

Issues: Qualification – Benefits (FLMA) and Compliance – Grievance Procedure (5 Day Rule); Ruling Date: 08/08/07; Ruling #2008-1751; Agency: Virginia Department of Health; Outcomes: Qualified for Hearing; Grievant Not In Compliance



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of Department of Health
Ruling Number 2008-1751
August 8, 2007

The Department of Health (VDH or the agency) has requested the appointment of a hearing officer for the grievant's March 2, 2007 grievance, which was partially qualified for hearing by the agency head.

FACTS

The grievant was terminated from employment with the agency effective February 2, 2007, after being issued a Group II Written Notice for allegedly failing to request leave on January 3, 2007. On March 2, 2007, the grievant initiated a grievance challenging her termination. The grievant appears to assert that she was harassed, singled out, and wrongfully terminated while using Family and Medical Leave Act (FMLA) leave. Although the agency initially closed the grievance, citing the grievant's errors in completing the Form A, this Department subsequently ruled that the agency must allow the grievance to proceed.¹

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head qualified for hearing that portion of the grievance relating to the grievant's termination, but denied qualification on the grievant's allegations regarding FMLA leave. The agency has now requested appointment of a hearing officer on the grievant's qualified claims.

DISCUSSION

As the agency properly recognizes, grievances involving formal discipline automatically qualify for hearing, while claims challenging harassment, discrimination and retaliation do not.² However, where, as here, the allegations of harassment, discrimination and retaliation are in effect asserted as a defense to the disciplinary action, those allegations

¹ EDR Ruling No. 2007-1631.

² *Grievance Procedure Manual* § 4.1(a) and § 4.1(b).

must be qualified as well. The hearing officer is charged with determining whether the disciplinary action taken against the grievant was consistent with law and policy³: an agency may not limit a grievant's ability to argue that the discipline was inconsistent with law or policy by foreclosing, through the qualification process, a grievant's ability to assert or establish such claims. Accordingly, the grievant's FMLA-based claims are qualified for hearing, to the extent those claims relate to her termination.

To the extent the grievant raises any claims of FMLA-based retaliation and harassment which are not related to her termination, she has apparently not advised the agency that she wishes to appeal the agency head's qualification determination. In accordance with this Department's precedent regarding the closing of grievances,⁴ the grievant is therefore directed to notify the agency **within 10 workdays of the date of this ruling** if she wishes to appeal the agency's denial of qualification with respect to any FMLA-based claims raised by her grievance which do not directly pertain to her termination. If the grievant does not give timely notification to the agency, the agency may close that portion, if any, of the grievance which raises FMLA claims unrelated to the grievant's termination, and this Department will move forward to appoint a hearing officer to hear the qualified issues. If the grievant appeals the denial of qualification, this Department will stay appointment of a hearing officer until after a qualification ruling has been issued on the remaining FMLA claims.

Claudia T. Farr
Director

³ *Id.* at § 5.9.

⁴ *See, e.g.*, EDR Ruling No. 2007-1714, EDR Ruling No. 2007-1711.