

Issue: Qualification/management actions/transfer (non-disciplinary); performance evaluation/arbitrary/capricious performance/re-evaluation; termination/poor performance; Ruling Date: April 27, 2006; Ruling #2006-1324; Agency: Department of Health; Outcome: EDR qualified transfer issue



## ***COMMONWEALTH of VIRGINIA***

### ***Department of Employment Dispute Resolution***

### **QUALIFICATION RULING OF DIRECTOR**

In the matter of Virginia Department of Health  
Ruling Number 2006-1324  
April 27, 2006

The Virginia Department of Health (VDH or the agency) asserts that the grievant's January 15, 2006 grievance has been partially qualified for hearing. The grievant has requested a qualification ruling regarding any issues the agency states were not qualified. For the reasons set forth below, this grievance, in its entirety, qualifies for hearing.

#### **FACTS**

The grievant was employed by the agency as a medical social worker. On January 15, 2006, she initiated an expedited grievance challenging her July 1, 2005 reassignment, her October 2005 performance evaluation and subsequent reevaluation, and her January 18, 2006 termination. After the parties failed to resolve the grievance during the management steps, the grievant requested qualification of her grievance for hearing.

In response to the grievant's request for qualification, the agency head checked the box on the Grievance Form A indicating that the grievance was qualified for hearing and signed the form. In addition, in the space designated for the reasons for qualification, the words "termination of employment" were written. The same day, the agency forwarded the grievance record and a Grievance Form B to this Department. In her cover letter to this Department, which was not copied by the agency to the grievant, the designee of the agency's EEO Manager stated, "Please note that while [the grievant's] termination action qualifies for hearing, the relocation/reassignment of [the grievant] occurred in July, 2005.<sup>1</sup> Therefore [the

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<sup>1</sup> We note that this cover letter did not address the grievant's claims regarding her evaluations.

grievant's] January 18, 2006 grievance is clearly outside the 30 day time frame for filing and this aspect of her grievance should not qualify for hearing."<sup>2</sup>

### DISCUSSION

Under the grievance procedure, only the agency head (or his or her designee), the EDR Director or the Circuit Court may qualify (or choose not to qualify) issues for hearing.<sup>3</sup> Moreover, this Department has repeatedly held that in determining what, if any issues have been qualified by an agency head, the plain language of the Grievance Form A is determinative.<sup>4</sup>

Because the grievant, the agencies and this Department rely on the Form A to ascertain the intent of the parties, it is incumbent on the parties to clearly express their intentions on that document. An inquiry into the subjective intent of the parties beyond that which is clearly and unambiguously expressed on the Form A would be impracticable. Likewise, allowing a party to change his or her original decision as indicated on Form A could be unfair to the opposing party. Therefore, this Department can only rely on the plain language of the Grievance Form A when determining the intent of a party. For this reason, this Department has previously held that where an agency head intends to qualify a grievance only in part, he or she must give the grievant express and unequivocal notice of that intention on the Form A or an accompanying attachment.<sup>5</sup>

Here, the plain language of the Form A indicates that the grievant's January 15, 2006 grievance was qualified by the agency head in its entirety. While the agency head identified the grievant's termination as the reason for the qualification, the agency head did not expressly exclude any of the grievant's other claims from qualification or in any way indicate on the Form A (or any attachments to the Form A) that he was qualifying the grievance only in part. Rather, the agency head checked the box to qualify the grievance for hearing, without in any way limiting the qualification to the termination, or indicating that he rejected the grievant's request for hearing on her other claims. Although the EEO Manager's designee

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<sup>2</sup> Although the agency's cover letter identifies the grievance as having been initiated on January 18, 2006, the Grievance Form A indicates the grievance was initiated on January 15, 2006.

<sup>3</sup> *Rules for Conducting Grievance Hearings*, § I ("Any issue not qualified by the agency head, the EDR Director, or the Circuit Court cannot be remedied through a hearing.")

<sup>4</sup> See EDR Ruling No. 2006-1099, 1104 (finding the hearing officer erred when he found the only issue qualified by the agency was the grievant's termination, when the agency head had not excluded other issues from qualification "through express and unequivocal language"); EDR Ruling No. 2005-1015; EDR Ruling No. 2004-611 (finding agency bound by having checked box on Form A qualifying the grievance for hearing, even though agency subsequently claimed the check mark was made in error). See also Ruling No. 2004-696 (holding that a grievant was bound by having checked the box indicating that she was concluding her grievance, even though she asserted that was not her true intent).

<sup>5</sup> See EDR Ruling No. 2006-1099, 1104; EDR Ruling No. 2005-1015.

subsequently attempted to narrow the agency head's qualification decision, those efforts were ineffective because she lacked the authority under the grievance procedure to reverse an agency head's qualification decision. While this lack of authority alone is dispositive, we also note that because the agency did not copy the grievant on the cover letter to this Department describing the partial qualification, the agency failed to provide the grievant with any notice of its intent.<sup>6</sup>

Accordingly, we conclude that the agency has qualified the grievance, in its entirety, for hearing. Although the agency head could have denied qualification with respect to the grievant's claims with respect to her reassignment and her October 2005 evaluation on the basis that those claims were untimely, he was required to convey any such intent clearly and unequivocally on the Form A or an accompanying attachment.

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.

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Claudia T. Farr  
Director

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Gretchen M. White  
EDR Consultant

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<sup>6</sup> We recently found, in EDR Ruling Nos. 2006-1203, 206-1204, that a grievant had complied with the grievance procedure when her Form A indicated that she wished to advance to the third step and be qualified for hearing and she also advised the agency by e-mail that she wanted EDR to rule on the question of access. Our decision in this case is distinguishable in two critical respects. In the previous case, the e-mail requesting an access ruling was entirely consistent with the stated intent in the Form A to advance the grievance through the grievance process and to EDR. In contrast, in this case, the cover letter to EDR was inconsistent with the plain language of the Form A. Moreover, in this case, the writer of the cover letter lacked the authority under the grievance procedure to take the act attempted—that is, to make a determination on qualification.