Issue: Qualification/miscellaneous issue; discipline/suspension pending investigation; Ruling Date: December 13, 2006; Ruling #2007-1459; Agency: Department of Juvenile Justice; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2007-1459
December 13, 2006

The grievant has requested a qualification ruling in his July 11, 2006 grievance with the Department of Juvenile Justice (DJJ or Agency). The grievant asserts that (1) the agency suspended him pending an investigation of alleged misconduct without first notifying him of the charges against him and allowing him to respond; (2) the investigation into his alleged misconduct was improperly conducted; (3) the agency failed to train him on the proper physical restraint procedures and techniques as required under policy; (4) he was the only officer present with approximately 22 wards when the alleged misconduct occurred; and (5) the agency searched his office locker without cause. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

Prior to his termination, the grievant was employed as a DJJ Correctional Sergeant. On June 1, 2006, the grievant was placed on suspension pending the outcome of an investigation regarding an allegation of inappropriate behavior leveled by a minor ward in the custody of the facility. The allegation was referred to the Office of the Inspector General. The investigation resulted in the agency issuing the grievant a Group III Written Notice with termination for pushing "a handcuffed ward head first into bleachers with force."[1]

[1] The grievant challenged the Group III Written Notice and termination through the grievance process. The grievance was qualified for a hearing and pursuant to the grievance procedure, will proceed to hearing before the circuit court in the jurisdiction in which the grievant was employed. *See Grievance*

DISCUSSION

Suspension Pending Investigation

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 responsibility and discretion to remove employees from the work place if there is sufficient evidence that misconduct or criminal activity may have occurred. However, 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 misapplication or unfair application of policy.[3] For a misapplication or unfair application 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 intent of the applicable 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, the grievant does allege that the agency misapplied policy by suspending him without first affording him his due process rights. More specifically, the grievant contends that the agency violated Institution Operating Procedure (IOP) 1108-4.6 which states: "[p]rior to any *disciplinary action* being taken, the employee shall be informed of the alleged offense and any evidence being considered. The employee must then be given reasonable time to respond before the official Written Notice is issued."[4] State policy also requires that the agency provide an employee with certain due process protections before it places the employee on *disciplinary* suspension.[5] However, for employees who are placed on suspension pending the outcome of an investigation, which is different than a *disciplinary suspension*, the agency is only required to provide written notice that he or she is being placed on suspension.[6] On June 1, 2006, the agency provided the grievant with a letter informing him that he was "being suspended,

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Procedure Manual § 5.10 (qualified grievances of employees of the Department Juvenile Justice, whose employment was terminated for client or resident abuse proceed to a hearing before the circuit court in the jurisdiction in which the employee had been employed).

[2] Virginia Code § 2.2-3004(B).

[3] *Grievance Procedure Manual*, 4.1(c).

[4] [Facility] Institution Operating Procedures, Procedure Number: IOP-1108, *Disciplinary Actions*, page 2 of 4 (emphasis added).

[5] 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).

[6] DHRM Policy 1.60 (VIII)(B).

effective immediately, pending the outcome of an investigation into an allegation of misconduct." Accordingly, the agency appears to have complied with policy.[7]

In addition, the grievant raises two arguments regarding his culpability for the incident that prompted his suspension. More specifically, the grievant claims that on the day in question (1) he was working on the unit alone with 22 wards in violation of agency policy[8]; and (2) he had not been re-certified in proper restraint techniques.[9] Moreover, the grievant claims that the agency continued with the investigation despite a request by the alleged victim to withdraw his allegations.

At issue in the grievant's July 11th grievance is the suspension pending investigation and the investigation process itself and not the termination as the grievant's termination was not implemented until July 13th. As stated above, the agency acted in accordance with policy when it suspended the grievant pending an investigation into his alleged misconduct. Accordingly, even if this Department were to assume that the grievant's assertions are true, the agency still had a right, and a responsibility it appears, under policy to suspend the grievant pending an investigation into the minor ward's complaint even if that complaint was later rescinded. In other words, nothing in policy requires that an agency discontinue its investigation if the complaint is later rescinded. It should be noted however that the grievant may proffer the above arguments at the circuit court hearing on his termination in support of his claim that the termination was unwarranted.

