

Issue: Qualification/Outside employment; Ruling Date: May 13, 2005; Ruling #2005-1016; 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 Number 2005-1016  
May 13, 2005

The grievant has requested a ruling on whether his grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that the agency misapplied and/or unfairly applied state and agency policy. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant has been employed by DOC since 1989 and currently serves as a Mental Hospital Program Director. For a number of years the grievant has submitted and the agency has approved his "Requests for Permission to Secure Employment Outside Regular Working Hours," which allowed him to provide services to offenders under DOC's supervision. However, the grievant was recently informed that he would no longer be allowed to offer his services to such individuals. The grievant objects to this modification of his outside employment agreement.

DISCUSSION

Management has broad discretion in determining what sort of outside employment is acceptable and permissible for its employees. Accordingly, claims relating to outside employment agreements do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision regarding outside employment, or whether policy may have been misapplied.<sup>1</sup>

For an allegation of misapplication 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. The applicable policy in this case is DOC Procedure Number 5-4.17. This policy states in relevant part that:

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<sup>1</sup> Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1.

A. No employee shall engage in any other employment or activity that is prejudicial to the Department's operations either in another agency or outside of the state service, or in any private business, or in the conduct of a profession during the hours for which he or she is employed to work, or outside such hours in a manner or to an extent that affects or is deemed by the employing agency as likely to be in violation of State and Local Government Conflict of Interests Acts.

B. Employees may not accept payment for services from any persons(s) or organization other than the Department of Corrections without written approval of the organizational unit head.

Failure to secure such permission may result in disciplinary action under the Standards of Conduct.<sup>2</sup>

The agency contacted the Attorney General's office for advice regarding whether it should continue to grant the grievant permission to provide services to offenders under DOC's supervision.<sup>3</sup> Acting upon legal counsel's advice, DOC concluded that the grievant's "working with offenders under the Department's supervision is a conflict of interest and is perceived as a conflict of interest." Accordingly, DOC modified the outside employment agreement to prohibit the grievant from offering his services to offenders under DOC's supervision. The grievant is still permitted to work with the general public, just not offenders under DOC supervision. In addition, it should be noted that grievant informed the agency that he has requested a formal opinion from the Office of the Attorney General on whether his work with offenders would constitute a conflict of interest. In response, the agency has informed the grievant that if he receives an opinion that differs from the advice that it received, it is willing to abide by that decision.

In light of the above, this Department cannot conclude that this grievance raises a sufficient question as to whether policy was misapplied. The agency is granted broad discretion under DOC Procedure Number 5-4.17 to accept or reject outside work agreements. Especially where, as here, an agency is informed by its legal counsel that it should modify or reject an outside work agreement, this Department cannot conclude that the agency has abused its broad discretion by following its legal counsel's advice. Thus, 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

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<sup>2</sup> DOC Procedure 5-4.17(D).

<sup>3</sup> The agency sought an informal opinion from the Attorney General's office. (That office has advised that it will issue formal opinions under the Conflicts of Interest Act only to the involved employee, not to the agency.)

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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