

Issues: Qualification – Performance Evaluation (re-evaluation) and Separation from State (termination – poor performance); Ruling Date: December 17, 2007; Ruling #2008-1840; Agency: Department of Corrections; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections  
Ruling No. 2008-1840  
December 17, 2007

The grievant has requested qualification of his September 5, 2006 grievance with the Department of Corrections (the agency). For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On October 19, 2005, the grievant received his 2005 performance evaluation, which rated his performance as "Below Contributor."<sup>1</sup> 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.<sup>2</sup> In January 2006, the grievant's performance was re-evaluated, and he received another "Below Contributor" rating.<sup>3</sup> The grievant was subsequently terminated from employment for unsatisfactory job performance on January 11, 2006.<sup>4</sup> The grievant initiated a grievance challenging his termination on January 23, 2006.<sup>5</sup> Both grievances were qualified and consolidated for a hearing, which took place on July 21, 2006.<sup>6</sup>

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."<sup>7</sup> 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."<sup>8</sup> As such,

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<sup>1</sup> Decision of Hearing Officer, Case Nos. 8337/8373, July 24, 2006 ("Hearing Decision"), at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *Id.* at 7.

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.”<sup>9</sup> Additionally, the hearing officer ordered the agency to provide the grievant with back pay and benefits.<sup>10</sup>

Pursuant to the July 24, 2006 hearing decision, the grievant was reinstated to his position with the agency. 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 the agency. The grievant subsequently challenged the re-evaluation and termination by initiating this grievance on September 5, 2006. The grievant and the agency additionally appear to disagree in their interpretation of the hearing officer’s July 24, 2006 decision and the implementation of that decision. More specifically, 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 addition to challenging his re-evaluation and termination, the grievant argues that the agency misapplied the hearing officer’s decision in Case No. 8337/8373. However, these claims are not proper subjects for a grievance. Rather, the means specified in statute by which a grievant can challenge an agency’s implementation of a hearing officer’s decision is to pursue a petition to the circuit court having jurisdiction in the locality in which the grievance arose.<sup>11</sup> Therefore, the grievant’s claims related to the agency’s implementation of the hearing decision do not qualify for a hearing.<sup>12</sup>

We recognize that the September 5, 2006 grievance can be viewed as challenging a new re-evaluation and a new termination, in that the grievant was reinstated following the July 24, 2006 hearing decision, re-evaluated anew, and terminated again for unsatisfactory performance. Nevertheless, because the claims raised by this grievance are so intertwined with implementation issues, qualification is denied. Allowing grievances of this type to proceed to hearing would lead to a potential “revolving door” of repeated grievances being heard by hearing officers on the same situation with no finality in sight. Therefore, it is this Department’s determination that the claims raised by the grievant are more properly brought in the circuit court on a petition for

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<sup>9</sup> *Id.* at 8.

<sup>10</sup> *Id.*

<sup>11</sup> Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).

<sup>12</sup> This would include the grievant’s argument that he be given a full three months’ re-evaluation period once returned to work. It would also include his claims regarding corrections to his benefits for the period of termination, though those claims appear to have already been resolved.

implementation<sup>13</sup> to avoid these problems. This process will allow the parties to have the circuit court rule on the dispute. Moreover, if there is any further question about an agency failing to follow the hearing decision or another order entered by the circuit court, the court will have the necessary authority to enforce its judgments through contempt proceedings or such other processes as the court deems appropriate. As such, this Department determines that in the interests of expediency a grievance such as that raised here is an action more appropriate to circuit court review rather than a new grievance.

For these reasons, qualification for hearing is denied. Therefore, if the grievant still wishes to pursue his claims raised by this grievance, 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.<sup>14</sup>

#### 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 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 does not wish to proceed.

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Claudia T. Farr  
Director

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<sup>13</sup> See Va. Code § 2.2-3006(D).

<sup>14</sup> Va. Code § 2.2-3006(D); *Grievance Procedure Manual* § 7.3(c).