

Issue: Qualification – Performance Evaluation (arbitrary and capricious) and Consolidation of grievances for purpose of hearing; Ruling Date: February 27, 2008; Ruling #2008-1955; Agency: Department of Corrections; Outcome: Qualified and Consolidated.



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

**QUALIFICATION AND  
CONSOLIDATION RULING OF DIRECTOR**

In the matter of the Department of Corrections  
Ruling Numbers 2008-1955  
February 27, 2008

The grievant has requested a ruling on whether his November 16, 2007 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons discussed below, the November 16<sup>th</sup> grievance is qualified and consolidated with the grievant's other pending grievances for a single hearing.

FACTS

On November 16, 2007, the grievant initiated a grievance challenging his 2007 performance evaluation, which rated his performance as "Below Contributor." After the parties failed to resolve this grievance through the management steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed the agency head's decision to this Department.

In addition to his November 16, 2007 grievance, the grievant also has three pending November 7, 2007 grievances, which have been qualified by the agency head and consolidated for hearing.<sup>1</sup> These grievances challenge three Group II Written Notices issued to the grievant on October 9, 2007. The agency has identified these three Written Notices (and the alleged underlying conduct) as at least a partial basis for the grievant's "Below Contributor" rating.

DISCUSSION

*Qualification*

Under the grievance procedure, a dismissal for unsatisfactory performance automatically qualifies for a grievance hearing.<sup>2</sup> On the other hand, grievances that challenge "Below Contributor" performance evaluations as arbitrary and capricious are generally not qualified for hearing unless the grievant provides sufficient evidence in support of his claim.<sup>3</sup>

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<sup>1</sup> EDR Ruling Nos. 2008-1937, 2008-1938, 2008-1939.

<sup>2</sup> Grievance Procedure Manual, §4.1(a).

<sup>3</sup> Grievance Procedure Manual, §4.1(b). *See also* EDR Ruling Nos. 2006-1291, 2006-1393.

In a case like this, where the grievant will be afforded a hearing to challenge the Written Notices related to his evaluation, it simply makes sense to send his grievance challenging the performance rating to hearing as well.<sup>4</sup> The grievances all share common factual questions about the grievant's work performance and the agency's assessment of that performance. Further, sending these related claims to a single hearing (*see* consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues. We note, however, that this qualification ruling in no way determines that the 2007 annual performance evaluation was arbitrary or capricious, retaliatory, a misapplication or unfair application of policy, or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

*Consolidation*

EDR strongly favors consolidation of grievances for hearing 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>5</sup>

This Department finds that consolidation of the November 16th grievance with the three November 7, 2007 grievances is appropriate. The grievances involve the same parties and likely many of the same witnesses. In addition, they share a related factual background. Finally, consolidation is not impracticable in this instance.

In the interests of efficiency, as the agency has already requested the appointment of a hearing officer in the November 7th grievances, this Department shall assume that the grievant wishes to advance his November 16<sup>th</sup> grievance to hearing and appoint a hearing officer to hear the consolidated grievances. If the grievant does not wish to pursue his November 16<sup>th</sup> grievance to hearing, he should notify this Department within 5 days of the date of this ruling.

This Department's rulings on compliance are final and nonappealable.<sup>6</sup>

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Claudia T. Farr  
Director

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<sup>4</sup> *See* EDR Ruling No. 2005-957.

<sup>5</sup> *Grievance Procedure Manual* § 8.5.

<sup>6</sup> Va. Code § 2.2-1001(5).