Issue: Qualification Group I and Group II plus termination; Ruling Date: March 13, 2002; Ruling #2002-013; Agency: Norfolk State University; Outcome: Qualified for hearing

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Norfolk State University/ No. 2002-013
March 13, 2002

The grievant has requested a ruling on whether his June 26, 2000 grievance with Norfolk State University ("University" or "NSU") qualifies for hearing. The grievant is challenging a written notice issued to him on June 9, 2000 for leaving the work site during working hours without permission.[1] He alleges that the written notice was issued in retaliation for his insistence that the University radio station comply with federal broadcasting laws. NSU did not qualify the hearing, for the reason that the grievance has been rendered moot by the grievant's subsequent dismissal. For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant was employed as an Assistant Safety Officer at NSU's physical plant until June 2001. Prior to being transferred to the physical plant, he worked at the University's radio station. He filed a grievance on June 26, 2000 alleging that written notices dated June 1 and June 9, 2000 had been issued in retaliation for his having questioned the way that the radio station was being operated. Because he was alleging retaliation by his supervisor, there was some confusion on the part of the University as to who should serve as his first step respondent, and as a result, the grievant did not initially have a face-to-face meeting at his second step. In an effort to correct the noncompliance, NSU agreed to re-evaluate his grievance at the second step. The second step respondent determined that the June 1, 2000 written notice should be removed and that the June 9, 2000 written notice should remain.[2] Furthermore, the second step respondent determined

[1] The grievance also challenged a June 1, 2000 written notice that was removed during the management resolution steps.

[2] The June 1, 2000 written notice was issued because the grievant allegedly failed to keep the radio station free of "dead air." However, due to inconsistencies in the grievant's position description and the radio station's *Policy and Procedure Guide*, the second step respondent determined that it was unclear whether it was the grievant's responsibility to prevent silence on the radio station. The June 9, 2000 written notice stated that the grievant left the work site without authorization. The grievant claims that he was given permission, but a memorandum from the supervisor indicates that no permission had been granted.

that the written notices were not a result of retaliation by the grievant's supervisor. The grievant requested that his grievance advance to the third step.

Next, the grievant claims that he had a meeting with the University Vice President in which a "settlement" was offered: the grievant would transfer to the physical plant and would drop the claims of retaliation, and the June 9 written notice would be rescinded. After the grievant transferred, NSU Human Resources contacted him and requested that he officially conclude his grievance. However, the grievant claims he responded that he would not conclude his grievance until he received written confirmation that his written notice had been removed.

In June 2001, the grievant was terminated based on an accumulation of written notices. At the hearing challenging his dismissal, the hearing officer did not consider the June 2000 written notices, given the controversy surrounding them. However, the grievant had two other active written notices, issued in 1999. The accumulation of these two notices and another Group II notice issued in June 2001 was sufficient to justify removal.

On October 19, 2001, the grievant sent a letter of noncompliance to the President of the University, noting that the University had failed to provide him with a third step response to his June 26, 2000 grievance.[3] However, in EDR Ruling No. 2001-205, this Department found that NSU did provide a third step response in a letter dated September 28, 2000 from the President of the University to the grievant. In that letter, the third step respondent removed the June 1, 2000 written notice and upheld the June 9, 2000 written notice "due to the fact that a May 31, 2000 memo from your immediate supervisor . . . indicated that annual leave would not be granted on June 1, 2000."[4] The third step respondent also noted that she did not find any evidence of harassment or retaliation. This letter further clarified that its author was the third step respondent and noted the grievant's transfer to the physical plant.[5]

After the issuance of Ruling No. 2001-205, the grievant requested qualification for a hearing on November 26, 2001. Then, on December 11, the University's attorney notified the grievant that because his grievance was moot based on his subsequent termination from NSU, it would not advance to a hearing. The University's President reinforced that position in her qualification decision, stating that "nothing would be served by a hearing in this matter."[6] The grievant appealed that decision, noting that disciplinary actions automatically qualify for hearing.

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[3] It has been almost two years since the filing of this grievance. However, the grievant alleges that he was not aware that the agency had not removed his June 9, 2000 written notice, the subject of the grievance, until the filing of a subsequent grievance in 2001.

[4] *See* Third Step Response.

[5] The letter suggests that the transfer was made as the prerogative of the University, not as a "settlement," as the grievant contends.

[6] Grievance Form A, Section V.

DISCUSSION

In addition to finding that NSU was in compliance with the grievance procedure, EDR Ruling 2001-205 further found that the grievance remained open, even though no action had been taken on it for some time, and that it was "up to the grievant to decide whether to request a hearing on this matter."[7] A footnote in that ruling made clear that the grievant's subsequent termination from the University was justified based on the accumulation of several other written notices and that removal of the June 9, 2000 written notice would not affect his employment status.[8] It further suggested that the issue might not qualify for a hearing since a hearing officer could not reinstate the grievant to his employment with NSU. The University believes there is no need to incur the time and expense of a grievance hearing, since the grievant could not be reinstated to his former position.

However, the grievant's termination does not render moot all of the relief requested in his June 26, 2000 grievance.[9] During this Department's investigation, the grievant clarified that he is not interested in challenging his termination, rather, he is attempting to clear his employment record so that the written notice may not affect his attempts for future employment in radio broadcasting elsewhere. Moreover, the grievant is correct in stating that formal disciplinary actions automatically qualify for a hearing.[10] Although he will remain discharged from his employment, it is his right to seek removal of the June 9, 2000 written notice from his personnel record through a grievance hearing. Accordingly, this grievance must advance to hearing as provided in the grievance procedure.[11]

CONCLUSION

For additional information about the actions that the grievant may take as a result of this ruling, please refer to the enclosed sheet. At the hearing, the agency will have the burden of proving, by a preponderance of the evidence, that the June 9, 2000 written notice was "warranted and appropriate under the circumstances."[12] The grievant will be given the opportunity to contest the agency's case by presenting evidence that the written

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[7] EDR Ruling No. 2001-205, dated November 19, 2001, page 3.
[8] *See* footnote 7, EDR Ruling No. 2001-205, dated November 19, 2001, page 3.
[9] He requests as relief, "removal of all pending written notices, return of all keys, equal access to station work spaces, reasonable assurance of equal treatment and safe work environment, return to the duties I was hired to perform." All of those requests have been rendered moot by his termination *except* the request to remove the written notices.
[10] *Grievance Procedure Manual* § 4.1(a), page 10.
[11] If the agency elects to remove the June 9th written notice from the grievant's personnel file, the Agency can avoid the time and expense of a hearing. Once the group notice is removed, there is no further effectual relief available to the grievant under the grievance process and, therefore, a hearing would be pointless.
[12] *Grievance Procedure Manual*, § 5.8, page 14.

notice was unwarranted and inappropriate, including evidence that it was retaliatory. The hearing officer may uphold, reduce, or rescind the disciplinary action.[13]

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[13] *Grievance Procedure Manual*, § 5.9, page 15.