

Issue: Qualification/work conditions/supervisor-employee conflict; Ruling Date:
December 29, 2005; Ruling #2006-1191; 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. 2006-1191
December 29, 2005

The grievant has requested a ruling on whether his August 11, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant alleges that he was wrongfully accused of not having made himself known to security.¹ For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Loadman Bailer Operator. He alleges that on July 14, 2005, his supervisor made him aware of an e-mail accusing the grievant of refusing to identify himself to facility security on July 9, 2005. The grievant claims that he did not refuse to identify himself and that the allegations made in the e-mail are false. The grievant further asserts that on July 26, 2006, he met with the assistant warden and his supervisor regarding the e-mail, but that they advised him that security was merely doing its job. The grievant states that no disciplinary action was taken against him as a result of his alleged conduct during the July 9th incident.

On August 11, 2005, the grievant initiated a grievance challenging the purported false accusations by security, as well as management's alleged assertion at the July 26th meeting that security had acted properly. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

¹ The grievant also alleges that since he initiated his grievance, one or more members of the security department have damaged his car and harassed him in the facility parking lot. As this conduct is alleged to have occurred after the initiation of the grievance and does not fall within the scope of the allegations made by the grievant in his Grievance Form A, it will not be considered in this ruling. See *Grievance Procedure Manual* § 2.4 ("Once the grievance is initiated, additional claims may not be added.") Similarly, the grievant's allegations regarding a supervisor giving coffee to inmates will not be considered because the grievant did not directly or indirectly assert this claim in the Form A.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management's decision, or whether state policy may have been misapplied or unfairly applied.³

In addition, to advance to a hearing, the grievant must demonstrate that the action being grieved constitutes an "adverse employment action."⁴ An adverse employment action is defined as a "tangible employment act 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."⁵

In this case, the grievant has failed to present evidence that the alleged false accusations by security and/or management's alleged response constituted adverse employment actions. Assuming, for purposes of this ruling only, the truth of the grievant's allegations, the grievant has not shown that he experienced a significant change in employment status or benefits because of the grieved conduct. In particular, we note that the grievant admits that he was not disciplined as a result of the alleged false accusations. Because the grievant has failed to make the threshold showing of an adverse employment action, his grievance does not qualify for hearing.

Moreover, even if the grievant's grievance were to be broadly construed as a general claim of harassment by security, it nevertheless would not qualify for hearing. 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 his protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.⁶ Here, the grievant has not asserted that the alleged agency actions were based on any protected status or prior protected activity.⁷ Accordingly, any claim of hostile work environment or harassment does not qualify for hearing.

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (c).

⁴ Va. Code § 2.2-3004(A).

⁵ *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

⁶ See generally *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004).

⁷ 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). While the grievant asserts in his reply to the second-step respondent that he had previously stated that he was being discriminated against on the basis of his race, the grievant did not include any allegation of racial

December 29, 2005

Ruling #2006-1191

Page 4

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 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

discrimination or harassment on his Grievance Form A. This Department has repeatedly held that the plain language of the Form A controls in determining the scope of a grievance. *See, e.g.*, EDR Ruling No. 2005-1015. Moreover, as previously noted, once a grievance is initiated, additional claims may not be added to that grievance. *See Grievance Procedure Manual* § 2.4. However, to the extent the grievant asserts that he has been subjected to ongoing harassment on the basis of his race, he may initiate a subsequent grievance challenging that conduct, providing he does so within 30 calendar days of the most recent alleged act of harassment.