

Issue: Qualification: Discipline – Suspension pending investigation/court action;
Ruling Date: June 7, 2007; Ruling #2007-1682; Agency: Department of Motor
Vehicles; Outcome: Not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Motor Vehicles
Ruling Number 2007-1682
June 7, 2007

The grievant has requested a ruling on whether his March 22, 2007 grievance with the Department of Motor Vehicles (DMV or the agency) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Senior Special Agent with DMV. On March 13, 2007, the grievant was suspended without pay pending the outcome of a criminal court action.¹ The letter notifying the grievant of his suspension states that he is being suspended pursuant to Virginia Code § 9.1-505.² The grievant challenged his suspension by initiating an expedited grievance on March 22, 2007. Because the parties failed to resolve the grievance in the management resolution steps, the grievant seeks qualification of his grievance for a hearing.

DISCUSSION

Violation of Virginia Code § 9.1- 500 et seq.

The grievant claims that he was wrongly suspended pursuant to Virginia Code §9.1-505 as his “continued presence on the job does not constitute a substantial or immediate threat to the welfare of DMV or the public.” This Department has no authority to assess the applicability of Virginia Code § 9.1-505 to this case, nor enforce those provisions. Rather, this is a matter for the Circuit Court to decide. Thus, while this

¹ On March 11, 2007, the grievant was arrested and charged with driving under the influence (DUI) and refusal to take a breathalyzer test. The grievant reported the arrest to his agency the following day.

² Va. Code §§ 9.1-500 et seq. is entitled the “Law-Enforcement Officers Procedural Guarantee Act” (the Act). Section 9.1-505 of the Act allows for immediate suspension without pay of a law enforcement officer whose “continued presence on the job is deemed to be a substantial and immediate threat to the welfare of his agency or the public” or if he “refus[es] to obey a direct order issued in conformance with the agency's written and disseminated regulations.” Va. Code § 9.1-505.

issue appropriately proceeded through the management resolution steps for a possible resolution,³ it does not qualify for a hearing.

Misapplication/Unfair Application of Policy

By statute and under the grievance procedure, management has the exclusive right to manage the affairs and operations of state government.⁴ Inherent in this authority is the ability to remove employees from the work place without pay if there is sufficient evidence that criminal activity may have occurred. State policy permits an agency to suspend without pay an employee who is the subject of a criminal investigation.⁵ Under state policy, such suspensions are not viewed as disciplinary actions.⁶ Thus, while employees may challenge an investigative suspension through the management steps of the grievance procedure, such a challenge does not qualify for a hearing absent sufficient evidence of discrimination, retaliation or a misapplication or unfair application of policy.

While the grievant challenges the agency's decision to suspend him, he does not allege that discrimination or retaliation played any role in his suspension. However, although not specifically stated on the grievant's Form A, fairly read, the grievance makes a claim that the agency misapplied and/or unfairly policy by suspending him.⁷ 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.

Under the *Standards of Conduct*, a suspension may be imposed pending (i) an investigation by the employee's agency, (ii) an investigation by the State Police or other law enforcement agencies, or (iii) court action.⁸ The period of suspension pending an investigation by the employee's agency is limited to ten workdays.⁹ However, the ten workday limit shall not apply if: "(1) the court action or investigation by law enforcement agencies involves alleged criminal misconduct that occurred either on or off the job; or (2) the misconduct under investigation is of such a nature that to retain the employee in his or her position could constitute negligence in regard to the agency's duties to the public and

³ Va. Code § 2.2-3004 (A).

⁴ Va. Code § 2.2-3004 (B).

⁵ Department of Human Resources Management (DHRM) Policy No. 1.60, "Standards of Conduct" (effective 9/16/93) at VIII.B ("A suspension may be imposed pending: . . . an investigation involving the employee's conduct by the State Police and/or other federal, state, or local law enforcement agencies, or a court action.")

⁶ DHRM Policy No 1.60.

⁷ More specifically, on Form A, the grievant states that "[w]hen I received these charges I was not enforcing the laws of which the Commissioner [of DMV] is required to enforce nor was I in a state vehicle" and "[m]y livelihood has been eliminated along with health benefits and access to other employment benefits, prior to being found guilty of any wrongdoing."

⁸ See DHRM Policy 1.60(VIII)(B)(1).

⁹ See DHRM Policy 1.60(VIII)(B)(5)(a).

other state employees.”¹⁰ Further, while state policy requires that the agency provide an employee with certain due process protections before it places the employee on *disciplinary* suspension,¹¹ an employee who is placed on suspension pending the outcome of a criminal investigation need only be given written notice that he or she is being placed on suspension.¹²

In accordance with policy, the grievant was given written notice on March 12, 2007 that he was being suspended pending court action related to his arrest for DUI and alleged refusal to take a breathalyzer test. Additionally, because the grievant has been suspended pending court action for alleged criminal misconduct, there is no limit on the length of suspension under state policy. Moreover, because the suspension was not disciplinary, the grievant was not entitled under state policy to an explanation of the evidence in support of the allegations and an opportunity to respond to the allegations. Accordingly, this Department concludes that there is no evidence that the agency has misapplied or unfairly applied policy in this case.¹³

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 this 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

¹⁰ DHRM Policy 1.60(VIII)(B)(6)(a).

¹¹ An employee who is placed on *disciplinary* suspension is entitled to: (1) oral or written notification of the offense; (2) an explanation of the agency’s evidence in support of the charge; and (3) a reasonable opportunity to respond. DHRM Policy 1.60 (VII)(E)(2).

¹² See DHRM Policy 1.60 (VIII)(B)(2).

¹³ However, it should be noted that a suspension pending a court action is often preliminary to further agency action which, when taken, could then be grieved. At the conclusion of the investigation, if the agency does not discipline the employee, full back pay is restored, including a refund for the state’s portion of the health insurance premiums that may have been paid by the employee. If disciplinary action is taken, the employee may challenge it through the grievance process.