Investigative Process

The grievant also challenges the agency's manner of investigation into his alleged misconduct. In particular, the grievant claims that the agency inappropriately allowed two of his subordinates to be present during the interview of the alleged victim. The grievant claims that the presence of his subordinates during the interview violated policy because confidential information was disclosed. As stated above, for a misapplication or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory

[7] This is not to say that an employee may be suspended without pay indefinitely pending an investigation such as the one at issue in this case. Rather, the U.S. Supreme Court has stated that while a public employee may not have a constitutional right to a "pre-suspension hearing," he does have a right to an "adequately prompt post-suspension" hearing. *See* Gilbert v. Homar, 520 U.S. 924, 117 S.Ct. 1807 (1997).

[8] The grievant claims that policy requires that there be one officer present for every eight wards.

[9] According to 22 VAC 42-10-820(F), DJJ staff responsible for the supervision of children shall apply physical restraint only if they have been trained in the facility's physical restraint procedures and techniques and "staff shall review the facility's training in physical restraint ….. at least annually." According to the grievant, the agency pulled him from his annual training on proper restraint techniques in order to attend a monthly security meeting.

policy provision or whether the challenged action, in its totality, was so unfair as to amount to a disregard of intent of the applicable policy.

The grievant references two facility policies in support of his claim that the presence of his subordinates during the questioning of the alleged victim was improper. The first of these policies, IOP-1106 *Conflict of Interest/Code of Ethics*, discusses what is deemed appropriate and inappropriate behavior for facility employees and requires employees to report any inappropriate behavior to the organizational unit head or the Department's Inspector General.[10] The policy further states that "[a]t all times, persons investigating alleged misconduct will protect confidentiality" and "[e]mployees and volunteers are expected to keep matters under investigation confidential…".[11]

The second policy referenced by the grievant is IOP-1105, *Confidentiality of Personnel Files/Challenging Information*. IOP-1105-4.6 states that "[a]ll other supervisors have access only to files of employees they directly supervise."[12] The grievant contends that this provision prohibits subordinates from having access to confidential information about their supervisors. In addition to facility policy, DHRM Policy 6.05 states that personal information such as "records concerning grievances or complaints" and/or "records of arrests, convictions or investigations"… "may not be disclosed to third parties without the written consent of the subject employee."[13] However, like IOP-1105-4.6, DHRM Policy 6.05 allows supervisors, and in some instances higher level managers in the employee's supervisory chain access to such information without the consent of the subject employee.[14]

According to the agency, corrections officers "are frequently present during questioning of wards; to insure safety and security of all staff, as [office of the inspector general] investigators are not trained and/or equipped to monitor and secure wards." The grievant does not appear to challenge security presence during the interview, but rather asserts that the security present should have been his superiors, not his subordinates. There is nothing in the policies cited above, nor has this Department found any other policy, that would require that only officers superior to the person being investigated be present at witness interviews. As such, it does not appear that a mandatory policy provision was violated by having the grievant's subordinates present during the interview rather than the grievant's superiors. Further, the agency alleges that the corrections officers present during the interview were "informed – per standard procedure- that any information heard during the session was to remain confidential and not to be disclosed to anyone under any circumstance." Moreover, the grievant has not

[10] *See* [Facility] IOP-1106-7.0(1).
[11] [Facility] IOP-1106-7.0(2).
[12] [Facility] IOP-1105-4.6.
[13] *See* DHRM Policy 6.05.
[14] *Id.*

alleged, nor has this Department found during the course of its investigation, that the officers present that day have violated this order by sharing the information disclosed during the interview. Accordingly, this issue does not qualify for a hearing.

