

Issue: Qualification/discrimination; management actions/assignment of duties; recruitment/selection; Compliance/30day rule; documents; Ruling Date: September 30, 2005; Ruling #2005-1039; Agency: Department of Corrections; Outcome: all qualification issues non-qualified; agency in compliance with documents issues; grievant out of compliance with 30-day rule.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections  
Ruling No. 2005-1039  
September 30, 2005

The grievant has requested a ruling on whether her March 2, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant claims that: (1) the agency has subjected her to a hostile work environment; (2) she was “allowed to attend a second interview for promotion knowing that no one will be promoted while under investigation;” and (3) during an agency investigation of the grievant for fraternization, the grievant was not allowed to perform her regular duties and as a result, suffered a pay loss. Additionally, both the agency and the grievant raise issues of noncompliance. More specifically, the agency claims that the pay loss claim in this grievance should be administratively closed because it is out of compliance with the grievance procedure’s 30-calendar day requirement, while the grievant contends that the agency has violated the grievance procedure by failing to provide requested information/documents.

FACTS

The grievant is employed as a Corrections Officer Senior with DOC. In June 2004 DOC began investigating the grievant for an alleged violation of DOC’s policy on fraternization with inmates. The grievant was investigated by her facility as well as DOC’s Special Investigations Unit (SIU). The investigation was on-going for approximately 8 or 9 months. The SIU investigation allegedly determined the fraternization charges against the grievant to be founded, while the facility investigation was allegedly deemed inconclusive. On March 2, 2005, the grievant challenged the fraternization investigation by initiating a grievance. Thereafter, the grievant received a counseling letter for her alleged improper conduct.<sup>1</sup>

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<sup>1</sup> The counseling letter was received on March 17, 2005 and thus, is not being challenged in the March 2<sup>nd</sup> grievance.

To allegedly avoid a compromise of institutional security, the grievant was not permitted to work inside the facility during the investigation. As a result, the grievant was unable to perform all of her duties as a Strike Force member.<sup>2</sup> During the course of the investigation, the Strike Force was in training for two days. Because the fraternization investigation was ongoing, the grievant was not permitted to participate in that Strike Force training. During the management resolution steps of the grievance process however, the grievant was granted pay for the Strike Force training days that she missed. The grievant claims however, that there were other days the Strike Force was called into action and for which she should be paid. Specifically, there were alleged “lockdown dates” in July and December 2004 that the grievant could not participate in and as such, allegedly missed an opportunity for overtime on those days. The agency claims that this alleged loss of pay occurred more than 30 calendar days prior to the initiation of the grievant’s March 2, 2005 grievance, and because the pay loss claim was untimely, it should be administratively closed due to noncompliance.

Additionally, on March 10, 2005 the grievant attached to her grievance a request for all investigation documents, including the SIU report and any documents generated as a result of the facility investigation. In his March 22, 2005 second step-response, the second step-respondent stated: “[d]uring our meeting you requested a copy of the investigation and I informed you that I am not authorized to give you copies of the investigation from the Special Investigative Unit.” On April 18, 2005, the grievant advanced her grievance to the agency head for qualification for hearing. In addition to the Form A, the grievant sent the agency head a notice of noncompliance as a result of the agency’s failure to provide her with requested documents. Specifically, in an attachment to the Form A dated April 18<sup>th</sup>, the grievant states that she believes the agency’s refusal to provide her with the requested documents constitutes noncompliance with the grievance process and again requests that she be granted all documents related to the fraternization investigations.

The agency head subsequently denied qualification, but did not address the grievant’s request for documents. The grievant consequently sought a qualification determination from this Department. During the course of this Department’s investigation into the grievant’s request to qualify her March 2<sup>nd</sup> grievance for hearing, the grievant alleged that the agency failed to produce requested documents and asked this Department to address the issue. Accordingly, the agency was asked why it had not produced the requested documents. The agency responded by stating that it had not read the grievant’s April 18, 2005 attachment to the Form A as a notice of noncompliance and advised this Department that it would address the grievant’s document request. Subsequently, on July 25, 2005, the agency provided the grievant with a copy of the SIU investigation report and supporting documentation in redacted form.

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<sup>2</sup> Strike Force members respond to institutional and/or regional emergencies. Since the investigation was ongoing and it related to alleged inappropriate conduct, the agency determined that it was in the best interest of the institution to suspend the grievant’s duties as a Strike Force member until completion of the investigation.

## DISCUSSION

### Compliance

#### *30 Calendar Days*

The grievance procedure provides that an employee must initiate a written grievance within 30 calendar days of the date she knew or should have known of the event or action that is the basis of the grievance.<sup>3</sup> When an employee initiates a grievance beyond the 30-calendar day period without just cause, the grievance is not in compliance with the grievance procedure, and may be administratively closed.

