

Issue: Qualification/sick leave; Ruling Date: October 18, 2002; Ruling #2002-150; Agency: Department of Corrections; Outcome: qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department Of Corrections/ No. 2002-150
October 18, 2002

The grievant has requested a ruling on whether his June 5, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC improperly docked his pay for a May 23, 2002 absence. Specifically, he claims that he was penalized even though he followed applicable policy and procedure. As relief, he requests that he be allowed to use available leave for his May 23rd absence.¹ For the reasons discussed below, this grievance qualifies for a hearing.

FACTS

The grievant is a Correctional Officer Senior with DOC. On May 22, 2002, at 6:25 a.m., the grievant telephoned to inform management that he could not report to work because he had consumed too much alcohol the night before. On May 23, 2002, the grievant again called to report that he would not be reporting to work this time due to "personal reasons." The agency asserts that the night watch lieutenant ("lieutenant") with whom the grievant spoke instructed him to call the day shift commander later that morning.² The grievant never made a second call to the institution on May 23rd and denies that he was instructed to call back.

The agency later notified the grievant that his pay would be docked for calling in on May 22nd to report that he was too intoxicated to work. The agency also informed him that his pay would be docked for failing to call the shift commander back on the May 23rd as purportedly instructed.³

On June 5, 2002 the grievant filed a grievance claiming that in docking his pay, management unfairly applied policy. While the grievant originally claimed that the docking of his pay for his May 22nd absence was improper, he has since agreed with the agency that it was not and thus, the issue of misapplication of policy regarding May 22nd absence is not qualified for hearing.

¹ During the review for this ruling, grievant clarified that his use of the term "sick leave" on his Form A was not correct. The reason stated for his absence on 5/23/02 was due to a "personal problem" and not illness and he knew he would not be going to a doctor and could not present a doctor's certification upon return to work. Thus, his Form A's original request for twelve hours of sick leave reimbursement appears to have been withdrawn.

² See "Staff Call-In Status" log entry for 5/23/02 regarding grievant signed by the lieutenant.

³ See 5/23/02 memorandum.

As to the May 23rd absence, the grievant asserts that the lieutenant verified his home phone number and did not instruct him to call back and speak with his shift commander. The grievant states that he did not even consider calling back as he verified his phone number and DOC policy only requires a later call back when there is no verifiable phone number, at which the person can be reached. Further, the grievant claims that since his absence did not involve an illness, he was not required to present a doctor's certification on his return to work and that he should be allowed to use other available leave for his May 23rd absence. Although the agency agrees that the grievant called in once on the 23rd, it asserts that the grievant's pay was docked because he did not call back as instructed by the lieutenant.⁴

The agency head denied qualification, and the grievant subsequently requested that the Director of this Department qualify the grievance for hearing.

DISCUSSION

Informal Disciplinary Action

In this case, the grievant essentially asserts that the agency has improperly used DOC policy to discipline him. All formal discipline accompanied by a written notice automatically qualifies for a hearing if challenged through the grievance procedure.⁵ In the absence of an accompanying written notice, a disciplinary action qualifies for a hearing only if there is a sufficient question as to whether it was an "adverse employment action" and was taken primarily to correct behavior or to establish the professional or personal standards for the conduct of an employee.⁶ These policy and procedural safeguards are designed to ensure that the discipline is merited. The issues of whether the grievant's docked pay constituted an adverse employment action and was disciplinary in nature are discussed below.

Adverse Employment Action: An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.⁷ The docking of pay constitutes a significant detrimental effect on the terms, conditions or benefits of employment, and is thus an adverse employment action.⁸ Therefore, the only question remaining is whether there is sufficient evidence that DOC docked the grievant's pay on May 23rd in order to correct or punish his behavior, or to establish professional or personal standards.

Disciplinary Basis: Management asserts that its decision to dock the grievant's pay was based on his failure to follow his supervisor's instruction to call back on the morning of the 23rd. Management notes that such an action could have resulted in a Group II Written Notice and a ten-day suspension but that it elected instead to dock the grievant's pay for the unexcused

⁴ See Second Management Step Response.

⁵ Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1, page 10.

