

Issue: Qualification/Compensation/Leave/Leave Approval/Denial; Ruling Date: March 6, 2003; Ruling #2003-012; 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. 2003-012  
March 6, 2003

The grievant has requested a ruling on whether his grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that DOC misapplied or unfairly applied its policy regarding the use of unverified sick leave. Specifically, he claims that while he was penalized in accordance with applicable policy and procedure, others were not, possibly due to racial discrimination. His grievance seeks an end to the alleged racial discrimination, a consistent application of policy, and reimbursement for his docked pay for a July 25, 2002 unverified leave. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is a Correctional Officer, Senior with DOC. At the facility where the grievant works, DOC instituted a "Security Staff Call-In Procedure" which expressly states that "[a]ny security staff calling in the day prior to or the day following their rest days will be required to bring medical documentation to support the absence."<sup>1</sup> Further, this procedure specifically states that: "[i]f an employee calls in with car problems, inform them they need to report to work as soon as possible. Car problems are not generally excusable."<sup>2</sup> The grievant acknowledges that he was aware of the Security Staff Call-In Procedure, but asserts it is not consistently applied to all.<sup>3</sup>

On July 25, 2002, the grievant called in to report that he would not be in because of car problems. July 25<sup>th</sup> was the day before his scheduled rest day.<sup>4</sup> Upon his return to work, the grievant was asked for documentation for his absence on July 25, 2002.<sup>5</sup> When the grievant did not provide the requested 'C' break documentation, his pay was docked. On October 1, 2002, the grievant filed his grievance, and following the agency head's denial of qualification, requested a ruling from this Department.

---

<sup>1</sup> See Memorandum to DOC facility Security Staff, dated February 8, 2002, page 2.

<sup>2</sup> *Id.*

<sup>3</sup> See Grievance Form A, Expedited, dated October 1, 2002.

<sup>4</sup> See Attachment page 1 of 2 to Grievant's Form A dated 1 Oct. 02.

<sup>5</sup> See Lieutenant's signed report.

### DISCUSSION

The grievant asserts that the Security Staff Call-In Procedure was also applied to three other employees who are of a different race than the grievant, one a correctional officer and two supervisors, and the grievant questions whether they also had their pay docked.<sup>6</sup> If they did not, the grievant contends that in docking his pay, management discriminated against him on the basis of race. Management confirmed that it had investigated the grievant's claims and "they were handled properly, but [management] cannot divulge the outcome of those incidents with other employees."<sup>7</sup>

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex) may qualify for a hearing.<sup>8</sup> To qualify, however, there must be more than a mere allegation that discrimination occurred. In this case, the grievant must present facts that raise a sufficient question as to whether the decision regarding the docking of his salary was made *because of* his membership in a protected class. The grievant may accomplish this by coming forward with evidence that: (1) he is a member of a protected class; (2) he is qualified for the position; (3) in spite of his qualifications he suffered an adverse employment action; and (4) that he was treated differently than similarly situated employees outside of the protected class.<sup>9</sup> If, however, the agency comes forward with a nondiscriminatory reason for its actions, the grievance should not qualify for hearing, unless there is sufficient evidence that the agency's stated reason is merely a pretext or excuse for improper discrimination.<sup>10</sup>

In this case, the grievant has not met all of the above elements of a discrimination claim. As a Caucasian, the grievant is a member of a protected class. The grievant is qualified for his position as evidenced by receiving a "Contributor" rating on his most recent performance evaluation.<sup>11</sup> Being docked a day's pay is an adverse employment action.<sup>12</sup> However, the grievant has not established that he was treated differently from other similarly situated employees outside the protected class. While all officers named by the grievant are security staff, the situations that each called in for were different from his, and each appears to have been handled in accordance with policy. During the review for this ruling, the facility HRO provided this Department with requested information regarding the three other employees cited by the grievant.<sup>13</sup> According to the agency's human resource office, "A" was on military duty and a weekend drill just happened to

---

<sup>6</sup> The race of the other three employees is African-American.

<sup>7</sup> See First Resolution Step Response dated 10/21/02.

<sup>8</sup> Va. Code §2.2-3004 (A)

<sup>9</sup> See *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

<sup>10</sup> *Id.*

<sup>11</sup> See final rating page from grievant's EWP provided to this Department upon request.

<sup>12</sup> See *Boone v. Goldin*, 178 F.3d 253, 255 (4<sup>th</sup> Cir. 1999) typical requirements for an "adverse employment action" include, but are not limited to, a decrease in pay or benefits.

<sup>13</sup> See Correspondence to this Department dated February 11, 2003.

fall after "A's" rest days; "B" had worked one of the rest days because "B" was needed for coverage and "B's" schedule was adjusted to keep from incurring overtime; and "C" called in sick after "C's" rest days and presented a physician's certificate covering "C's" absence to the Captain.

In view of all the above, this grievance fails to present a sufficient question as to whether management discriminated against the grievant due to his race. Thus, the grievance does not qualify for hearing.

#### 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 she does not wish to proceed.

---

Claudia T. Farr  
Director

---

Deborah M. Amatulli  
Employment Dispute Resolution Consultant