

Issue: Qualification/implementation of hearing decision; Ruling Date: December 5, 2006; Ruling #2007-1464; Agency: Department of Corrections; Outcome: qualification decision cannot be made at this time; grievant may petition Circuit Court for issue of proper implementation of hearing officer decision.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2007-1464
December 5, 2006

The grievant has requested a qualification ruling in his September 5, 2006 grievance with the Department of Corrections (DOC or Agency). The grievant challenges his August 21, 2006 termination from DOC for poor performance as a misapplication and unfair application of state policy and contrary to the July 24, 2006 hearing decision that ordered the agency to reinstate him and re-evaluate his performance.

FACTS

The grievant was employed by the agency as a Correctional Officer Senior. On October 19, 2005, the grievant received his 2005 performance evaluation, which rated his performance as "Below Contributor." On November 16, 2005, the grievant initiated a grievance challenging the evaluation as retaliatory, arbitrary and capricious, and a misapplication and/or unfair application of policy.

In January 2006, the grievant's performance was re-evaluated, and he received another "Below Contributor" rating. The grievant states that he was subsequently terminated from employment for unsatisfactory job performance on January 11, 2006. The grievant initiated a grievance challenging his termination on January 23, 2006, and on April 11, 2006, the agency head qualified the January 23rd grievance for hearing. On June 1, 2006, this Department qualified and consolidated for hearing the November 16, 2005 and January 23, 2006 grievances.¹ The grievances proceeded to hearing on July 21, 2006.²

¹ See EDR Ruling #2006-1291, 2006-1353.

² See Decision of Hearing Officer, Case Nos. 8337/8373, issued July 24, 2006.

In a July 24, 2006 decision, the hearing officer stated, “Because there is credible evidence to support the ‘below contributor’ rating, I find the Grievant has not borne his burden of proof that his October 19, 2005, evaluation was either retaliatory, arbitrary and capricious, or a misapplication of policy.”³ However, with regard to the grievant’s re-evaluation and termination, the hearing officer concluded that the “re-evaluation process and bases for termination were so deficient as to be arbitrary and capricious.”⁴ As such, the hearing officer reinstated the grievant and ordered the agency to repeat the three-month re-evaluation process and “provide a rating with a reasoned basis related to established expectations.”⁵ Additionally, the hearing officer ordered the agency to provide the grievant with back pay and benefits.⁶

Pursuant to the July 24, 2006 hearing decision, the grievant was reinstated to his position with DOC. Upon his return to work on August 21, 2006, the grievant was given another written re-evaluation reflecting a rating of “Below Contributor” and was again terminated from his employment with DOC. The grievant subsequently challenged the re-evaluation and termination by initiating a grievance on September 5, 2006. The grievant and the agency appear to disagree in their interpretation of the hearing officer’s July 24th decision and the implementation of that decision. More specifically, the agency asserts that the grievant believes that the hearing decision required the agency to reinstate him for three months and conduct a re-evaluation at the conclusion of this three-month period. The agency, on the other hand, believes that the hearing decision merely required it to provide the grievant with another written re-evaluation based upon his performance during the three-month period subsequent to his October 2005 performance evaluation.

DISCUSSION

In this case, the grievant seeks qualification of his September 5, 2006 grievance for hearing. However, before a qualification determination can be made, it must be determined whether or not the July 24th hearing decision was correctly implemented.⁷ Because the grievant believes that the agency has not properly implemented the hearing officer’s orders for reinstatement and re-evaluation, he may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the final hearing decision,⁸ after which both parties should be able to present their respective arguments to the court. Once the circuit court has made its determination on implementation, the grievant may renew his request for qualification to

³ *Id.* at 5.

⁴ *Id.* at 7.

⁵ *Id.* at 8.

⁶ *Id.*

⁷ If the circuit court were to adopt the grievant’s interpretation of the hearing decision, i.e., that the hearing decision directed the agency to reinstate the grievant and re-evaluate his performance at the conclusion of a three-month period, the grievant’s September 5, 2006 grievance would be rendered moot as the grievant’s termination would no longer be an issue. Conversely, if the circuit court were to adopt the agency’s interpretation of the hearing decision, the grievant could continue with his September 5th grievance challenging his August 21, 2006 termination as the termination was new management action that was imposed upon the grievant’s reinstatement to employment with DOC.

⁸ Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

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this Department. In any event, the grievant must notify this Department in writing **within 10 calendar days of the date of the circuit court decision** whether he desires to renew his request for qualification or conclude his grievance.

If the parties have any questions regarding this ruling or the grievance procedure, please feel free to contact EDR's AdviceLine at 1-888-232-3842.

Claudia T. Farr
Director