

Issue: Qualification/grievant asserts that the agency unfairly suspended; Ruling Date: July 6, 2006; Ruling #2006-1331; Agency: Department of Corrections; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2006-1331
July 6, 2006

The grievant has requested a qualification ruling in his December 7, 2005 grievance with the Department of Corrections (DOC or the agency). The grievant asserts that the agency unfairly suspended him. For the reasons set forth below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Correctional Officer. On November 21, 2005, the grievant was involved in an accident while driving a state vehicle. He apparently did not report the accident as required by policy. Effective November 23, 2005, the grievant was placed on suspension without pay “pending the outcome of the official investigation [by the State Police] and pending Court action.” The grievant was subsequently charged with two Class 1 Misdemeanors related to the accident, although the charges were ultimately dismissed.¹

On December 7, 2005, the grievant initiated a grievance challenging his suspension. He alleges that the suspension was unfair because other employees were involved in accidents with state vehicles but were not suspended. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied the grievant’s request, and the grievant has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management has the exclusive right to manage the affairs and operations of state government.² Inherent in this authority is the ability to remove employees from the work place without pay if there is sufficient evidence

¹ Although the criminal charges against the grievant were dismissed, he was subsequently terminated from employment on or about April 24, 2006, for what the agency characterizes was a “total” and “blatant” disregard of policy.

² Virginia Code § 2.2-3004(B).

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.³ Under state policy, such suspensions are not viewed as disciplinary actions.⁴ 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.⁵

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. Here, the grievant asserts that his suspension was an unfair application of policy because other employees who were involved in accidents in state vehicles were not suspended.

The agency admits that several other employees involved in accidents have not been suspended, but asserts that the circumstances of those accidents were different. In particular, the agency argues that in the other accidents, criminal charges had not been filed against the employee-driver. The agency also asserts that the grievant's accident differed from the others in the nature and severity of the accident. Although the grievant appears to dispute the agency's claim that his accident was more severe, he has not offered any evidence that would refute the agency's contention that in the other accidents cited by the grievant, criminal charges were not filed against the employee driving. Thus, it would appear that the distinction drawn between the grievant and the other employees is consistent with the recognition in policy that conduct resulting in a criminal charge may result in a suspension. Under these circumstances, we cannot find that the grievant has presented sufficient evidence that the agency disregarded the intent of the applicable policies or otherwise unfairly applied policy, therefore his grievance does not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

³ 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.") Under agency policy, an unpaid suspension may be imposed for longer than 10 days where the court action or official investigation involves "alleged criminal misconduct that occurs on or off the job and is plainly related to job performance; or is of such a nature that to continue the employee in the assigned position could constitute negligence in regard to the agency's duties to the public and to other state employees." DOC Operating Procedure 135.1, "Standards of Conduct" (effective 9/1/05), at XVII. Here, the agency asserts that the criminal charges against the grievant were of such a nature that continuing him in his position could constitute negligence with respect to the agency's duties to the public or to other employees.

⁴ DHRM Policy No 1.60.

⁵ *Grievance Procedure Manual*, 4.1(c). In addition, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A). For the purposes of this ruling only, we assume, without deciding, that the grieved conduct constitutes an adverse employment action.

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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 Department's 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 he wishes to conclude the grievance.

Claudia T. Farr
Director