

Issue: Qualification/Misapplication of policy regarding denied training; Resolution Steps;
Ruling Date: December 28, 2004; Ruling #2004-909; Agency: Department of Corrections;
Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2004-909
December 28, 2004

The grievant has requested a ruling on whether his July 19, 2004 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant alleges that the agency discriminated against him and misapplied and/or unfairly denied policy in failing to select him for a training program. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

The grievant is employed by the agency as a Corrections Officer. On July 19, 2004, the grievant initiated a grievance challenging the agency's failure to select him for Field Training Officers (FTO) training.¹ The grievant alleges that he had been told that he was "next in line" for this training, but that others with less seniority and experience were selected instead. The grievant alleges that the agency's failure to select him for training, while selecting other, less senior officers, was a misapplication of policy. In addition, he alleges that the agency misapplied policy by failing to advertise upcoming trainings and thereby open the application process. The grievant also alleges that the agency discriminated against him in denying him the requested training opportunity, although he did not assert any particular basis, other than "favoritism," for the alleged discrimination in either his Grievance Form A or his other written submissions during the agency resolution steps. As relief, the grievant seeks FTO training.

¹ During the course of this Department's investigation, the grievant alleged that he had been wrongly denied defensive driving training as well. The grievant states that he had discussed this training, as well as the FTO training, with his previous supervisor, and that he had been told he would receive the training at the next opportunity. The grievant did not, however, specifically identify the denial of defensive driving training in his Grievance Form A or in his other written submissions during the agency resolution steps. Although the grievant claims that he spoke to one or two supervisors about the defensive driving training in the course of the agency resolution steps, these conversations are alleged to have occurred after the grievant had initiated his grievance and received the first-step respondent's response. When asked during our investigation why he did not identify the defensive driving training in his narrative attachment to his Form A, the grievant explained that he deliberately chose to focus on the FTO training, because if he could "just get one" of the two types of training, he would "be tickled to death." The grievant also stated that he viewed the FTO training as more important. As the grievant did not specifically raise the denial of defensive driving training in his Form A, this claim will not be addressed in this ruling, and it will not be considered to be part of his grievance. See *Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, additional claims may not be added.")

At the first resolution step, the agency respondent agreed that the next FTO class would be advertised to all correctional officers and applicants selected according to the criteria set forth in the applicable policy, I.O.P. 403. The grievant rejected this resolution and advanced his grievance to the second resolution step. The second-step respondent determined that there had been a misapplication of policy and advised the grievant that, in the future, policy would be followed with respect to FTO training. After receiving this response, the grievant advanced his grievance to the third resolution step, citing the second-step respondent's failure to address the issue of favoritism, an alleged continued misapplication of policy, and retaliation against him for engaging in the grievance process.² The third-step respondent noted the second-step respondent's conclusion that policy had not been followed and again advised the grievant that policy would be applied consistently in the future.³

The grievant subsequently asked the agency head to qualify his grievance for hearing. In his response, the agency head acknowledged that policy had not been followed and that steps would be taken to assure that the policy would be followed in the future. The agency head also advised the grievant that, as a means of resolving his grievance, if the grievant were still interested in attending FTO training, he should notify the Warden in writing within five workdays of receipt of the agency head's response. The grievant was advised that "[u]pon receipt of your written request, you will be selected for the next FTO School."⁴ The agency head then denied qualification on the grounds that no additional relief could be granted by the hearing officer.

The grievant reviewed the agency head's response with his attorney. The grievant states that he and his attorney understood the agency's offer merely to be an offer of the possibility of future training, rather than a guarantee of training. On the apparent advice of his attorney, the grievant did not accept the agency's offer of FTO training. The grievant now asks that his grievance be qualified for hearing.

DISCUSSION

² The grievant alleges that after he initiated his grievance, he overheard a supervisor discussing the grievance on the telephone (although he believes those involved were subsequently counseled about this conduct). He also alleges that his supervisors began "keeping tabs" on him and monitoring his lunch breaks and location more carefully. Finally, he claims one supervisor wrongly accused him of taking an extended lunch break. The grievant has never initiated a grievance regarding this alleged retaliation, however, and he admits that since these incidents, his supervisors have been "super nice" to him.

³ The third-step respondent rejected the grievant's argument that the agency had misapplied policy by selecting applicants with less than three years experience, noting that under I.O.P. 403, this level of experience is not a mandatory prerequisite to selection. The grievant concedes that his belief that there was a requirement of three years' experience was based on his understanding of a previous version of I.O.P. 403, rather than the current version of this policy, which took effect May 30, 2004.

⁴ The agency states that it asked the grievant to indicate his continued interest in the training in writing because FTO training has been held since the time the grievant initiated his grievance, but the grievant did not apply for the training.

Under the grievance procedure, a grievance advances through one or more agency resolution steps before possibly being qualified for hearing. Although these resolution steps are a prerequisite to hearing, they are not intended to be mere formalities through which a grievant must proceed before having the opportunity to present his case to a hearing officer. Rather, the agency resolution steps are intended to give grievants the opportunity to bring concerns to management's attention and to give management an opportunity to resolve those concerns within the agency. An agency has an incentive to make good faith efforts to resolve meritorious claims during the resolution steps because doing so will allow the agency to avoid a hearing.

In this case, the grievant challenges the agency's failure to follow its policy regarding FTO training. He alleges that the agency has selected candidates with less experience and seniority, at least in part on the basis of favoritism, and that the agency's failure to follow its policy in advertising the training had the effect of excluding qualified candidates. The remedy he seeks for the agency's conduct is that he be allowed to attend FTO training.

In the course of the resolution steps, the agency investigated the grievant's allegations and ultimately agreed with the grievant that policy had been misapplied. The agency then promised the grievant that if he still wanted to attend FTO training, he simply needed to advise the warden in writing of his desire within five workdays of receiving the agency's offer, and he would be allowed to participate in the next training session. Although the grievant claims that he and his attorney did not understand the agency's offer to be a guarantee of training, we find the agency's offer to be clear and unambiguous.⁵

Under the particular circumstances present in this case, we conclude that the grievant's failure to accept the agency's offer of relief precludes qualification of his grievance for hearing. The agency admitted fault and made the grievant a full and unconditional offer of the relief sought. To allow the grievant to reject such an offer in order to proceed to hearing would in effect render the agency resolution steps mere formalities and would undermine a key policy objective underlying these steps, which is to encourage appropriate resolution of workplace disputes within an agency.⁶

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

⁵ The offer stated, "As a means to resolve your grievance, if you are still interested in attending FTO School you should notify the Warden in writing within five workdays of receipt of this ruling. Upon receipt of your written request you will be selected for the next FTO School."

⁶ This ruling, however, in no way impinges upon the grievant's right to initiate a new grievance in the event he believes he is improperly denied training in the future, or to use evidence of the agency's previous admitted misapplication of policy in support of such a grievance.

December 28, 2004

Ruling #2004-909

Page 5

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

Gretchen M. White
EDR Consultant