The agency asserts that the grievant's pay loss claim is untimely. In this case, the grievant's alleged pay loss (i.e. several days in July and December 2004) occurred more than 30 calendar days prior to the initiation of her March 2, 2005 grievance, and therefore this claim is untimely. Thus, the only remaining issue is whether there was just cause for the delay.

The grievant claims that she delayed grieving this claim because once she was told she could not participate as a Strike Force member due to the fraternization investigation, she decided that the issue should be left alone. In other words, it appears that the grievant simply decided not to challenge the alleged pay loss at the time it occurred because of the ongoing investigation. Such a decision does not constitute just cause for delay. Accordingly, the grievant's pay loss claim for the July and December 2004 "lockdown" dates is untimely without just cause and may be administratively closed. The grievant's remaining claims of hostile work environment and misapplication of policy however will be addressed below.

#### *Documents*

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."<sup>4</sup> This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance statute further states that "[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the

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<sup>3</sup> Va. Code § 2.2-3003(C); *Grievance Procedure Manual* § 2.4 (1).

<sup>4</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual*, § 8.2.

privacy of the individuals not personally involved in the grievance.”<sup>5</sup> Documents, as defined by the Rules of the Supreme Court of Virginia, include “writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.”<sup>6</sup> While a party is not required to create a document if the document does not exist,<sup>7</sup> parties may mutually agree to allow for disclosure of relevant non-privileged information in an alternative form that still protects that the privacy interests of third parties, such as a chart or table, in lieu of production of original redacted documents. To summarize, absent just cause, a party must provide the other party with all relevant documents upon request, in a manner that preserves the privacy of other individuals.

This Department has also long held that both parties to a grievance should have access to relevant documents during the management steps and qualification phase, prior to the hearing phase. Early access to information facilitates discussion and allows an opportunity for the parties to resolve a grievance without the need for a hearing. To assist the resolution process, a party has a duty to conduct a reasonable search to determine whether the requested documentation is available and, absent just cause, to provide the information to the other party in a timely manner.

In this case, the grievant requested all documents related to the investigation into her alleged fraternization, including the SIU investigation report and any documents generated as a result of the facility investigation. The grievant’s March 2, 2005 grievance challenges the fraternization investigation and its effects on the grievant. Accordingly, the SIU report and other investigation documents are relevant to her March 2, 2005 grievance and can only be denied the grievant if the agency can show that just cause exists for withholding such documents.

As stated above, the agency provided the grievant with a copy of the SIU investigation report and supporting documentation in redacted form. The grievant challenges the documents provided as non-responsive to her request. Specifically, the grievant claims that (1) the SIU report and supporting documents do not tell her why the fraternization charges were deemed founded; (2) the agency failed to provide her with documents generated as a result of the facility investigation; (3) she was only provided with her own written statements and other information she supplied during the course of the investigation; (4) some of the documents provided are irrelevant; and (5) the documents were unnecessarily redacted.<sup>8</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *See* Rules of the Supreme Court of Virginia, Rule 4:9(a)(1).

<sup>7</sup> Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2.

<sup>8</sup> During the course of the investigation for this ruling, the grievant advised that she did not need an unredacted copy of the SIU report. Accordingly, it is not necessary to address the grievant’s claim that the documents were unnecessarily redacted.

The document provisions of the grievance procedure merely require that requested documents, if relevant, be provided to the requesting party. This does not mean, however, that the documents will necessarily contain information that the requesting party had hoped to discover; thus, the documents produced may or may not fulfill the requesting party's expectations. Although the grievant was disappointed with the content of the SIU report and its supporting documents, the agency appears to have provided the grievant with what she specifically requested (i.e., a copy of the SIU report) and therefore, it cannot be concluded that the agency has failed to comply with the grievance procedure merely because the grievant asserts that the documents do not answer her questions as to why the fraternization charges were deemed founded.

Moreover, the agency asserts that documents generated as a result of the facility investigation (e.g., incident reports) were included as part of the supporting documents attached to the SIU report provided to the grievant on July 25, 2005. The grievant has not alleged or presented evidence indicating that there are other facility investigation documents in existence that she has failed to receive pursuant to her request. Additionally, contrary to the grievant's assertion that she was only provided with those documents and information she supplied during the investigation, the SIU investigation report and supporting documents include written and verbal statements from witnesses other than the grievant. Further, although some of the documents provided to the grievant if viewed in isolation appear to be irrelevant, the documents the grievant complains of as being irrelevant are exhibits attached to the SIU investigation report specifically requested by the grievant. Accordingly, it was appropriate for the agency to produce these documents.

