingly, this Department will issue one ruling. The grievant claims that management misapplied or unfairly applied policy and harassed him when it required him to obtain a medical assessment and certification before returning to work. For the reasons set forth below, the grievance is not qualified for hearing.

### FACTS

The grievant is employed as a Power Plant Operations Lead Worker at one of the agency's correctional facilities. From early 1999 through the summer of 2001, the grievant made several reports of incidents allegedly involving his personal property or workspace. On August 27, 2001, the grievant reported four incidents that had allegedly occurred the previous month, including someone looking into and/or tampering with his personal vehicle, controls being moved, and an exit door being left ajar in his work area.

On September 13, 2001, the Warden advised the grievant that he had documented a pattern in the grievant's complaints showing that the grievant consistently made the complaints after being counseled about performance problems; moreover, the complaints were not reported immediately, they were made when the grievant worked by himself on the night shift and "no one else ever sees anything."[2] Because of the proximity of the grievant's workplace to a security tower and to roving patrols of the facility's perimeter—both operating 24 hours a day—the Warden determined that some of the alleged incidents could not have happened.

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[1] The agency's central human resources office assigned numbers to the grievances for ease of reference in the management steps: Grievances #1-3 were those initiated on September 25, 2001, grievances #4 & #5 were initiated on October 11, 2001, and grievance #6 was initiated on October 18, 2001.
[2] *See* Assistant Warden of Operations' letter to grievant dated September 26, 2001.

In light of this, management has stated that they were concerned about the grievant's mental health and his ability to perform his job without posing a risk to himself or others. Consequently, management required the grievant to leave the workplace until he could provide medical certification that he was able to perform the essential functions of his job without posing a threat to himself or others. The grievant was initially told that the time away from work would be charged to his sick leave, and he submitted leave reporting forms for the period from September 14, 2001 through November 10, 2001. However, the grievant continued to receive his full compensation, and the agency later confirmed in writing that none of his leave balances were ever charged.[3]

The grievant first submitted a medical clinician's note dated September 18, 2001, which, in management's view, did not address whether he could *safely* return to work (as opposed to simply stating that he was *capable* of working). The Warden states that he called the clinician on September 20th to ask whether the clinician's note was certification that the grievant could return to work safely, to which the clinician replied that it was not, because he had not conducted a "fitness for duty" type of evaluation. Based on this, the Warden wrote the clinician a letter on October 16th, reiterating the requirement of an evaluation and statement certifying that the grievant could return to work safely. The grievant subsequently provided a satisfactory note from a second provider and was returned to work on November 10, 2001.

## DISCUSSION

*Unfair Application or Misapplication of Policy*

The grievant alleges that management's requirement that he obtain a medical fitness for duty certification before returning to work was a suspension that violated state policy by: (1) requiring him to submit to a mental health evaluation although he was not sick, and requiring more than one evaluation; (2) requiring him to use his sick leave for his time away from work; and (3) breaching his confidentiality by discussing his performance problems in a prior DOC job with the clinician.

A claim of unfair application or misapplication of policy may qualify for a hearing only where there is evidence raising a sufficient question as to whether management violated a mandatory policy provision, or that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy.

As to the first claim, DHRM policy recognizes that supervisors may refer employees as appropriate to employee assistance services, which would include psychological counseling and evaluation.[4] DHRM policy also provides that

[3] The grievant did not seek reimbursement for any charges relating to his doctor's visits –he did ask to be repaid for the cost of copying his personnel records (which he requested pursuant to his grievance) and the agency reimbursed the full amount requested.

[4] DHRM Policy No. 1.60(VI)(C)(1)(effective 9/16/93).

"management may immediately remove an employee (with pay) from the work area, without providing advance notification, when the employee's continued presence: (1) may be harmful to the employee, other employees, clients, and/or patients."[5] Further, DHRM has interpreted its policy in the past (as the Department of Personnel and Training), as allowing agency management to direct an employee to submit to a psychological evaluation without any charge to his leave balances.[6] DHRM does not recognize such actions as suspensions under the *Standards of Conduct*.[7] Thus, although it no doubt caused the grievant concern to be required to submit to the medical assessments, management's actions in this regard were consistent with policy, including management's requirement that a second evaluation specifically address the central issue of whether the grievant could return to work without presenting a risk of harm to himself or others.

With regard to the grievant's claim involving sick leave, DHRM policy indicates that when an agency requires an employee to undergo a mental health evaluation, such as here, the time involved is considered hours worked.[8] Thus, it appears that the agency should not have instructed the grievant to submit sick leave for his time away from the work place. However, as stated, the leave forms submitted by the grievant were never processed and his leave was never charged. Thus, ultimately, policy was not misapplied.

The grievant's third misapplication claim is that his confidentiality was breached when the Warden allegedly told the clinician about the grievant's performance problems in a prior DOC job. DHRM policy generally prohibits disclosure of an employee's personal information -- such as performance evaluations, disciplinary and investigative records, or records regarding grievances or complaints -- without the written consent of the subject employee.[9] Importantly, however, that policy also provides a non-inclusive list of exceptions to the general rule, one of which would allow disclosure of an employee's personal information to a private health benefits provider under contract with the state for the purpose of providing services.[10]

Here, the grievant has presented no evidence to suggest that the Warden disclosed information to the clinician about the grievant's job performance. Although the Warden did disclose information to the clinician about the grievant's night shift complaints, such disclosure would appear to be consistent with DHRM policy: the information was disclosed to a health care provider so that the safety of the grievant's return to work could be evaluated.

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[5] DHRM Policy No. 1.60(VII)(E)(4)(a)(1)(effective 9/16/93).
[6] *See* DHRM Policy No. 4.55, Annotations, page 1 of 4 (effective 1/28/94).
[7] *See* DHRM Policy No. 1.60(VI)(B) (effective 9/16/93).
[8] DHRM Policy No. 4.55, Annotations, page 1 of 4 (effective 1/28/94).
[9] *See* DHRM Policy No. 6.05(III)(B) (effective 9/16/93).
[10] *See* DHRM Policy No. 6.05(III)(C)(3).

In sum, this grievance does not present a sufficient question as to whether the agency violated any mandatory policy or that its actions were so unfair as to amount to a disregard of policy.

*General Harassment by Management*

The grievant also alleges that management's actions constitute harassment. 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 challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.[11] In this case, the grievant does not assert that management's actions were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing significant differences and perceptions between the grievant and management, such as his supervisor and the Warden. Such claims of supervisory conflict, however, are not among the issues identified by the General Assembly that may qualify for a hearing. Because this case presents no evidence of improper discrimination, retaliation or a misapplication of policy, the issue of harassment does not qualify for hearing.

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

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Claudia T. Farr
Director

[11] *See* Va. Code § 2.2-3004(A).