Issue: Qualification/misapplication or unfair application of state disciplinary policy; Consolidation/combining grievances for purposes of hearing; Ruling Date: February 9, 2005; Ruling #2005-952; Agency: Department of Corrections; Outcome: qualified for hearing and consolidation granted

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2005-952
February 9, 2005

The grievant has requested that this Department qualify for hearing the October 18, 2004 grievance she initiated with the Department of Corrections (DOC or the agency). The grievant essentially claims that the agency issued her a Written Notice indicating that she was being demoted to a new position at the facility where she was then working. Later, however, she was transferred to another facility based on the same misconduct that formed the basis of the Written Notice and demotion. As relief, she seeks to be moved back to the facility from which she transferred. For the following reasons, this grievance is qualified.

FACTS

Prior to her demotion, the grievant was employed as a Program Specialist with DOC. On May 10, 2004, the grievant was issued a Group III Written Notice for "[t]hreatening or coercing persons associated with any state agency, including not limited to employees, supervisors, patients, visitors, and students."[1] The Written Notice further noted that the grievant was to be demoted and have her salary reduced by 5%. In addition, the Written Notice indicated that the grievant would have a new role title of "Office Service Specialist" and that she would remain at the facility where she worked prior to the issuance of the Written Notice. Later the same day, the grievant challenged the Group III Written Notice and demotion through the initiation of a grievance.

Within about a week of filing her grievance challenging the Written Notice and demotion, the grievant was transferred to another facility outside of the region where she had previously worked. The agency characterized the transfer as a temporary one, meaning that the grievant would be moved into a position within the region when one arose. It is undisputed that the grievant was transferred as a result of the actions that led to the May 10th Written Notice (threatening a co-worker).

The grievance advanced to hearing on July 7, 2004. In a July 14, 2004 decision, the hearing officer upheld the disciplinary action and demotion. The decision did not mention

[1] In a meeting with her supervisor, the grievant allegedly stated that she "could kill" her co-worker.

the transfer. This Department upheld the hearing officer's decision in an August 16, 2004 administrative appeal ruling.

On or about August 27, 2004 the grievant purportedly damaged property at the home of the individual she had earlier threatened and was subsequently arrested for her actions. On November 9, 2004, citing the grievant's "continued violent behavior directed at a fellow employee," the agency issued the Grievant a second Group III Written Notice, this one terminating the Grievant's employment. On November 15, 2004, the grievant initiated a grievance challenging the November 9th Written Notice and termination.

DISCUSSION

Qualification:

Fairly read, the October 18th grievance appears to assert a claim of misapplication or unfair application of state disciplinary policy. For such a grievance 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.[2]

The applicable policy in this case is the Department of Human Resources Management (DHRM) Policy 1.60 *Standards of Conduct*. The *Standards of Conduct,* Section VII (E) addresses "procedures related to disciplinary suspension, demotion or transfer with disciplinary salary action, or termination (due process)." That section mandates that:

> Prior to any (1) disciplinary suspension, demotion, and/or transfer *with disciplinary salary action*, or (2) disciplinary removal action, employees must be given oral or written notification of the offense, an explanation of the agency's evidence in support of the charge, and a reasonable opportunity to respond.[3]

This "due process" section of the *Standards of Conduct* has its genesis in well-settled Constitutional law. Prior to the deprivation of a property interest (including formal discipline), the United States Constitution entitles a non-probationary, non-exempt employee of the Commonwealth to "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[4]

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[2] Va. Code § 2.2-3004(A)(ii); *Grievance Procedure Manual* § 4.1(b)(1).
[3] DHRM Policy 1.60, Standards of Conduct, § VII (E)(2)(emphasis in original).
[4] Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). While Loudermill discusses the due process afforded employees in termination cases, the same principles apply in a case such as this, where an employee receives a disciplinary action without termination. A more comprehensive post-disciplinary hearing follows the issuance of discipline and will provide the employee with a hearing before an impartial decision-maker, an opportunity to confront and cross-examine the accuser in the presence of the decision-maker, an opportunity to present evidence, and the presence of counsel.

The Department of Human Resources Management has designed the formal Written Notice form so that if properly filled out and presented to an employee, these basic Constitutional protections will automatically be provided. The Written Notice has a section where the "nature of the offense and evidence" are to be listed and instructs the supervisor to "briefly describe the offense and give an explanation of the evidence." (The form allows for the attachment of additional documentation if required.) The Written Notice also has a signature line for the employee to sign, which presumably serves as evidence that the employee was given notice of the offense and evidence along with the opportunity to respond. Finally, the Written Notice requires that any other discipline in addition the Written Notice such as a suspension, demotion, or termination, must be stated on the Written Notice form.

