

Issue: Qualification-Performance-Arbitrary/Capricious; Ruling Date: July 23, 2002;
Ruling #2002-138; Agency: Department of Juvenile Justice; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2002-138
July 23, 2002

The grievant filed a grievance with the Department of Juvenile Justice (DJJ) on March 15, 2002, challenging his November 5, 2001 performance evaluation, a February 14, 2002 written counseling memorandum, a Group II written notice issued February 15, and his March 8 re-evaluation. Two of these issues, the written notice and the re-evaluation, have been qualified for hearing by the agency. The grievant has requested a ruling on whether the two remaining issues qualify for a hearing. For the reasons discussed below, these issues do not qualify for hearing as separate claims for which relief may be granted, but may be offered at hearing as background evidence with respect to the qualified group notice and re-evaluation issues.

FACTS

The grievant was employed as an Institutional Training Officer with DJJ until he was reassigned in April 2002. In August 2001, the grievant received both oral and written counseling. The counseling indicated that internal and external audits noted several deficiencies in the training department, specifically in the area of training documentation. On November 5, 2001, the grievant received an overall rating of "Below Contributor" on his annual performance evaluation. The evaluation cited problems in the areas of professionalism and record keeping. In addition, the grievant received a Notice of Improvement Needed/Substandard Performance that outlined the agency's expectations of him.

On December 15, 2001, the grievant's interim performance evaluation indicated that several areas of the grievant's performance still needed improvement. Two memoranda issued in January and February also expressed concerns about the grievant's performance. On February 14, the grievant received a written counseling memorandum, noting his failure to improve, specifically in the area of training records and documentation. The following day, DJJ issued a Group II written notice for failure to follow supervisor's instruction and perform work as assigned. In March, the grievant received a rating of "Below Contributor" on his performance re-evaluation. As a result of these alleged performance deficiencies, DJJ reassigned the grievant to the position of Security Sergeant.

The grievant filed a grievance on March 15, 2002, challenging DJJ's assessment of his performance. During the management resolution steps, DJJ reduced the Group II written notice to a Group I for unsatisfactory performance. The agency head qualified for hearing the issues of formal discipline and performance re-evaluation. However, he did not qualify the grievant's February 14, 2002 counseling memorandum or his November 2001 performance evaluation.

DISCUSSION

Informal Supervisory Action

The grievant has requested that his February 14 counseling memorandum qualify for a hearing. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. Inherent in this authority is the responsibility to advise employees of observed performance problems. The Department of Human Resource Management (DHRM) has sanctioned the use of counseling memoranda as an informal means for management to communicate to an employee concerns about his or her behavior, conduct, or performance. DHRM does not recognize such counseling as disciplinary action under the Standards of Conduct.¹ Further, under the grievance procedure, informal supervisory actions, including counseling memoranda, do not qualify for a hearing absent a claim of discrimination, retaliation, or misapplication or unfair application of policy.²

In this case, the letter to the grievant dated February 14 communicated to the grievant the Department's concern that his performance had not improved since his November performance evaluation and he had not followed his supervisor's instructions. The counseling further stated that the grievant would be receiving a Group II written notice. While this counseling memorandum was serious in nature, as it indicated that the grievant would receive a disciplinary action, it was nonetheless an informal supervisory action. Therefore, this issue does not qualify for a hearing, unless the grievant claims discrimination, retaliation, or a misapplication of policy. The grievant does not allege or present any evidence of those grounds. Rather, the grievant essentially challenges management's conclusion that his performance warranted correction through a counseling memorandum. Accordingly, the issue of the counseling memorandum does not qualify for a hearing.

Annual Performance Evaluation

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date he knew or should have known of the event or action that is the basis of the grievance.³ When an employee initiates a grievance

¹ DHRM Policy No. 1.60(VI)(C).

² *Grievance Procedure Manual* § 4.1(c), page 11.

³ Va. Code § 2.2-3003 (C); *Grievance Procedure Manual* § 2.4(1), page 6.

beyond the 30 calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed. *The Grievance Procedure Manual* further states that “management may allow a grievance to proceed through the resolution steps” even if it is not filed within 30 days of the event forming the basis of the grievance.⁴ Here, DJJ allowed the grievant’s claim to proceed through the management resolution steps, but denied a hearing due to noncompliance.

The grievant received a “Below Contributor” rating on his annual performance evaluation on November 5, 2001. Although he appealed his evaluation informally to management, he did not file his grievance until March 15, 2002, well beyond the 30 calendar day limit. Therefore, the grievant is out of compliance with the grievance procedure, and his claim regarding the November 2001 performance evaluation cannot proceed to hearing as a qualified issue for which relief may be awarded. At his hearing on the written notice and re-evaluation, however, the grievant may offer evidence relating to the November 2001 evaluation and the February 2002 counseling memorandum to support his claims concerning the written notice and re-evaluation. This Department’s rulings on matters of compliance are final and nonappealable.⁵

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 the qualification determination to the circuit court, the grievant 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 wishes to conclude the grievance and notifies the agency of that desire.

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Director

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⁴ *Grievance Procedure Manual* § 2.4, page 7.

⁵ Va. Code § 2.2-3003(G).