

Issue: Qualification/Compensation/Leave/Sick Leave; Ruling Date: February 3, 2003;
Ruling #2002-169; Agency: Department of Corrections; Outcome: not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-169
February 3, 2003

The grievant has requested a ruling on whether his April 25, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC misapplied agency policy when it counseled him for tardiness. For the following reasons, this grievance does not qualify for hearing.

FACTS

The grievant is a Correctional Officer with DOC. The grievant's daily shifts last 11.5 hours. On April 8, 2002, he called into work and stated that he would not be reporting to his shift due to illness. Later in the day, he realized that his sick leave balance was only ten hours. He claims that he phoned the facility and learned that he would be placed on Leave Without Pay (LWOP) status for the remainder of his shift.¹ The grievant saw his doctor, received an excuse for his absence, then reported to work for the last hour and a half of his shift. His lieutenant counseled him about his alleged tardiness, documented the counseling, and placed the documentation in the grievant's fact file. The grievant claims that this counseling session was an unfair application of Institutional Operating Procedure (IOP) 207, because he was using sick leave time, which IOP 207 distinguishes from tardiness.²

IOP 207 requires that "personnel who must be absent because of illness shall personally notify the Shift Commander or his/her supervisor on duty at least two (2) hours in advance of the beginning of their shift" and that medical documentation may be necessary to document the sick leave.³ The policy further describes the four-step process

¹ According to the facility's policy, employees may not use annual leave or compensatory leave to cover an absence due to illness without prior approval. See March 14, 2002 Memorandum to Staff from Warden. The memorandum further states that those employees who have exhausted their sick leave time and are then absent without prior approval will receive LWOP. While on LWOP, an employee does not accumulate annual leave. See DHRM Policy 4.45.

² IOP 207 "Hours of Work, Sick and Annual Leave," effective May 1, 2000.

³ IOP 207-7.3 "Sick Leave."

used by the agency to document instances of tardiness.⁴ Management views the grievant's ten-hour absence from work as his second incident of tardiness, because it was not scheduled in advance, and issued oral counseling as described by policy. The grievant disputes that agency's interpretation of "tardiness" and requests that the documentation be removed from his file.

DISCUSSION

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.⁵ Therefore, under the grievance procedure, informal supervisory actions, including counseling memoranda, generally do not qualify for a hearing.⁶ Here, the grievant asserts that his supervisor's issuance of oral counseling violates IOP 207. Specifically, he claims that he was not tardy to work on April 8, rather, he was out on documented sick leave.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."⁷ The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁸

A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹ In this case, the grievant has presented no evidence that he has suffered an adverse employment action, because the informal counseling had no significant detrimental effect on the grievant's employment status. Rather, the grievant essentially challenges management's conclusion that his behavior warranted correction through oral counseling, which had merely communicated to the grievant the agency's

⁴ The policy states that (1) after the first instance of tardiness, the employee must complete an incident report, (2) after the second tardiness, the employee completes an incident report and receives oral counseling, (3) the third offense results in written counseling and the employee completes an incident report, and (4) the fourth instance of tardiness results in the issuance of a Group I written notice. IOP 207-7.7.

⁵ DHRM Policy No. 1.60(VI)(C).

⁶ *Grievance Procedure Manual* § 4.1(c), page 11.

⁷ Va. Code § 2.2-3004(A).

⁸ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁹ *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

perception that he had arrived to work tardy for a second time. Accordingly, although the grievant disagrees with management's perception of his absence, this grievance does not qualify for a hearing.

While informal counseling does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. According to IOP 207, the accumulation of four instances of tardiness will result in the issuance of a Group I written notice, which *would* have a detrimental effect on the grievant's employment. Therefore, should the counseling memorandum later serve to support an adverse employment action against the grievant, such as a formal written notice or a "Below Contributor" annual performance rating, this ruling does not foreclose the grievant from attempting to challenge the merits of the counseling memorandum through a subsequent grievance contesting any related adverse employment action.

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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