Locker Search

The grievant also claims that his locker at work was searched without cause. According to the agency, during the course of the Inspector General's investigation of the grievant, it was reported by some of the residents that the grievant keeps contraband, such as snack foods and cigarettes, in his work locker and uses these items to bribe the residents of the facility.[15] As a result of these allegations, the DJJ Deputy Director of Institutions authorized a search of the grievant's locker. Two of the grievant's supervisors subsequently searched the grievant's locker. According to the agency, the search revealed a trash bag full of snack foods, breakfast cereals, etc…. The grievant claims that nothing illegal or prohibited was found.

DJJ has a Standard Operating Procedure (SOP) for searches and inspections of areas within its facilities.[16] SOP-223 authorizes and requires routine and frequent room area searches, housing area searches, total institutional searches, searches of kitchens, shops and support buildings, and perimeter inspections.[17] These searches and inspections are primarily for the purpose of detecting contraband.[18] Any place that may be used to hide contraband, including lockers, must be searched during routine searches and inspections.[19] Although not specifically stated in SOP-223, it can certainly be presumed under that policy that if an employee is suspected of concealing contraband in his locker, in the interest of safety, the agency would be permitted to initiate a search of that locker to determine if contraband is actually present. Accordingly, this Department concludes that there was no misapplication or unfair application of agency policy when the agency searched the grievant's locker.

Additionally, although not specifically designated as such, the grievant's claim that his locker was searched without cause implicates a claim of invasion of his privacy rights. While courts have recognized privacy rights in the workplace,[20] the

[15] IOP-1106-4.3 prohibits staff from providing any form of contraband to wards.
[16] *See* SOP-223, *Searches and Inspections*.
[17] *Id.*
[18] *Id.*
[19] *See* SOP-223-4.6.
[20] In O'Connor v. Ortega, the Supreme Court recognized that public employees frequently have "substantial" privacy expectations in private property maintained at their workplaces. 480 U.S. 709, 721, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987) (O'Connor, J., plurality opinion); *see id.* at 730 (Scalia, J., concurring in the judgment); *id.* at 737 (Blackmun, J., dissenting). At the same time, however, the Court acknowledged that "the operational realities of the workplace . . . may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement

Commonwealth has not promulgated a privacy policy that covers the conduct described in this grievance.[21] However, this Department by no means endorses unfettered, baseless searches of the workplace. Notwithstanding the lack of a state policy specifically addressing the issue of privacy, state agencies should be mindful of the limits placed on searches by law.[22]

For all of the reasons stated above, this grievance is not qualified for hearing.

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 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.

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Director

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official." *Id.* at 717 (plurality opinion) (emphasis in original); *see also id.* at 737 (Blackmun, J., dissenting). As the plurality observed, some workplaces "are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits," under which circumstances "no expectation of privacy is reasonable." *Id.* at 717-718; accord Leventhal v. Knapek, 266 F.3d 64, 73 (2001).

[21] The Department of Human Resources Management (DHRM) has a policy that prohibits the disclosure of personnel records, DHRM Policy 6.05. DHRM has also addressed the issue of privacy, in Policy 1.75, the Use of Internet and Electronic Communications Systems policy. Under that policy, the DHRM makes it clear that "no user should have any expectation of privacy in any message, file, image, or data created, sent, retrieved or received by use of the Commonwealth's equipment and /or access."

[22] A plurality of the Supreme Court has held that public employers may, consistent with the Fourth Amendment, conduct workplace searches without a warrant and without probable cause when there are reasonable grounds to suspect work-related misconduct. O'Connor v. Ortega, 480 U.S. 709, 725-26, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1987) (plurality opinion); *see also* O'Connor, 480 U.S. at 732 (Scalia, J., concurring in judgment and concluding government searches to investigate work-related misconduct "do not violate the Fourth Amendment"). A workplace search by a government employer implicates an employee's Fourth Amendment rights only if the employer's conduct infringes upon the employee's reasonable expectations of privacy. O'Connor, 480 U.S. at 715; *see also* United States v. Bach, 310 F.3d 1063, 1066 (8th Cir. 2002) ("in order to find a violation of the Fourth Amendment, there must be a legitimate expectation of privacy in the area searched and the items seized"), cert. denied, 538 U.S. 993, 155 L. Ed. 2d 693, 123 S. Ct. 1817 (2003).