

Issue: Compliance/grievance procedure issue; management actions/non-disciplinary transfer; Ruling Date: September 14, 2006; Ruling #2006-1332; Agency: Department of Corrections; Outcome: qualification stands-agency in compliance.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections  
Number 2006-1332  
September 14, 2006

The Department of Corrections (DOC or agency) has asked this Department to reverse its February 7, 2006 ruling in which we qualified the grievant's July 5, 2006 grievance for hearing. That grievance challenges the agency's refusal to return him to his previous position upon his return from active military duty.

FACTS

The grievant is employed as a Security Officer III with DOC. In February 2004, the grievant, a member of the Army National Guard, was ordered on a one-year deployment to Iraq. At the time of his deployment, the grievant was a corrections officer with canine handler responsibilities. In his capacity as a corrections officer with canine handler responsibilities, the grievant and his dog provided security and supervision of the inmates.

Upon his return to work with DOC following his military deployment, the grievant was placed back into a corrections officer position; however, he was no longer assigned a canine to assist him in carrying out his duties. When he questioned the agency on why he was no longer assigned a canine, the grievant claims that he was told he "wasn't a team player." In his second management resolution step response, the Warden stated that while he believes the grievant to be a valued member of the institutional team and DOC, he did not think it was in the best interest of the institution and/or the grievant for the grievant to be assigned to a canine post.

The grievant initiated two grievances on July 5, 2005. In the first of these two grievances (Grievance #1), the grievant claims that the agency (1) discriminated against him; (2) misapplied and/or unfairly applied policy; and (3) violated Virginia Code § 44-93 by failing to return him to his previous position upon his return from active military

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duty. In a second related grievance (Grievance #2), the grievant claims that the agency engaged in workplace harassment by stating he “wasn’t a team player” and using this as a basis upon which to deny his return to his previous position.

On February 7, 2006, this Department declined to qualify Grievance #2 for hearing because claims of supervisory harassment must involve “hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy,”<sup>1</sup> and here the grievant had not alleged that management’s actions were based on any of these factors. This Department did, however, qualify Grievance #1 for hearing. We explained that based on the Virginia statute that provides an employee must be returned to the position he held when ordered to duty unless such position has been abolished or otherwise ceases to exist, the grievance raised a sufficient question as to whether the grievant was restored to the proper position upon his return from military service.

On March 15, 2006, after Grievance #1 had been qualified for hearing, the agency offered the grievant a position in the canine unit. The grievant declined the position, stating that he believed, based on certain personnel issues, that it was not the right time for him to accept the position. Based on the grievant’s denial of the agency’s offer, the agency now seeks to have this Department reverse its earlier qualification of the July 5, 2005 grievance challenging to the agency’s initial refusal to return him to a position within the canine unit.

In June of 2006, the grievant was again deployed with the National Guard.

### DISCUSSION

The agency, based on the offer to place the grievant a canine post, now asks this Department to reverse its earlier decision qualifying Grievance #1. The agency’s agreement to provide the grievant with a position in the canine unit certainly provides the grievant with part of the relief sought in his grievance: “reinstatement back to my K-9 position.” However, the offer to return him to the canine unit alone does not provide the grievant with all the relief that he could potentially be granted at hearing, if the hearing officer were to rule in his favor. For example, the grievant has broadly grieved “Discrimination - for being a member of the Va. Army National Guard.” A remedy typically sought in a case where discrimination is asserted is a request that the hearing officer order that the discrimination cease. If such an order is not followed by an agency, then the employee may seek an implementation order from the circuit court in the jurisdiction in which the grievance arose. To deny qualification at this juncture, would effectively deny the grievant any opportunity to seek an enforceable court order that he not be subject to discrimination based on his National Guard service. Given that the

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<sup>1</sup> DHRM Policy 2.30 (effective date 5/1/02).

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grievant has once again been deployed with the National Guard, he presumably has an ongoing interest in not being subjected to such alleged discrimination.<sup>2</sup>

Accordingly, by copy of this ruling, the grievant and the agency are advised that Grievance #1 remains qualified for hearing. Within 5-workdays of the grievant's return from deployment, the agency shall contact the hearings division to renew the request for the appointment of a hearing officer.

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Claudia T. Farr  
Director

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<sup>2</sup> Neither this ruling nor Ruling Nos. 2006-1182, 2006-1197 has in any way determined that the agency's actions with respect to the grievant were discriminatory or otherwise improper. The discussion of discriminatory treatment is hypothetical only and merely intended for illustration.