

Issue: Qualification/hostile work environment, retaliation for previous grievance activity, sex discrimination, misapplication/unfair application of state policy; Consolidation/for purposes of hearing; Ruling Date: June 8, 2005; Ruling #'s 2005-1048, 2005-1049; Agency: Department of Taxation; Outcome: qualified and consolidated for hearing



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

**QUALIFICATION and COMPLIANCE
RULING OF DIRECTOR**

In the matter of the Department of Taxation
Ruling Nos. 2005-1048, 1049
June 8, 2005

The grievant has requested qualification of two grievances. The grievant alleges that the Department of Taxation (DT or the agency) has created a hostile work environment, retaliated against him for previous intended grievance activity, discriminated against him on the basis of his sex, and misapplied and/or unfairly applied state policy. For the reasons set forth below, these grievances are qualified and consolidated with the grievant's other pending grievance for hearing.

FACTS

The grievant is employed by the agency as a Tax Auditor. On November 19, 2004, the grievant received a Group I Written Notice for disruptive/inappropriate behavior toward a female co-worker. The grievant alleges that approximately two weeks later, the agency refused his request for sick leave and instead required him to attend a scheduled meeting, a charge which the agency denies.

On December 6, 2004, the grievant initiated two grievances challenging the November 19th written notice. The first of these grievances (identified by the agency internally as Grievance No. 3381) alleges that the written notice was "defective and capricious" on its face; that the notice is "lacking in material facts and allegations" and "patently false"; that the notice is part of a pattern by his supervisor of harassment, sexual discrimination, and retaliation for an earlier grievance that the grievant "intended to file against" the supervisor; and that the agency failed to give him due process in issuing the written notice. The second grievance (identified by the agency as Grievance No. 3382) asserts that the grievant's supervisor issued the written notice as part of an ongoing campaign of harassment, sexual discrimination and retaliation. The grievant also alleges that his supervisor violated state policy by sharing confidential personnel information about the grievant with other supervisors.

On December 8, 2004, the grievant initiated a third grievance, identified by the agency as Grievance No. 3380. This grievance challenges the agency's alleged denial of

sick leave, which the grievant asserts is also part of a continuing pattern by his supervisor of harassment, unequal treatment, and discrimination.

With the grievant's consent, the agency consolidated the two December 6th grievances for the purposes of the agency resolution steps. The grievant subsequently asked that the two grievances be separated, and the agency states that it "reluctantly complied" with the grievant's request. At the conclusion of the resolution steps, the agency qualified Grievance No. 3381 for hearing, but denied qualification of the remaining two grievances. The grievant now asks this Department to qualify these two grievances for hearing.

DISCUSSION

By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices and those suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline) *automatically* qualify for a hearing.¹ Although Grievance No. 3382 raises issues other than the written notice, its focus is the written notice issued to the grievant on November 19, 2004. On this basis alone, the grievance qualifies for hearing.

In addition, however, Grievances Nos. 3380 and 3382 both share with Grievance No. 3381—which has already been qualified for hearing by the agency—common allegations of a pattern of harassment, discrimination, retaliation, and misapplication of policy. In light of these common allegations, this Department deems it appropriate to send Grievances Nos. 3380 and 3382 for adjudication by a hearing officer as well, to help ensure a full exploration of what could be interrelated facts and issues. We note, however, that this qualification ruling in no way determines that the agency's actions with respect to the grievant were discriminatory, retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same parties, legal issues, and/or factual background.² EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.³

¹ Va. Code § 2.2-3004 (A); *Grievance Procedure Manual* 4.1(a)-(c). For purposes of determining qualification for a hearing, agency actions are divided into three categories: Actions Which *Automatically* Qualify, Actions Which *May* Qualify, and Actions Which *Do Not* Qualify. Dismissals for unsatisfactory performance also automatically qualify for a hearing.

² *Grievance Procedure Manual* § 8.5.

³ *Id.*

In this case, the grievant argues that he has been subjected to a continuing course of harassment, retaliation, discrimination, and misapplication of policy, which includes both the conduct alleged in the present grievances as well as that at issue in the grievance qualified for hearing by the agency. Although the grievant previously requested that Grievances Nos. 3381 and 3382 be handled separately for purposes of the agency resolution steps, in light of the common parties and allegations in the grievant's three pending grievances, and in the interests of efficiency and judicial economy, this Department finds that consolidation of the three grievances is appropriate. Accordingly, the grievant's three pending grievances are consolidated and will be heard together by a single hearing officer at a single hearing.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's December 6th and December 8th grievances are qualified and shall advance to hearing with his other pending grievance to be heard by a single hearing officer at a single hearing. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant