

Issue: Qualification/Discipline/suspension pending investigation; Ruling date: December 9, 2003; Ruling #2003-442; Agency: Department of Juvenile Justice; Outcome: not qualified. Appealed in Circuit Court for the County of Powhatan, Decision entered on January 12, 2004; Court decision is facts alleged do not qualify the issue for a hearing; case dismissed. Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2003-442
December 9, 2003

The grievant has requested a qualification ruling in the September 2, 2003 grievance that he initiated with the Department of Juvenile Justice (DJJ or Agency). The grievant asserts that the agency suspended him without pay pending an investigation of alleged misconduct. He further notes that his badge was taken and he was escorted from the facility where he worked without first being informed of the charges against him. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

The grievant is employed as a Senior DJJ Correctional Officer. On or about August 26, 2003, the grievant was placed on suspension without pay pending the outcome of an investigation regarding an allegation of inappropriate behavior leveled by a minor ward in the custody of the facility. The allegation was referred to the Office of the Inspector General and the Child Protective Services Unit. The matter was also investigated by the Virginia State Police. The investigation was ultimately deemed "inconclusive" by the agency and the grievant was returned to work on September 8, 2003 with back pay and lost benefits.

DISCUSSION

By statute and under the grievance procedure, management has the exclusive right to manage the affairs and operations of state government.¹ Inherent in this authority is the responsibility and discretion to remove employees from the work place without pay if there is sufficient evidence that criminal activity may have occurred. State policy permits an agency to suspend without pay an employee who is the subject of a criminal investigation.² Under state policy, such suspensions are not viewed as disciplinary actions.³ Thus, while employees

¹ Virginia Code § 2.2-3004(B).

² Department of Human Resources Management (DHRM) Policy No. 1.60 (VIII), the *Standards of Conduct*; Agency policy also permits suspension without pay pending the conclusion of a criminal investigation. DOC Procedure 5-10.22.

³ DHRM Policy No 1.60.

may challenge an investigative suspension through the management steps of the grievance procedure, such a challenge does not qualify for a hearing absent sufficient evidence of discrimination, retaliation or misapplication or unfair application of policy.⁴

While the grievant challenges the agency's decision to suspend him, he does not allege that discrimination or retaliation played any role in his suspension. Nor does the grievant appear to allege that the suspension itself was a misapplication of policy.⁵ However, the grievant does object to the manner in which he was suspended, including the confiscation of his badge and a state trooper's reading of his Miranda rights.

For a 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 intent of the applicable policy. Here, the confiscation of the grievant's badge did not violate any mandatory policy provision nor does it appear to be unfair given that the grievant was the subject of a criminal investigation. Likewise, the reading of Miranda rights by a state trooper does not appear to be attributable to the agency, but even if it was, such an action can hardly be viewed as a misapplication or unfair application of policy. To the contrary, *failure* to have read the grievant his Miranda rights could have been a serious abridgment of the grievant's Constitutional rights.

The grievant also asserts that he was not apprised of the charges against him in a timely manner. State policy requires that the agency provide an employee with certain due process protections before it places the employee on *disciplinary* suspension.⁶ For employees who are placed on suspension pending the outcome of a criminal investigation, the agency is only required to provide written notice that he or she is being placed on suspension.⁷ On August 26, 2003, the agency provided the grievant with a letter from the Superintendent informing the grievant that he was "being suspended pending [the] outcome of an investigation into an allegation of misconduct." Accordingly, the agency appears to have complied with state policy.

The grievant also contends that the agency violated Internal Operating Procedure (IOP) 1128-4.4 which states that the "Superintendent-appointed investigator shall inform staff that an accusation against them has been received, what steps will be taken, and what staff's rights are in the manner." IOP 1128-4.4 further states that the "Employee Standards of Conduct shall be followed relative to investigations." In this case it would appear that the

⁴ *Grievance Procedure Manual*, 4.1(c), p. 11.

⁵ The grievant states in an attachment to his ruling request that "I am aware that that an employee can be suspended pending an investigation."

⁶ An employee who is placed on *disciplinary* suspension is entitled to: (1) oral or written notification of the offense; (2) an explanation of the agency's evidence in support of the charge; and (3) a reasonable opportunity to respond. DHRM Policy 1.60 (VII)(E)(2).

⁷ DHRM Policy 1.60 (VIII)(B).

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agency has complied with IOP 1128-4.4 because the August 26th suspension letter informed the grievant that the agency was investigating an allegation of misconduct and that he would be suspended pending the outcome of the investigation. The grievant was further informed that he had no right to enter the premises of the facility except to conduct official business with the agency's Human Resources or Business Offices. The letter also informed the grievant that he had a right to use annual leave while he was on suspension so that he could avoid a loss of earnings.

For all of the reasons stated above, this grievance is not qualified 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 she wishes to conclude the grievance.

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Director

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