Issue: Qualification/other grievance procedure; Ruling Date: September 12, 2006; Ruling #'s 2006-1388, 2006-1389; Agency: Department of Corrections; Outcome: grievance stays qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Corrections/ Ruling Nos. 2006-1388, 1389
September 13, 2006

The Department of Corrections (DOC or the agency) has requested that this Department deny qualification of a grievance previously qualified by DOC. For the reasons set forth below, DOC's request is denied.

FACTS

The Department of Corrections employs the Grievant as a captain at one of its facilities. He also serves as watch commander as needed by the agency. One of the Grievant's responsibilities is to ensure that staff arrive at work as scheduled.

On February 5, 2006 at approximately 4:30 a.m., a call was placed to Officer S's cell phone from one of two switchboards at the facility where the grievant works. The caller at the facility did not realize that Officer S's voice mail activated and began recording. The caller did not conclude the cell phone call. As a result, Officer S's voice mail recorder began recording the conversations between the Grievant and other staff at the facility without their knowledge. During the conversation the Grievant referred to Officer S in an unprofessional manner, stating that Officer S looked like a "fool" and was "half damn crazy."

On February 7, 2006, the Grievant, while at home on a day off from work, received a phone call from the Lieutenant Colonel advising him to report to the Chief Deputy Warden on February 10, 2006, regarding the phone incident. The Grievant was advised at that time that his shift and rest days had been changed.

On February 10, 2006 the Grievant met with the Chief Deputy and was presented with a Disciplinary Hearing Notification for a February 14, 2006 hearing. On February 14, 2006, the Grievant was subject to a disciplinary hearing. On March 15, 2006, the Grievant initiated a grievance claiming that the agency had subjected him to a hostile work environment and to workplace harassment created by the Human Resource Officer, Chief of Security, and the Chief Deputy.

On March 21, 2006, the Grievant was presented with a Group II Written Notice for violation of DHRM Policy 2.30, Workplace Harassment. On March 24, 2006, the Grievant initiated a grievance challenging the Group II Notice.

Both grievances advanced through the management resolution steps and the agency head qualified both for hearing. The agency head noted that as to the March 24th grievance, disciplinary actions qualify for hearing. As to the March 15th grievance, he observed that while the issues raised therein are not typically qualified, because they were similar to those in the March 24th grievance, the agency was agreeable to send the March 15th grievance to hearing as well.

When the agency requested the appointment of a hearing officer for the March 24th grievance, it did not indicate on the Form B that there were other pending grievances. On June 30, 2006, DOC requested consolidation of the March 15 and March 24, 2006 grievances for hearing. Because of the close proximity of the date of the consolidation request to the hearing date, this Department declined to consolidate the grievances.

On July 10, 2006, the March 24th grievance advanced to hearing, and on July 12, 2006, the Hearing Officer issued a decision in which he reduced the Group II Notice to a Group I. He found that the while the Grievant's behavior was unprofessional, it was nevertheless not based on Officer S's race, sex, color, national origin, religion, sexual orientation, age, veteran status, political affiliation, or disability. It was also on July 12, 2006 that the agency requested this Department to rescind the agency's qualification of the March 15th grievance.

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.[1] 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 or any attachment is determinative.[2]

Because grievants, agencies, and this Department all 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, as this Department noted in EDR Ruling No. 2006-1324, allowing a party to change his or her original decision as indicated on Form A could be unfair to the opposing party. Here, the plain language of the Form A indicates that the

[1] *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.")

[2] *See* EDR Ruling Nos. 2006-1099 and 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).

Grievant's March 15, 2005 grievance was qualified by the Agency Head in its entirety. While we understand that the agency qualified the March 15th grievance based on the assumption that the March 15th grievance would proceed to hearing with the March 24th grievance, the fact that it did not so advance was due to the agency's failure to indicate on the Form B, or to provide other timely notice to this Department, that another grievance was pending. Moreover, in his March 15th grievance, the Grievant claims that it was he who was a victim of workplace harassment, namely that (1) he is the only employee who has been scheduled to work a 6 p.m. to 6 a.m. shift, and (2) the Chief Deputy Warden purportedly stated that the grievant is "not suitable to supervise staff." These claims were not addressed in the July 12, 2006 hearing decision. Accordingly, we conclude that because the agency qualified the March 15th grievance for hearing and that because remain issues raised in that grievance that were not addressed in the July 12th hearing decision, the March 15th grievance should proceed to hearing. [3]

By copy of this ruling, the Grievant and the agency are advised that the March 15th grievance shall advance to hearing and that this Department will appoint a hearing officer to preside over that grievance hearing.

This Department's rulings on matters of grievance procedure compliance are final and nonappealable.[4]

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Claudia T. Farr
Director

[3] The March 15th grievance appears to assert that the agency's use of the inadvertently recorded telephone message was harassment. The grievant may proffer evidence pertaining to the alleged harassing use of this message at hearing. However, the July 12, 2006 hearing decision addressed the issue of the legality of that recording, thus that issue will not be before the hearing officer appointed to hear the March 15th grievance.
[4] Va. Code § 2.2-1001 (5).