Issue: Qualification/Compensation/leave without pay (LWOP); Performance/Notice of Improvement Needed; Ruling Date: May 11, 2004; Ruling #2004-653; Agency: Department of Corrections; Outcome: issues not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2004-653
May 11, 2004

The grievant has requested a ruling on whether his December 26, 2003 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant claims that management misapplied or unfairly applied policy when it (1) failed to approve his leave request for December 5, 2003 and placed him on "Leave Without Pay" (LWOP) status, thereby docking his pay and (2) issued him a Notice of Improvement Needed/Substandard Performance regarding the incident. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Corrections Officer. He was scheduled to work on December 5, 2003, but failed to report to work, allegedly due to poor road conditions as a result of a significant snow storm. Accordingly, the facility placed the grievant on "leave without pay" (LWOP) and docked his pay for the eight hours he would normally have worked. The grievant was also issued a Notice of Improvement Needed/Substandard Performance.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities are to be carried out, including the scheduling of employees, generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied.[2] The grievant claims that the agency misapplied or unfairly applied policy by refusing to honor his leave request and docking his pay for December 5, 2003, and issuing a notice of substandard performance.

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A) and (C) ; *Grievance Procedure Manual* § 4.1(b) and (c) , pages 10-11.

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.

In this case, the facility's Internal Operating Procedure provides that designated employees (Corrections Officers) who do not report to work without authorization will be subject to disciplinary action and placed on LWOP.[3] That policy grants solely to the warden or Duty Administrator the authority to determine if extenuating circumstances exist and if so, to grant an exception. Further, Department of Human Resource Management (DHRM) policy provides that an employee who is absent without approval "will be considered absent without proper authorization" and will not be paid for the time away from work.[4]

Although the grievant made several calls to his supervisor, making him aware of the difficulties he was experiencing while attempting to get to work through the heavy accumulation of snow, it is undisputed that he failed to report to work as scheduled.[5] In this instance, the warden determined that no extenuating circumstances existed to justify the grievant's absence.[6] Therefore, the agency merely exercised its discretion under policy to deny leave and place the grievant in a LWOP status for his failure to report to work as scheduled. Thus, this issue does not qualify for hearing.[7]

The grievant also asserts that he was unfairly issued a Notice of Improvement Needed/Substandard Performance form. The applicable policy is DHRM Policy No. 1.40, Performance Planning and Evaluation.[8] DHRM has sanctioned the issuance of Notices of Improvement Needed/Substandard Performance as a formal means of communicating management's assessment of deficiencies in performance. Indeed, such Notices are akin to interim evaluations. This Department has long held that interim evaluations generally cannot be qualified for a hearing. Likewise, Notices of Improvement Needed generally cannot be qualified for hearing because they do not constitute an "adverse employment action" affecting the terms and conditions of

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[3] See facility IOP #202-7.3, (2), page 4.
[4] *See* DHRM Policy 4.30 III(E)(1) and (2).
[5] The grievant asserted that his road had not been plowed in time for him to get into work on time.
[6] The grievant noted that the following day he purchased new tires. The agency expressly references to the new tire purchase in the second-step response, emphasizing that the tires were bought on December 6th, the day after the storm. The agency appears to infer that one who is designated as an essential employee may be required to venture out in inclement weather during the winter under advisory conditions and accordingly should be prepared to do so. In other words, the agency seems to take the reasonable position that the lack of appropriate tires was not a circumstance beyond the control of the grievant.
[7] The agency's action does not appear to be unfair in this instance either. At least one other corrections officer's pay was docked for not showing up for work on December 5th. Thus, it would appear that the agency applied policy consistently. Furthermore, in the case cited by the grievant as an example of a circumstance where pay was not docked, the employee was not similarly situated to the grievant. In the cited case, the agency had not issued a code yellow.
[8] *See* DHRM Policy No. 1.40, *Identifying Substandard Performance*, page 6.

employment.[9] Here, there is no evidence that the issuance of the Notice of Improvement Needed has resulted in an adverse employment action. Accordingly, this issue 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 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.

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Claudia T. Farr
Director

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June M. Foy
EDR Consultant, Sr.

[9] An adverse employment action is defined as a "tangible employment act 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). Furthermore, a Notice of Improvement is to be maintained in the supervisor's file and only becomes part of the employee's personnel file if the employee is presented with an overall rating of "Below Contributor" during the annual performance evaluation . DHRM Policy 1.40, page 6 and 15. On the other hand, an overall rating of "Below Contributor" is typically considered an adverse employment action and, if grieved, could be qualified for hearing if the facts, taken as a whole, raise a sufficient question as to whether the evaluation was arbitrary or capricious. *Grievance Procedure Manua*l, § 4.1 (b), page 10.