In a case where an employee is challenging a disciplinary action, "only the misconduct cited on the Written Notice and attachments are subject to adjudication."[5] Likewise, not only must the charges and evidence be stated on the Written Notice, but the discipline too must be clearly defined. If the discipline is not clearly set forth on Written Notice form, a hearing officer is unable to determine whether the discipline issued is appropriate (i.e. consistent with law and policy) under the circumstances.[6]

Here, *after* the grievant received the Written Notice indicating that she would not be transferred from the facility, and then grieved that discipline, the agency apparently reconsidered its decision and transferred the grievant to another facility outside of the region where she had previously worked. From the face of the hearing decision, it appears that the issue of the transfer was not considered by the hearing officer--he makes no mention of the transfer, only the Written Notice and demotion. Nor would it appear that he had any reason to consider the transfer, which was not listed on the Written Notice form. Because the agency imposed a different discipline from that listed on the Written Notice form, there is a sufficient question as to whether the agency may have misapplied or unfairly applied the Standards of Conduct.

In this case, the grievant has been terminated from state employment for the alleged destruction of property belonging to the employee she had earlier threatened. She grieved her termination and thus is automatically granted a hearing to challenge her termination. If the termination is upheld by the hearing officer then the issue of whether the grievant's transfer was in accordance with state policy is moot. If the hearing officer reverses that termination and reinstates the grievant he may consider the issue of whether the transfer complied with state policy.

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[5] *See* Hearing Decision, Case No. 551, page 6, issued March 12, 2004. In this hearing decision, the hearing officer cites to *O'Keefe v. United States Postal Service*, 318 F.3d 1310 (Fed. Cir. 2002), which states that "[o]nly the charge and specifications set out in the Notice may be used to justify punishment because due process requires that an employee be given notice of the charges against him in sufficient detail to allow the employee to make an informed reply." *O'Keefe*, 318 F.3d at 1315. Moreover, under the rules of the grievance procedure, "[a]ny issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing." *Rules for Conducting Grievance Hearings*, I. *See also* EDR Ruling #2004-720.

[6] *See* Hearing Decision, Case No. 5426 in which the hearing officer recounts a circuit court's qualification of a grievance for a second hearing apparently because the court could not determine whether the hearing officer at the first hearing fully addressed the discipline issued due to the potential for ambiguity in the Written Notice.

Consolidation:

EDR strongly favors consolidation of grievances for hearing and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.[7]

This Department finds that consolidation of the October 18th grievance with the November 15th grievance is appropriate. The grievances involve the same parties, potential witnesses, share a common factual background, and are essentially inextricably intertwined. Furthermore, consolidation is not impracticable in this instance. Thus, the agency shall request the appointment of a hearing officer within 5 workdays of its receipt of the grievant's indication that she intends to advance her November 15th grievance to hearing.[8]

This Department's rulings on compliance are final and nonappealable.[9]

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's October 18, 2004 grievance is qualified and shall advance to hearing.[10]

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Claudia T. Farr
Director

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William G. Anderson, Jr.

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[7] *Grievance Procedure Manual,* § 8.5.

[8] The November 15th grievance challenges formal disciplinary action and therefore automatically qualifies for hearing. Once the agency head qualifies the grievance for hearing, the grievant has 5-workdays from her receipt of the agency head's qualification decision to forward the grievance back to the agency indicating whether she intends to proceed to hearing. Within 5-workdays of receiving this response from the grievant, the agency must seek appointment of a hearing officer. Should the parties resolve the November 15th grievance during the management resolution steps and the grievant elects to conclude it, the agency shall request the appointment of a hearing officer within 5 days of the resolution of the November 15th hearing, assuming that the October 18th grievance is not also resolved.

[9] Va. Code § 2.2-1001 (5).

[10] A final note: by qualifying this grievance for hearing, this Department does not intend to question the wisdom of the agency's determination that the grievant should not be permitted to the return to facility where the employee whom she had threatened continues to work. Qualification of this grievance is based merely on the issue of whether the agency misapplied policy in the manner in which it effectuated the disciplinary transfer.

EDR Consultant, Senior