⁶ Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (b) and (c), pages 10-11.

⁷ *Von Gunten v. Maryland Department of the Environment*, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001)(citing *Munday v. Waste Mgmt. Of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

⁸ *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

absence. While the agency's stated reason for docking the grievant's pay appears on its face to be disciplinary, the determination of whether the grievant's pay was docked primarily to punish or correct the grievant's behavior is a factual determination that a hearing officer, not this Department, should make. Thus the grievance is qualified for hearing.

Misapplication of Policy

The grievant claims that the agency has misapplied policy by docking his pay. 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.

In this case, the DOC facility has instituted Internal Operating Procedure (IOP) 213, which contains specific instructions regarding "Leave of Absence".⁹ IOP 213 expressly states that "annual leave shall be approved in advance by the supervisor. Subsequent approval *may* be given if the absence is justified and promptly reported."¹⁰ IOP 213 further states that "[I]leave taken without advance approval may be considered unauthorized leave, *which may result in disciplinary action in accordance with Employee Standards of Conduct.*"¹¹

The grievant essentially contends that he called in as required by policy and his leave was thereby authorized. The agency counters that the leave was not authorized, because while the grievant may have called once, he never called back as instructed.

In light of all the above, it appears that the issue of misapplication of leave policy is intertwined with the issue of whether the docking was a disciplinary action subject to the Standards of Conduct. Accordingly, the question of whether the agency misapplied applicable policy by docking the grievant's pay is qualified for hearing.

Qualification of this grievance is not intended to discourage an agency from docking the pay of an employee who has not followed applicable attendance policy reporting requirements. An agency may refuse to grant paid leave in such circumstances. In this case, however, the agency does not assert that the grievant violated its *policy's* reporting requirements—it is undisputed that the grievant timely called in to report that he would not be in on the morning of the 23rd. Instead, the agency apparently bases its decision to dock the grievant's pay on the grievant's failure to follow the purported instruction to call the dayshift commander later in the morning. Thus, questions remain as to interrelated material facts and determinations that should be addressed by a hearing officer rather than this Department.

APPEAL RIGHTS AND OTHER INFORMATION

⁹ Internal Operating Procedure 213 "Hours of Work and Employee Leave Procedure" effective date April 15, 2002.

¹⁰ *Id.* Section 213-7.2 (1). (Emphasis added.)

¹¹ *Id.* (Emphasis added).

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. At hearing, the grievant must prove by a preponderance of the evidence¹² that DOC misapplied leave policy by docking his pay for an unexcused absence on May 23, 2002. If the hearing officer finds that the agency misapplied leave policy, he may order the agency to reapply that policy at the point at which it became tainted, which could result in the restoration of his docked pay that resulted from the misapplication.¹³ On the other hand, if the hearing officer determines that the agency did not misapply applicable leave policy, but that the primary reason for the docking of the grievant's pay was disciplinary (which the grievant must prove by a preponderance of the evidence), the agency will have the burden of proving that the docking, though disciplinary, was warranted. Should a hearing officer find that the docking of pay was disciplinary and unwarranted, he may rescind the action, thus effecting reinstatement of the docked pay just as he or she may rescind any formal disciplinary action, such as termination, by ordering reinstatement to a previously held position.¹⁴ This Department notes in closing that a hearing officer is not a "super-personnel officer."¹⁵ Therefore, in resolving the grievance, the hearing officer should give an appropriate level of deference to actions by agency management that are consistent with law and policy, and to management's right to manage the affairs and operations of the agency.¹⁶

Finally, our qualification of the above issues in no way indicates that either a misapplication of policy or unwarranted discipline occurred. This ruling simply reflects that a further exploration of the facts by a hearing officer is warranted.

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Director

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¹² *Grievance Procedure Manual*, § 5.8, page 14.

¹³ *Rules for Conducting Grievance Hearings*, § VI (C)(1), page 14.

¹⁴ *Grievance Procedure Manual* § 5.9(a), page 15; *Rules for Conducting Grievance Hearings*, § VI (A), page 10.

¹⁵ *Rules for Conducting Grievance Hearings*, § VI (A), page 10.

¹⁶ *Id.*