Issue: Qualification/Suspension pending investigation of patient abuse; Ruling Date: August 16, 2004; Ruling #2004-599; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling Number 2004-599
August 16, 2004

The grievant has requested a ruling on whether her January 12, 2004 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for a hearing. The grievant claims that her suspension pending an investigation of client abuse constitutes: (1) discrimination; (2) disparity in treatment; (3) defamation of character; (4) harassment; and (5) misapplication of policy. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Direct Service Associate II with DMHMRSAS. On November 23, 2003, it was reported to the agency that a client had been abused. The grievant was informed by a co-worker on November 26, 2003 of the abuse investigation. On December 1, 2003, the grievant was questioned by agency police regarding the client abuse case. On December 13, 2003, the grievant received written notice that she was being suspended pending further investigation of the matter. Because the investigation was not concluded within the initial ten-day period, the grievant was brought back into pay status on December 26, 2003, by being placed on paid administrative leave. At the direction of the DMHMRSAS Central Office, the Department of the Virginia State Police was also asked to investigate. As of July 21, 2004, the abuse case remains open and the grievant continues on paid administrative leave pending final decision as to what, if any, disciplinary action will be taken.

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 an employee who is the subject of an agency or criminal

[1] Virginia Code § 2.2-3004(B).

investigation.[2] Under state policy, such suspensions are not viewed as disciplinary actions.[3] Thus, while employees 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] In this case, the grievant alleges that her suspension constitutes discrimination, harassment and a misapplication of policy.

Discrimination/Disparate Treatment/Workplace Harassment

Under the grievance procedure, a claim of discrimination arising from membership in a protected class (in other words, on the basis of race, color, religion, political affiliation, age, disability, natural origin, or sex) may qualify for a hearing.[5] Disparate treatment discrimination is the *intentional* discrimination against an individual because of that person's race, color, religion, sex, nation origin, age, or disability. To qualify a disparate treatment claim for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on the grievant's protected status; in other words, that because of her membership in a protected class, the grievant was treated differently than other "similarly-situated" employees. If the agency provides a legitimate, nondiscriminatory business reason for its actions, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[6]

Similarly, while grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.[7]

In this case, it does not appear that the grievant's complaints of discrimination and workplace harassment are based on any membership in a protected class, but rather on a generalized claim of unequal treatment.[8] Accordingly, the issues of discrimination, disparity and harassment do not qualify for a hearing.

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[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.
[3] DHRM Policy No 1.60.
[4] *Grievance Procedure Manual*, 4.1(c).
[5] *See Grievance Procedure Manual*, § 4.1(b)(2).
[6] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
[7] *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).
[8] Specifically, the grievant claims that she was the only group leader suspended pending the investigation and final disposition of the client abuse matter. Because other group leaders were not suspended, the grievant alleges discrimination and disparity in treatment.

Misapplication of Policy

The grievant claims that the agency misapplied or unfairly applied policies and procedures by suspending her some twenty days after the alleged client abuse was reported and by not giving her notice prior to the suspension. For an allegation of misapplication of policy 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 applicable policies are Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct* and DMHMRSAS Departmental Instruction 201(RTS)(03), *Reporting and Investigating Abuse and Neglect of Individuals Receiving Services in Department Facilities*. Departmental Instruction 201(RTS)(03) states: "[u]pon receipt of an allegation of abuse or neglect, the facility director shall: [t]ake steps to protect the safety and welfare of the facility patient or resident which may include suspending or relocating any workforce member who is the subject of an investigation."[9] An employee accused of abuse or neglect shall "[b]e informed that an allegation of abuse or neglect has been made, the nature of the allegation, and that the allegation will continue to be investigated in a timely and thorough manner."[10] Further, when suspending an employee pending an investigation of client abuse, DMHMRSAS policy states that the suspension procedures outlined in Section VIII of DHRM's *Standards of Conduct* policy shall be followed.[11]

Under the *Standards of Conduct*, a suspension may be imposed pending (i) an investigation by the employee's agency, (ii) an investigation by the State Police or other law enforcement agencies, or (iii) court action.[12] The period of suspension pending an investigation by the employee's agency is limited to ten workdays.[13] However, the ten workday limit shall not apply if: "(1) the court action or investigation by law enforcement agencies involves alleged criminal misconduct that occurred either on or off the job; or (2) the misconduct under investigation is of such a nature that to retain the employee in his or her position could constitute negligence in regard to the agency's duties to the public and other state employees."[14] Further, while state policy requires that the agency provide an employee with certain due process protections before it places the employee on *disciplinary* suspension,[15] an employee who is placed on suspension pending the outcome

[9] DMHMRSAS Departmental Instruction 201(RTS)03, 201-7.
[10] Departmental Instruction 201(RTS)03.
[11] DMHMRSAS Departmental Instruction 201(RTS)03, 201-8.
[12] *See* DHRM Policy 1.60(VIII)(B)(1).
[13] *See* DHRM Policy 1.60(VIII)(B)(5)(a).
[14] DHRM Policy 1.60(VIII)(B)(6)(a).
[15] 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).

of a criminal investigation need only be given written notice that he or she is being placed on suspension.[16]

In accordance with policy, the grievant was given written notice on December 13, 2003 that she was being suspended pending an agency investigation of client abuse. The agency asserts that a criminal investigation began in early January, 2004. Because returning the grievant to work under the circumstances of this case could possibly constitute negligence, the agency was not required to return the grievant to work, even immediately after her initial ten-workday suspension. The ongoing criminal investigation by the Virginia State Police provides another basis, under policy, for not returning the grievant to work. Further, because the suspension was not disciplinary, the grievant was not entitled under state policy to an explanation of the evidence in support of the allegations and an opportunity to respond to the allegations. Additionally, neither state nor agency policy specifies a time period upon which an agency must act to suspend an employee once it receives an allegation of abuse.[17] Accordingly, this Department concludes that there is no evidence that the agency has misapplied or unfairly applied policy in this case.

Defamation

The grievant further alleges defamation. Although all complaints may proceed through the three resolution steps, thereby allowing employees to bring legitimate concerns to management's attention, only certain issues qualify for a hearing. Claims such as false accusations, defamation and slander are not among the issues identified by the General Assembly as qualifying for a grievance hearing.[18] Accordingly, this issue cannot be qualified for a hearing.[19]

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

[16] *See* DHRM Policy 1.60 (VIII)(B)(2).

[17] Even though there was a report of abuse on November 23, 2003, the agency did not immediately know who may have been responsible for the abuse until it conducted an investigation. It appears that the agency suspended the grievant as soon as it determined that she may have been responsible for the client abuse.

[18] Va. Code § 2.2-3004 (A); *Grievance Procedure Manual §* 4.1.

[19] To the extent the grievant's claim of defamation implicates a right to clear her name, this Department concludes that the grievant is not entitled to such rights at this time under the grievance process. An employee is entitled to a name-clearing hearing when government action threatens her "good name, reputation, honor or integrity." *See* Board of Regents v. Roth, 408 U.S. 564, 573 (1972). In this case, the agency has not yet taken formal management action, such as issuing the grievant a disciplinary written notice. If upon conclusion of the investigation the grievant is issued a written notice, she could grieve the disciplinary action and would be entitled to a full administrative hearing and the name-clearing issue could be addressed at that time. Further, if no formal action is taken by management upon conclusion of the investigation, the grievant may request that her name be cleared through the process outlined by the agency in its December 13, 2003 notice of suspension.

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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Jennifer S.C. Alger
EDR Consultant