Issue: Qualification/misapplication of policy; Ruling Date: May 4; 2004; Ruling #2004-661; Agency: Department of State Police; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2004-661
May 4, 2004

The grievant has requested a ruling on whether his February 12, 2004 grievance with the Department of State Police (VSP) qualifies for a hearing. The grievant claims that management misapplied or unfairly applied the agency's deadly force policy in deciding that he was not justified in discharging his firearm during an arrest.[1] For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a State Police Trooper II. On April 7, 2003, the grievant was involved in an arrest in which he fired his service weapon at the driver of a fleeing vehicle, an act that he believed was necessary to save the life of a fellow trooper. An internal investigation was conducted of the incident and a determination made that the facts of the case did not justify the grievant's discharge of his firearm.[2] Accordingly, on January 20, 2004, the agency issued a decision that the grievant's actions were not considered justified and directed that he receive extensive training.[3] The grievant seeks to have the agency's decision overturned and the record changed to reflect that the discharge of his firearm was justified.

DISCUSSION

For the grievant's claim of misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

The grievant contends that the agency misapplied its deadly force policy by ruling that his discharge of his weapon was "not justified." The agency states that its deadly force ruling is an informal supervisory action, and thus, does not qualify for hearing.

---

[1] Department of State Police General Order 24 (6) (a), page 24-4. (Revised July 1, 2003).
[2] Department of State Police General Order 18 (8), page 18-2 and (17), page 18-9. (Revised October 1, 2002).
[3] The grievant was directed to receive extensive training in (1) "Shoot-Don't Shoot" situations; (2) liability issues; (3) the use of deadly force; and (4) the consequences of shooting into vehicles.

The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[4] 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 action 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."[5] 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.[6]

Under VSP General Order 24,[7] a sworn employee may only use deadly force[8] to protect his or her life or the life of others from what the sworn employee reasonably believes[9] to be an immediate threat of death or serious physical injury.[10] Violations of the policy may only form the basis for departmental administrative sanctions.[11] In this case, the grievant was determined to have violated policy, and as a sanction, was directed to attend prescribed training. A copy of the January 20, 2004 ruling was retained in the files of the Professional Standards/Internal Affairs Unit and copies were distributed to the grievant's supervisory chain. Neither the grievant's training nor the disposition of copies of the ruling resulted in an adverse effect on the terms, conditions, or benefits of his employment.

Indeed, the administrative sanction is akin to a counseling memorandum or interim evaluation. This Department has long held that a counseling memorandum or interim evaluation, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment. However, like a counseling memorandum or interim evaluation, should the administrative sanction later serve to support an adverse employment action against the grievant, such as a formal Written Notice or arbitrary or capricious performance evaluation, the grievant may offer evidence as to the merits of that administrative sanction through a subsequent grievance challenging the adverse employment action.[12]

---

[4] Va. Code § 2.2-3004(A).
[5] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[6] *See* Von Gunten v. Maryland Department of the Environment , 243 F. 3d 239, 243 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F. 3d 858, 866 (4th Cir. 1997)).
[7] *See* VSP General Order 24 (6) (a), page 24-5 (revised July 1, 2003).
[8] Deadly force: That amount of force which is reasonably expected to cause death or grave injury to a person. *See* VSP General Order 24 (6) (a) (1), page 24-5.
[9] Reasonable belief: The facts or circumstances the officer knows, or should know, are such as to cause an ordinary and prudent person to act or think in a similar way under similar circumstances. VSP General Order 24 (6) (a) (2), page 24-5.
[10] Serious physical injury: A bodily injury that creates a substantial risk of death; causes serious, permanent disfigurement; or results in long-term loss or impairment of the functioning of any bodily member or organ. VSP General Order 24 (6) (a) (3), page 24-5.
[11] VSP General Order 24 (6) (b), page 24-5.
[12] *See* EDR Ruling Nos. 2002-220 and 2002-069.

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.

_____
Claudia T. Farr
Director

_____
June M. Foy
EDR Consultant, Sr.