Issue: Qualification/Methods/Means/Counseling (oral or written memorandum) Compliance/Consolidation of Grievances for purposes of hearing; Ruling Date: November 15, 2002; Ruling #2002-110 and 068; Outcome; Qualified and consolidated

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Numbers 2002-068 and 110
November 15, 2002

The grievant has requested a ruling on whether his February 4, 2002 and February 22, 2002 grievances with the Department of Corrections (DOC or the agency) qualify for hearing. In the February 4th grievance, the grievant essentially alleges that DOC policy was misapplied or unfairly applied when Internal Affairs investigators conducted a biased investigation into allegations of the use of excessive force by the grievant. In the February 22nd grievance, the grievant alleges that DOC conducted a criminal investigation into his arrest record without justification and revealed personal information about him to another employee. For the reasons set forth below, the grievances are qualified and consolidated for hearing.

FACTS

The grievant is employed as a Corrections Sergeant. On June 25, 2001, the grievant was involved in an incident in which he and several other corrections officers placed an inmate into a five-point restraint.[1] Per DOC policy, the procedure was recorded by videotape.

Upon review of the video, DOC determined that the grievant might have used excessive force in placing the inmate into the restraint. The agency conducted an investigation into the matter and concluded that the allegation of excessive force was founded, with respect to both the grievant and a Major who had instructed him in the restraint technique at issue. The grievant was advised that a "letter of reprimand" would be placed in his fact file.

The grievant asserts that during the investigation into the matter regarding the restraining of the inmate, DOC revealed personal information pertaining to him to another corrections sergeant. The grievant further asserts that another individual who was implicated in the restraining incident did not have his criminal background checked.

[1] Five-point restraint is a method of confining an inmate horizontally to a bed with straps on each arm and leg and a fifth strap across the inmate's chest.

DISCUSSION

Qualification

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[2] Therefore, claims relating to issues such as informal counseling generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In both grievances, the grievant essentially asserts that the agency misapplied or unfairly applied its investigative policies and procedures by the way that it conducted its investigation into the allegations of excessive force.

The February 4th Grievance

The grievant claims that the investigator who conducted the investigation into the allegations of excessive force did not conduct his investigation in an unbiased manner. He claims that due to personal differences between the investigator and the Major, the investigator prepared and conducted interviews in a manner designed to elicit specific responses to his questions, responses that would lead to a finding that the grievant and the Major had used excessive force.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The applicable policy in this matter is DOC Procedure 10-4, which pertains to the Internal Affairs (IA) Unit. This policy states that "[a]fter receiving an assignment, the [IA] investigator shall conduct a complete, thorough, and independent investigation." Thus, under DOC policy, an IA investigator must conduct a full, unbiased investigation.

In support of his claim that the investigation was narrow and biased, and thus in violation of DOC policy, the grievant first points to statements by several employees. For example, the Major has expressed concerns about the objectivity of the investigation and notes that when he attempted to provide one of the IA investigators with a statement regarding the investigation, the investigator initially refused the statement. In addition, at least one employee notes that he was shown only a short segment of the videotape of the inmate being placed into the five point restraints. The employee contends that upon examining the tape in full, he was convinced that the force used was not improper. In other words, omission of the circumstances preceding the actions in question could have had a misleading effect. Furthermore, at least one DOC employee reports trying to explain to the IA investigator that the inmate, in an attempt to cause the restraints to be loose fitting, expanded his chest while the restraints were being secured. The employee

[2] Va. Code § 2.2-3004(B).

reports that the investigator did not appear to be interested in his story. Also, it must be noted that the IA investigators who investigated this matter have since been prohibited from conducting investigations at the grievant's facility, apparently for alleged improprieties associated with another unrelated excessive force investigation. When viewed collectively, the evidence tends to support a determination that a more thorough examination of the facts surrounding the investigation, and whether it was conducted in accordance with DOC policy, is warranted.

It must be noted that a grievance that relates solely to informal supervisory actions, such as counseling memoranda, does not qualify for hearing. In this case, however, there is evidence that agency policy may have been misapplied: the IA investigation may not have been "complete, thorough, and independent." Furthermore, while counseling memoranda generally do not qualify for hearing because they do not constitute an "adverse employment action,"[3] here, the nature and findings of this reprimand could potentially impact the grievant's ability to move into other law enforcement positions within and outside of the Commonwealth and thus could constitute an adverse employment action. Accordingly, for all the above reasons this grievance is qualified for hearing.

The February 22nd Grievance

The grievant alleges in his February 22nd grievance that DOC: (1) conducted a criminal investigation into his arrest record without justification; (2) that no such investigation was conducted on the other employee involved in an alleged incident of use of excessive force; and (3) that DOC revealed personal information regarding the grievant to another employee during the course of the investigation. Because the February 4th grievance qualifies for a hearing, this Department deems it appropriate to send these ancillary investigation issues to hearing as well, to help assure a full exploration of what could be interrelated facts and claims.

This ruling does not conclude that the investigation was biased, incomplete, or otherwise in violation of applicable policy, only that further review by an administrative hearing officer is warranted on the issue of whether the agency misapplied or unfairly applied policy by failing to thoroughly and independently investigate the alleged use of excessive force, and by improperly conducting a criminal investigation and revealing personal information gathered as a result of that investigation. If a hearing officer determines that policy was misapplied or unfairly applied, he may only order that the agency reapply the policy as mandated and in a manner in keeping with its intent. A hearing officer may not direct any particular outcome for the investigation.[4]

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[3] An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)). This would include any management action that has a detrimental effect on an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion. *Id*.

[4] *Grievance Procedure Manual* § 5.9(b), page 15; *Rules for Conducting Grievance Hearings*, page 15.

CONCLUSION

In light of the above, this grievance qualifies for a hearing. For additional information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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