Issue: Qualification/ compensation-other; discipline/other; Ruling Date: September 20, 2006; Ruling #2007-1403; Agency: Department of Corrections; Outcome: qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling No. 2007-1403
September 20, 2006

The grievant has requested a ruling on whether his May 8, 2006 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant challenges the docking of his pay for eight hours on April 17, 2006. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The agency employs the grievant as a Corrections Sergeant. On April 17, 2006, the grievant allegedly failed to report to work as scheduled. The agency subsequently docked the grievant's pay for eight hours. The grievant initiated a grievance challenging the agency's action on May 8, 2006. Although the grievant did not submit his grievance on an expedited grievance form, the grievance was apparently handled in accordance with the expedited grievance procedure.

After the second-step respondent did not provide the grievant with the requested relief, the grievant requested qualification of the grievance for hearing by the agency head. In a decision denying the grievant's request, the agency head stated:

> The Department of Corrections Operating Procedure 135.1, Standards of Conduct states that employees should report to work as scheduled. According to the Standards of Conduct, failure to report to work as scheduled without proper notice to supervisor [sic] is considered a Group II Written Notice offense. However your pay was docked in lieu of being issued a written notice.

The grievant has appealed the denial of qualification to this Department.

DISCUSSION

The grievance statute and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues

[1] *See* Va. Code § 2.2-3004(B).

such as the methods, means and personnel by which work activities are to be carried out and the establishment or revision of compensation generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[2]

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.[3] For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.[4] These safeguards are in place to ensure that disciplinary action is appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[5]

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[6] Because docking pay may constitute an adverse employment action,[7] we find that the grievant has raised a sufficient question as to whether the grieved management conduct was an adverse employment action.

We also find that the grievance raises a sufficient question as to whether the agency's primary intent was to correct or punish perceived poor performance to qualify for hearing. In his qualification decision, the agency head noted that the reason for the agency's docking of the grievant's pay was his failure to report to work as scheduled. The agency head also expressly stated that the agency elected to dock the grievant's pay "in lieu of" issuing the grievant a written notice for his failure to report.

In sum, because it raises a sufficient question as to whether the docking of the grievant's pay was an informal disciplinary action, this grievance is qualified for hearing. At the hearing, the grievant will have the burden of proving that the agency's action was

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[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[3] Va. Code § 2.2-2900 *et seq.*
[4] DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93).
[5] *See* EDR Ruling Nos. 2002-227 & 230.
[6] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[7] *See* Farrell v. Butler University, 421 F.3d 609, 614 (7th Cir. 2005); *Cf* Lovell v. BBNT Solutions, LLC 295 F. Supp. 2d 611, 626 (E.D. Va. 2003).

adverse and disciplinary. If the hearing officer finds that the grievant has not met this burden, then he or she must determine if the grievant has presented evidence to show that the agency's action was nevertheless a misapplication or unfair application of policy.[8] If, however, the hearing officer finds that the agency's action was adverse and disciplinary, the agency will then have the burden of proving that the action was warranted and appropriate. Should the hearing officer find that the denial was adverse, disciplinary and unwarranted, he or she may rescind the agency's action, just as he or she may rescind any formal disciplinary action.[9]

We note that this qualification ruling in no way determines that the agency's actions with respect to the grievant constituted unwarranted informal discipline or a misapplication or unfair application of policy, only that further exploration of the facts by a hearing officer is appropriate.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's May 8, 2006 grievance is qualified. 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

[8] The grievant has argued that agency subjected him to "inhumane and injurious treatment," and that his supervisor had an obligation to make every effort to contact an employee who has not called in. The grievant did not assert in his Grievance Form A that he had been subjected to discrimination or retaliation. As the grievance fairly raises a claim of misapplication or unfair application of policy, this claim is qualified for hearing as well.

[9] *See* EDR Ruling No. 2002-127.