

Issue: Qualification-Suspension Pending Investigation or Court Action; Ruling Date: March 19, 2002; Ruling # 2002-016; 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 2002-016
March 19, 2002

The grievant has requested a ruling on whether his December 14, 2001 grievance with the Department of Corrections (DOC or agency) qualifies for a hearing. The grievant claims that management misapplied or unfairly applied policy when it placed him on indefinite suspension pending the resolution of criminal charges. For the reasons set forth below, the grievance is not qualified for hearing.

FACTS

The grievant is employed as a Corrections Sergeant. On November 17, 2001, several DOC officers allegedly beat an inmate and attempted to hide their actions. On December 12, 2001, following an internal affairs investigation regarding the purported attack, the grievant was criminally charged with malicious wounding, conspiracy to commit malicious wounding, falsifying a state document, and obstruction of justice. Later the same day, he was suspended from work without pay for his purported involvement in the assault. Two days later, the grievant initiated the grievance that is the subject of this ruling.

On January 2, 2002, the original charges against the grievant were “nolle prossed.”¹ The agency, however, was informed that a grand jury would convene later that month to consider indictments against the grievant. On January 22, 2002, a grand jury indicted the grievant for felonious assault, forging a public document, destroying a public record, and conspiracy to commit a felonious wounding.

DISCUSSION

Management has the exclusive right to manage the affairs and operations of state government.² Inherent in this authority is the responsibility and discretion to remove

¹ Charges are that are “nolle prossed” are those that the Commonwealth’s Attorney has determined will be prosecuted no further.

² Va. Code § 2.2-3004(B).

employees from the worksite if there is sufficient evidence that criminal activity may have occurred. While employees may challenge the substantive merits of an agency suspension or court action through the management steps of the grievance procedure, the General Assembly has limited the types of issues that may be qualified for a grievance hearing.³ Formal disciplinary actions (Group I, II, or III Written Notices under the *Standards of Conduct*⁴) automatically qualify for hearing.⁵ 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.⁶ Here, the grievant seeks reinstatement on the grounds that he was “suspended without pay based on an incomplete investigation of wrongdoing.” In addition, the grievant asserts that he was not afforded due process.

Formal Disciplinary Action

The Department of Human Resources Management (DHRM) does not recognize a suspension without pay pending an agency investigation or court action as a disciplinary action under the *Standards of Conduct*.⁷ A grievance challenging the merits of such a suspension is not ripe for a full, evidentiary hearing because no final discipline, as required by the *Code of Virginia* and defined by state personnel policy, had occurred at the time the grievance was initiated. A suspension pending a court action is often preliminary to further agency action which, when taken, could then be grieved. At the conclusion of the investigation, if the agency does not discipline the employee, full back pay is restored, including a refund for the state’s portion of the health insurance premiums that may have been paid by the employee. If disciplinary action is taken, the employee may challenge it through the grievance process. Accordingly, because in this case the agency had not formally disciplined the grievant at the time he initiated this grievance, the suspension issue is premature and cannot proceed to hearing.

Unfair Application or Misapplication of Policy

The grievant arguably attempts to state a claim of misapplication of policy, although his claim is more appropriately viewed as a challenge to the contents of the *Standards of Conduct* policy.⁸ A claim of unfair application or misapplication of policy

³ Va. Code § 2.2-3004.

⁴ DHRM Policy 1.60(V)(B).

⁵ *Grievance Procedure Manual*, § 4.1 (a) p. 10.

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

⁷ DHRM Policy 1.60(VIII).

⁸ It appears that the grievant is essentially challenging the constitutionality of DHRM Policy 1.60, which allows an agency to suspend without pay an individual who is (1) under investigation by a law enforcement agency, or (2) has criminal charges pending before a court. Challenges relating solely to the contents of policies may not be qualified for hearing. Va. Code § 2.2-3004 (c); *Grievance Procedure Manual*, § 4.1 (C), p. 11. Even if such a challenge could be qualified for hearing, the U.S. Supreme Court has ruled that such suspensions do not violate due process rights so long as the employee is granted an adequately prompt-post suspension hearing. *Gilbert v. Homar*, 520 U.S. 924 (1997). The Gilbert Court recognized

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. Under the *Standards of Conduct*, a suspension may be imposed pending (i) an investigation by the employee's agency, (ii) an investigation by the State Police or other law enforcement agencies, or (iii) court action.⁹ If the investigation is an agency investigation, the period of suspension is limited to ten workdays.¹⁰ If the agency does not impose disciplinary action within those ten workdays, then the employee must be returned to work while the investigation continues.¹¹ If, however, the investigation is by a law enforcement agency or pending court action, the 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.¹² When the investigation by a law enforcement agency or the court action is concluded, the agency may impose disciplinary action.¹³ If the agency chooses not to discipline the employee, then the employee must be reinstated with full back pay.¹⁴

In this case, there is no evidence that the agency has misapplied or unfairly applied policy. In accordance with policy, the grievant was suspended only after he had been charged with several serious crimes: malicious wounding, conspiracy to commit malicious wounding, falsifying a state document, and obstruction of justice. The charges against the grievant were "nolle prossed" on January 2, 2002; however, the agency was informed that a grand jury would convene later in the month to possibly hand down indictments against the grievant. The following day, January 3rd, the agency allowed the grievant to begin using his annual leave while awaiting the grand jury's action.¹⁵ On January 22, 2002, the grand jury indicted the grievant for felonious assault, forging a public document, destroying a public record, and conspiracy to commit a felonious wounding. During the period between the January 2nd and January 22nd, when the grand jury had yet to convene, the matter of the alleged criminal assault remained a "pending

that "the State has a significant interest in immediately suspending, when felony charges are filed against them, employees who occupy positions of great public trust and high public visibility, such as police officers." Gilbert at 932. The Court further recognized that risk of an erroneous deprivation of an individual's property interest is reduced in circumstances where the employee had been arrested or indicted. The Court states that "an 'ex parte finding of probable cause' such as a grand jury indictment provides adequate assurance that the suspension is not unjustified. The same is true when an employee is arrested and then formally charged with a felony. First, as with an indictment, the arrest and formal charges imposed upon respondent 'by an independent body demonstrate that the suspension is not arbitrary.' Second, like an indictment, the imposition of felony charges 'itself is an objective fact that will in most cases raise serious public concern.'" Gilbert at 934 (citations omitted).

⁹ DHRM Policy 1.60(VIII)(B)(1).

¹⁰ DHRM Policy 1.60(VIII)(B)(5).

¹¹ *Id.*

¹² DHRM Policy 1.60(VIII)(B)(6).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Under DHRM Policy 1.60(VIII)(B)(3), the agency was permitted but not required to allow the grievant to use his accrued annual leave while suspended.

court action,” even though the original charges had been nolle prossed, because no final disposition of the matter had yet occurred. 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.

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.

Neil A.G. McPhie, Esquire
Director

William G. Anderson, Jr.
Senior Employment Relations Consultant