

Issue: Compliance and Qualification/5-day rule/ Retaliation for grievance activity;  
Ruling Date: August 12, 2003; Ruling #2003-136 and 2003-141; Agency: Department  
of Health; Outcome: Compliance issue; agency in compliance; Qualification issue; not  
qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Health  
Ruling Number 2003-136 and 141  
August 12, 2003

The grievant has requested a compliance ruling regarding her June 2, 2003 grievance with the Department of Health (VDH). The grievant claims that the agency has violated a substantial requirement of the grievance procedure, without just cause, by failing to provide a timely qualification response. The grievant has also requested a ruling on whether her grievance qualifies for hearing. She claims that management's action towards her on May 28, 2003 was retaliatory.

Additionally, the agency asserts that the grievant is out of compliance with the grievance procedure because she added a new issue to her grievance following receipt of the third-step response, an issue that had not been included in her grievance as originally filed. For the reasons discussed below, the grievant's challenge on compliance is denied, but the agency's challenge on compliance is upheld. Furthermore, the grievance does not qualify for hearing.

FACTS

The grievant is employed as a Public Health Nurse. On May 28, 2003, she was verbally counseled by her supervisors for unacceptable conduct and performance.<sup>1</sup> On June 2, she initiated a grievance to challenge the counseling as retaliation for having initiated a prior grievance.<sup>2</sup> The grievance proceeded through the respondent steps without resolution and on June 30, 2003, the grievant requested qualification for hearing.

Upon the agency's receipt of the grievant's qualification request on July 1, the agency head was on annual leave (June 30-July 14, 2003) and was therefore not available

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<sup>1</sup> Specific areas of discussion included: (1) refusal to triage patients; (2) making unnecessary copies of documents; (3) excessive lunch hours; (4) rudeness and moodiness with patients; (5) confrontational attitude with clinicians; (6) unnecessary writing in patient charts; (7) failing to turn in encounter documents for posting; (8) placing hands over ears when clinicians attempt to relate information; (9) referring to co-worker as "M&M" as in M&M candy; and (10) playing radio too loud.

<sup>2</sup> Based on the counseling, the grievant was issued a Notice of Improvement Needed/Substandard Performance on June 2, 2003, subsequent to the initiation of her grievance. Accordingly, this action is not included as an issue and will not be further addressed in this ruling.

to render a qualification decision. In an effort not to delay the grievance process, the agency offered the grievant the option of (1) extending the five workday time period until after the agency head's return from annual leave or (2) receiving a qualification decision from the official serving in an acting capacity as agency head.

On July 3, 2003, the grievant forwarded an acknowledgment indicating her desire to receive a qualification decision from the acting agency head. Accordingly, the qualification decision was to be issued within five workdays of the agency's July 7, 2003 receipt of the grievant's acknowledgment. On July 11, 2003, a qualification decision was forwarded to the grievant indicating that her grievance did not qualify for hearing. Because she failed to receive the qualification decision within the five workday time period ending on July 14, 2003, the grievant requested, on July 15<sup>th</sup>, a compliance ruling from this Department challenging the agency's alleged failure to provide a timely qualification decision.

Furthermore, when she advanced her grievance for a qualification decision on June 30, 2003, the grievant included in the optional comments an additional claim regarding violation of her constitutional/civil rights, which was not included in her original grievance.

## DISCUSSION

### *Compliance*

#### Timeliness of Qualification Response

The grievant contends that the agency failed to provide a qualification decision within the required five workday time period. The grievance procedure requires both parties to address procedural noncompliance through a specific process.<sup>3</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>4</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

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<sup>3</sup> *Grievance Procedure Manual*, § 6, pages 16-18.

<sup>4</sup> *Grievance Procedure Manual*, § 6.3, page 17.

procedural requirement and that the grievance presents a qualifiable issue, this Department may resolve the grievance in the grievant's favor unless the agency can establish just cause for its noncompliance.

In this case, the grievant has not notified the agency head in writing of the alleged noncompliance as mandated by the grievance procedure. Furthermore, the purported non-compliance was corrected by the agency prior to any attempt by the grievant to notify the agency head of the alleged non-compliance. Accordingly, this Department cannot provide any relief on this issue.<sup>5</sup>

#### Additional Issue

The agency contends that the grievant attempted to add an additional issue to her grievance that was not included as originally filed. Once a grievance has been initiated, additional claims may not be added.<sup>6</sup> Because the claim of violation of constitutional/civil rights was not presented in the original written grievance, the issue cannot be added now. This Department's rulings on matters of compliance are final and nonappealable.<sup>7</sup>

#### *Qualification*

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>8</sup> Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied.<sup>9</sup> In this case, the grievant claims that management retaliated against her prior grievance activity by subjecting her to unwarranted verbal counseling on May 28, 2003.

#### Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; and (3) a casual link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected

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<sup>5</sup> It should be further noted that, based on the apparent facts, the agency has complied with the grievance procedure. While the grievant may not have received the qualification decision within five workdays, it was forwarded within that time frame and thus was timely.

<sup>6</sup> Grievance Procedure Manual, § 2.4, page 6.

<sup>7</sup> See Va. Code § 2.2-1001(5).

<sup>8</sup> See Va. Code § 2.2-3004(B).

<sup>9</sup> Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(C), page 11.

activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency' stated reason was a mere pretext or excuse for retaliation.<sup>10</sup>

The grievant clearly engaged in a protected activity when she filed her December 12, 2002 grievance.<sup>11</sup> However, the issue of retaliation does not qualify for hearing because verbal counseling is not an "adverse employment action," which is required to sustain a retaliation claim. An "adverse employment action" includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the "terms, conditions, or benefits" of employment.<sup>12</sup> This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion.<sup>13</sup> While the grievant may understandably view the May 28, 2003 verbal counseling as adverse, such an action, though unpleasant, is not formal discipline, nor did it result in an adverse employment action such as a firing, demotion, decreased compensation, or any other significant detriment to the terms and conditions of her employment. Accordingly, the grievance does not qualify for a 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, 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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Claudia T. Farr  
Director

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June M. Foy  
EDR Consultant, Sr.

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<sup>10</sup> See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4<sup>th</sup> Cir. 1998).

<sup>11</sup> Grievance Procedure Manual § 4.1(b)(4), page 10.

<sup>12</sup> See *Von Gunten v. Maryland Dept. of the Environment*, 243 F. 3d 858 (4<sup>th</sup> Cir. 2001).

<sup>13</sup> See *Boone v. Golden*, 178 F. 3d. 253 (4<sup>th</sup> Cir. 1999).