

Issue: Qualification/recovery of attorney's fees in successful challenge to earlier termination;
Ruling Date: November 26, 2003; Ruling #2003-429; Agency: Department of Corrections;
Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2003-429
November 26, 2003

The grievant has requested a qualification ruling in the July 15, 2003 grievance that he initiated with the Department of Corrections (DOC or Agency). Through his grievance, the grievant seeks to recover \$3,676.26 in attorney's fees for his successful challenge to two earlier Written Notices with termination.

FACTS

On April 3, 2003, the grievant was issued two disciplinary actions – a Group II Written Notice for failing to report an incident of sexual harassment, and a Group III Written Notice issued for sexual harassment. As part of the Group III disciplinary action, grievant was removed from employment. He filed a grievance on April 25, 2003. Following the failure to resolve that grievance at the third resolution step, the agency head qualified the grievance for a hearing.

On June 19, 2003, the grievance proceeded to hearing and in a June 24, 2003, hearing decision (case #5739) the hearing officer found that the testimony of the alleged victim of the purported harassment was not credible, that her allegations were “so inconsistent and illogical, and her reputation is so sullied that she [could] not be believed.”¹ He further found that:

The undisputed testimony of grievant and two assistant wardens establishes that grievant did report officer M's allegation of sexual harassment by another captain. The matter was not formally reported when officer M first told grievant that “someone” had harassed her because she did not divulge the name of the harasser. However, when she later told grievant that the alleged harasser was a specific captain, grievant did report what he had been told to the assistant warden. He did not write a report because officer M told him that she was preparing a written complaint for the warden. It does appear,

¹ Hearing Decision #5739, page 10.

however, that grievant could have reported the matter more quickly and filed a written report of his own.²

Accordingly, the hearing officer rescinded both Written Notices and reinstated the grievant's employment.³

DISCUSSION

The grievant claims that he should be awarded attorneys' fees for his successful challenge of the April 3, 2003 disciplinary actions based on the "numerous mitigating circumstances in this case."⁴ Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, the General Assembly has limited the issues that may be qualified for a hearing and the relief that may be awarded under the grievance procedure.⁵ Attorneys' fees for successful challenges to disciplinary actions are not among the issues identified by the General Assembly that may qualify for a grievance hearing.⁶ Furthermore, the grievance procedure expressly states that attorneys' fees are not available as relief.⁷ Accordingly, this 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 Department's 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 notifies the agency that he wishes to conclude the grievance.

² *Id.* at 7-8.

³ *Id.* at 12.

⁴ Attachment #3 to Grievance Form A. The grievant contends that had the agency allowed him to take a polygraph test, he would have been cleared of harassment charges. He further claims that he was not at work when the alleged harassment occurred. The crux of the grievant's argument is that if the agency had performed a more thorough investigation, he would never have been charged with harassment. Therefore, he would not have incurred legal fees defending the unfounded claim.

⁵ See Va. Code § 2.2-3004(A) and *Grievance Procedure Manual* §4.1, pp. 10-11.

⁶ *Id.*

⁷ *Grievance Procedure Manual* §5.9(b)(1) page 15.

November 26, 2003
Ruling #2003-429
Page 4

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Sr.