#### CONCLUSION - COMPLIANCE

For the reasons set forth above, this Department concludes that the grievant failed to timely challenge her claims of lost pay and thus, this issue may be administratively closed due to noncompliance. Further, this Department concludes that DOC has complied with the document provisions of the grievance procedure. This Department's rulings on matters of compliance are final and nonappealable.<sup>9</sup>

#### Qualification

##### *Hostile Work Environment*

The grievant claims that during the course of the investigation into her alleged improper behavior, she was subjected to a hostile work environment. For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on her protected status or prior protected activity; (3) sufficiently

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<sup>9</sup> See Va. Code § 2.2-1001 (5).

severe or pervasive so as to alter her conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.<sup>10</sup> Here, the grievant has not alleged that the agency actions outlined above were based on the grievant's protected status or prior protected activity.<sup>11</sup> Accordingly, the grievant's claim of a hostile work environment does not qualify for hearing.

*Misapplication of Policy – Promotion Process*

The grievance procedure recognizes management's exclusive right to manage the operations of state government, including the hiring or promotion of employees within an agency.<sup>12</sup> Inherent in this right is the authority to weigh the relative qualifications of job applicants and determine the "best-suited" person for a particular position based on the knowledge, skills, and abilities required. Grievances relating solely to the contents of personnel policies and the hiring of employees within an agency "shall not proceed to a hearing."<sup>13</sup> Accordingly, a grievance challenging the selection process does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, discipline, or a misapplication of policy tainted the selection process.<sup>14</sup> In this case, the grievant claims that allowing her to attend a second interview for promotion during the investigation into her alleged improper behavior was a misapplication of policy.<sup>15</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.

Additionally, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."<sup>16</sup> The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment action constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."<sup>17</sup> A misapplication of policy may constitute an adverse

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<sup>10</sup> See generally *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4<sup>th</sup> Cir. 2004).

<sup>11</sup> See generally *Chaloupka v. M. Financial Holdings, Inc.*, 2001 U.S. Dist. LEXIS 8287 (D. Ore. June 5, 2001); *Stevens v. Henderson*, 2000 U.S. Dist. LEXIS 22498 (S.D. Ohio Sept. 19, 2000).

<sup>12</sup> See Va. Code § 2.2-3004(B).

<sup>13</sup> Va. Code § 2.2-3004(C).

<sup>14</sup> *Grievance Procedure Manual* § 4.1(c).

<sup>15</sup> Although not specifically identified as such on Form A, the grievant's claim that she was "allowed to attend a second interview for promotion knowing no one will be promoted while under investigation" can be properly viewed as a claim that policy has been misapplied.

<sup>16</sup> Va. Code § 2.2-3004(A).

<sup>17</sup> *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

employment action if, but only if, the misapplication results in an adverse effect on the terms, conditions, or benefits of one's employment.<sup>18</sup>

In this case, the grievant does not appear to be challenging the fact that she did not get promoted, only that management allowed her to attend a second interview for promotion while she was under investigation. Attending a second interview for promotion, even if futile, is not a "tangible employment action constituting a significant change in employment status," and thus, is not an adverse employment action. Accordingly, the issue of misapplication of policy does not qualify for hearing.

#### *Misapplication of Policy – Performance of Regular Duties*

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>19</sup> Therefore, a grievance challenging management's assignment of duties does not qualify for a hearing unless there is evidence raising a sufficient question as to whether discrimination, retaliation, or a misapplication of policy has occurred.<sup>20</sup> Here, the grievant challenges the change in her duties during the fraternization investigation as a misapplication and/or unfair application of policies.

In this case, the grievant was restricted from working inside the institution during the fraternization investigation and as a result, her regular duties, including being able to participate as a Strike Force member, changed. According to the agency, the decision to restrict employees from working inside the institution is made on a case-by-case basis and depends upon the scope of the investigation and the conduct involved.

Assuming without deciding that the grievant suffered an adverse employment action when her regular duties were changed, the agency has provided a legitimate business reason for the restrictions. Namely, the grievant was restricted from performing her regular duties as a Corrections Officer Senior in order to limit her contact with inmates during the investigation and thus, ensure that institutional security is not compromised. Based upon the ongoing SIU investigation, it does not appear that the agency's actions were unfair or otherwise inappropriate under the circumstances. Moreover, it should be noted that the grievant has not alleged or otherwise demonstrated that she was treated differently than other similarly situated employees under investigation for fraternization. In light of the above, this Department concludes that the grievant's claim that the agency misapplied and/or unfairly applied policy by changing her regular duties during the course of the fraternization investigation does not qualify for hearing.

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<sup>18</sup> See *Von Gunten v. Maryland Department of the Environment*, 243 F. 3d 858, 866 (4<sup>th</sup> Cir 2001)(citing *Munday v. Waste Management of North America, Inc.*, 126 F. 3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>19</sup> Va. Code § 2.2-3004(B).

<sup>20</sup> *Grievance Procedure Manual* § 4.1 (b) and (c).



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APPEAL RIGHTS AND OTHER INFORMATION - QUALIFICATION

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 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 notifies the agency that she wishes to conclude the grievance.

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Claudia T. Farr  
Director

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