

Issue: Qualification/grievant claims retaliation based on previous grievance activity; arbitrary and capricious performance evaluation; misapplied and/or unfairly applied policy; Consolidation/consolidate with pending grievance; Ruling Date: June 1, 2006; Ruling #2006-1291, 2006-1353; Agency: Department of Corrections; Outcome: qualified and consolidated



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND CONSOLIDATION
RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2006-1291, 2006-1353
June 1, 2006

The grievant has requested qualification of his November 16, 2005 grievance. The grievant alleges that the Department of Corrections (DOC or the agency) has retaliated against him for previous protected activity, given him an arbitrary and capricious performance evaluation, and misapplied and/or unfairly applied policy. For the reasons set forth below, this grievance is qualified and consolidated with the grievant's pending January 23, 2006 grievance for hearing.

FACTS

The grievant was employed by the agency as a Correctional Officer Senior. On October 19, 2005, the grievant received his 2005 performance evaluation, which rated his performance as "Below Contributor." On November 16, 2005, the grievant initiated a grievance challenging the evaluation as retaliatory, arbitrary and capricious, and a misapplication and/or unfair application of policy.

In January 2006, the grievant's performance was re-evaluated, and he received another "Below Contributor" rating. The grievant states that he was subsequently terminated from employment for unsatisfactory job performance on January 11, 2006. The grievant initiated a grievance challenging his termination on January 23, 2006, and on April 11, 2006, the agency head qualified the January 23rd grievance for hearing.

DISCUSSION

Qualification

Under the grievance procedure a dismissal for unsatisfactory performance automatically qualifies for a grievance hearing.¹ On the other hand, grievances that challenge Below Contributor performance evaluations as arbitrary and capricious are generally not qualified for hearing unless the grievant provides sufficient evidence in support of his claim.

¹ Grievance Procedure Manual, §4.1(a).

However, in a case like this, where the grievant will be afforded a hearing to challenge his removal for unsatisfactory performance, it simply makes sense to send his grievance challenging the underlying unsatisfactory annual performance rating to hearing as well.² First, the annual performance evaluation rating led to the re-evaluation that ultimately apparently resulted in the grievant's removal from employment. In addition, the two grievances share common factual questions about the grievant's work performance and the agency's assessment of that performance, all of which relate to his termination. Finally, sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues. We note, however, that this qualification ruling in no way determines that the 2005 annual performance evaluation was arbitrary or capricious, retaliatory, a misapplication or unfair application of policy, or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

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.³

This Department finds that consolidation of the November 16th grievance with the January 23rd grievance is appropriate. The grievances involve the same parties and likely many of the same witnesses. In addition, they share a related factual background. Finally, consolidation is not impracticable in this instance.

In the interests of efficiency, as the agency has already requested the appointment of a hearing officer in the January 23rd grievance, this Department shall assume that the grievant wishes to advance his November 16th grievance to hearing and appoint a hearing officer to hear the consolidated grievances. If the grievant does not wish to pursue his November 16th grievance to hearing, he should notify this Department within 5 days of the date of this ruling.

This Department's rulings on compliance are final and nonappealable.⁴

Claudia T. Farr
Director

² See EDR Ruling No. 2005-957.

³ *Grievance Procedure Manual*, § 8.5.

⁴ Va. Code § 2.2-1001 (5).

June 1, 2006

Ruling No. 2006-1291, 2006-1353

Page 4