

Issue: Compliance/5 day rule, qualification, consolidation for purposes of hearing;  
Ruling Date: March 24, 2003; Ruling #2003-052; Agency: Norfolk State University;  
Outcome: qualified.



## ***COMMONWEALTH of VIRGINIA***

### ***Department of Employment Dispute Resolution***

#### **COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR**

In the matter of Norfolk State University  
Ruling Number 2003-052  
March 24, 2003

The grievant has requested a compliance ruling regarding her January 9, 2003 and January 22, 2003 grievances with Norfolk State University (NSU), both of which challenge NSU's grounds for her termination. The grievant claims that the agency has violated a substantial requirement of the grievance procedure, without just cause, by failing to provide her a timely qualification response. As relief, she requests qualification for hearing.

#### **FACTS**

Until her termination, the grievant was employed as an Education Specialist III. On January 9, 2001, she was issued a letter by her supervisor stating that her involvement in an altercation in the vicinity of her office was "considered a Group III offense" under Standards of Conduct policy.<sup>1</sup> The letter was not accompanied by a Written Notice form.

On December 13, 2002, the grievant was issued a Group II Written Notice with termination for failure to follow her supervisor's instruction or otherwise comply with established written policy. The grievant's termination was based on a purported accumulation of disciplinary actions (the January 9, 2001 letter referencing the Group III violation and the December 13, 2002 Group II Written Notice with termination).

On January 9, 2003, the grievant initiated a grievance challenging her termination and the December 13<sup>th</sup> Group II Written Notice. On January 22, 2003, she initiated a second grievance, which again challenged her termination, but more specifically, by contesting the status of the January 9, 2001 letter as accumulated formal discipline that could support the termination.

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<sup>1</sup> See the Department of Human Resources Management, (DHRM) Policy 1.60.

On January 30, 2003, the parties conducted a second-step meeting. Subsequently on February 7, 2003, both grievances were advanced to the agency head for qualification. When she failed to receive a qualification determination within the five workday time period mandated by the grievance procedure,<sup>2</sup> the grievant forwarded a written notification of noncompliance to the agency head on February 20, 2003.<sup>3</sup>

On February 28, 2003, the agency notified the grievant that the December 13, 2002 Group II Written Notice with termination had been rescinded, and in its place, a Group III Written Notice with termination had been issued on February 27, 2003, for the same alleged offense,<sup>4</sup> retroactive to the original termination date of January 10, 2003. On March 7, 2003, the grievant initiated a grievance to challenge her Group III Written Notice with termination.

### DISCUSSION

The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>5</sup> That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.<sup>6</sup> For example, if the grievant believes that an agency has not provided its qualification response within five workdays after the second-step meeting (as the grievant believed in this case), a grievant must notify the agency head of the alleged noncompliance.

Before seeking a compliance ruling from this Department, the grievant must allow the agency five workdays after receipt of the written notice to correct any noncompliance. If after five workdays the grievant believes that the agency has failed to correct the alleged noncompliance, the grievant may request a ruling from this Department. Furthermore, should this Department find that the agency violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this

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<sup>2</sup> *Grievance Procedure Manual*, § 4.2, page 11.

<sup>3</sup> *Grievance Procedure Manual*, § 6.3, page 17.

<sup>4</sup> The offense was re-characterized in the February 27, 2003 Group III Written Notice. In the original December 13, 2002 Group II Notice, the grievant was charged with "failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy." In the February 27<sup>th</sup> Group III Notice, the offense was characterized as "abuse of her position and role within the University, and conspiring to violate University policy for personal gain." The February 27<sup>th</sup> Group III Notice still appears to be based on the charges set forth in the January 13, 2003 termination letter sent to the grievant: (1) registering with an outstanding account balance, (2) obtaining a transcript with an outstanding balance; (3) obtaining a diploma with an outstanding balance, and (4) non-compliance with University degree clearance and diploma issuance policies.

<sup>5</sup> *Grievance Procedure Manual*, § 6, pages 16-18.

<sup>6</sup> *Grievance Procedure Manual*, § 6.3, page 17

Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

In this case, the agency clearly violated a requirement of the grievance procedure by failing to provide a qualification decision within the five workday deadline. However, this compliance issue became moot on February 27, 2003, when the agency rescinded the Group II Written Notice with termination. This action, coupled with a DHRM determination that the agency's January 9, 2001 letter failed to serve as official notice of a Group III violation,<sup>7</sup> removed the basis for the first two grievances and the requirement for a qualification response.

The agency's February 27, 2003 issuance of a Group III Written Notice with termination for the same alleged offenses requires that the grievant restart the grievance process, which she did by filing her grievance of March 7, 2003. Review of her efforts since initiating her first grievance on January 9, 2003 indicates that she has fully complied with the grievance procedure in an attempt to obtain timely due process. This has been hampered, however, by the actions of the agency described above. Furthermore, the core issues of the February 27, 2003 Group III Written Notice are the same as those contained in the December 13, 2002 Group II Written Notice, which were discussed at the second-step meeting held on January 30, 2003. To require the grievant to again proceed through another second resolution step and qualification process would be redundant and further delay her right to timely due process. Moreover, the issue at the heart of each of these grievances, formal discipline with termination, *automatically* qualifies for hearing.<sup>8</sup> Thus, given the agency's delay to date, and the unique facts of this case, this Department concludes that the appropriate course of action is to qualify the March 7<sup>th</sup> grievance for hearing at this time, rather than sending it back to the agency head for a qualification determination.

### CONCLUSION

For the reasons stated above, this Department has determined that the issue of qualification of the grievances of January 9, 2003 and January 22, 2003 is now moot. Accordingly, the agency's human resources department is directed to administratively close both grievances.

The grievance of March 7, 2003 is now qualified to proceed to hearing. The agency is directed to request the appointment of a hearing officer within five workdays

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<sup>7</sup> The Department of Human Resource Management, the agency charged with the promulgation of personnel policy, reviewed the status of the January 9, 2001 letter and determined that it did not meet the standard to serve as official Written Notice. Therefore, without the 2001 Group III, the December 13, 2002 termination was no longer possible based solely on the December 2002 Group II Written Notice.

<sup>8</sup> Under the grievance procedure, formal discipline automatically qualifies for a hearing. *See Grievance Procedure Manual*, § 4.1(a), page 10). Grievances may be qualified by the agency head, the Director of EDR, or the circuit court. Va. Code §§ 2.2-3004 (D) and (E); *Grievance Procedure Manual* §§ 4.2-4.4, pages 11-12).

unless the grievant notifies them that she does not wish to proceed. This Department's rulings on compliance are final and nonappealable.<sup>9</sup>

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Claudia T. Farr  
Director

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June M. Foy  
Sr. Employment Dispute Consultant

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<sup>9</sup> Va. Code § 2.2-1001 (5).