

Issues: Qualification – Performance Evaluation (Arbitrary/Capricious, Interim Evaluation, and Non-Disciplinary Transfer) and Consolidation of grievances for purpose of hearing; Ruling Date: April 3, 2008; Ruling #2008-1897, 2008-1980; Agency: Department of State Police; Outcome: Qualified and Consolidated for hearing.



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

**QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR**

In the matter of Virginia State Police  
Ruling No. 2008-1897 and 2008-1980  
April 3, 2008

The grievant has requested a ruling on whether his October 8, 2007 and February 13, 2008 grievances with the Virginia State Police (VSP or the agency) qualify for a hearing. The grievant's October 8, 2007 grievance challenges a "Below Contributor" rating on his performance evaluation as arbitrary and capricious and a misapplication of policies and procedures. The February 13, 2008 grievance challenges the grievant's transfer and demotion which was effectuated in February 2008 as a result of the grievant's alleged continued poor performance. For the following reasons, the October 8, 2007 grievance and the February 13, 2008 grievance are both qualified and consolidated for purposes of hearing with the grievant's November 14, 2007 grievance.

FACTS

Prior to his demotion, the grievant was employed as a Sergeant with VSP. On October 8, 2007, the grievant signed his performance evaluation for the 2006-2007 performance cycle. The performance evaluation rated the grievant as an overall "Below Contributor." The grievant challenged the performance evaluation by initiating a grievance on October 8, 2007. In his October 8<sup>th</sup> grievance, the grievant challenges the performance evaluation as arbitrary and capricious and alleges that the "evaluation used information that was obtained in violation of state policy and procedure and consisted of information that was illegal." The October 8<sup>th</sup> grievance advanced through all the management resolution steps and to the agency head for qualification. The agency head denied qualification and as such, the grievant now seeks a qualification determination from this Department.

On January 16, 2008, the grievant received an interim performance evaluation that again rated his performance as an overall "Below Contributor." As a result of his continued alleged poor performance, the grievant was demoted to the position of Senior Trooper and reassigned to a different division effective February 10, 2008. The grievant challenged his transfer and demotion by initiating a grievance on February 13, 2008. In his February 13, 2008 grievance, the grievant alleges: "[m]y performance was determined

through the use of fictitious information, arbitrary and capricious evaluations, missapplications [sic] of policies, and incomplete documentation on the behalf of the Department of State Police.” The February 13<sup>th</sup> grievance advanced through all the management resolution steps and to the agency head for qualification. The agency head denied qualification and as such, the grievant now seeks a qualification determination from this Department.

While the grievance challenging his performance evaluation was pending, on October 22, 2007, the grievant received a Group III Written Notice for “[m]anifesting cowardice, feigning illness, or otherwise attempting to shirk official duty.”<sup>1</sup> The grievant challenged the disciplinary action by initiating a grievance on November 14, 2007. In his November 14, 2007 grievance, the grievant alleges: “I received a Group III offense that was either not justified or excessive. The investigation is incomplete and the endorsements and responses contain false information. The discipline is clearly arbitrary and capricious and without merit or a basis. The Department is in violation of the State Police Manual and as such violated my due process.” The November 14, 2007 grievance was subsequently qualified for a hearing and a request for the appointment of a hearing officer was received by this Department on March 15, 2008.

### DISCUSSION

#### *Qualification*

In this case, the grievant’s performance is at issue in all three of his grievances. Moreover, in all three grievances, the grievant alleges that the agency’s actions with regard to his performance are arbitrary and capricious and a misapplication of policies and procedures. Additionally, the agency uses many of the same events to support the poor performance evaluation and the Group III Written Notice. For instance, the documents supporting the Group III Written Notice mention the grievant’s alleged past poor performance as a supervisor and cite to previous counseling sessions. These same counseling sessions are also discussed in support of the grievant’s “Below Contributor” rating on his 2006-2007 performance evaluation.

In light of the above and because the November 14<sup>th</sup> grievance has been qualified for a hearing, this Department deems it appropriate to qualify the October 8, 2007 and February 13, 2008 grievances as well to help assure a full exploration of what could be interrelated facts and claims. Accordingly, the October 8, 2007 and February 13, 2008 grievances are qualified as well. This qualification ruling in no way determines that the agency’s actions were arbitrary or capricious or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

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<sup>1</sup> More specifically, the agency alleges that the grievant failed to provide assistance to Special Agent R with a pending arrest.

*Consolidation*

Written approval by the Director of this Department in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will grant consolidation when grievances involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.<sup>2</sup>

This Department finds that consolidation of the October 8, 2007 and February 13, 2008 grievances with the November 14, 2007 grievance is appropriate. The grievances involve the same parties and likely many of the same witnesses. In addition, they share a related factual background and common issues. Further, consolidation is not impracticable in this instance.

This Department's rulings on compliance are final and nonappealable.<sup>3</sup>

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's October 8, 2007 and February 13, 2008 grievances are qualified for hearing and consolidated with the grievant's November 14, 2007 grievance. 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 for the October 8, 2007 and February 13, 2008 grievances.

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Claudia T. Farr  
Director

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<sup>2</sup> *Grievance Procedure Manual* § 8.5.

<sup>3</sup> Va. Code § 2.2-1001(5).