

Issues: Qualification – Discrimination (Race), and Consolidation of Grievances for Purpose of Hearing; Ruling Date: September 26, 2008; Ruling #2009-2127, 2009-2129, 2009-2130; Agency: Department of Corrections; Outcome: Qualified and Consolidated for Hearing.



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

**QUALIFICATION AND  
CONSOLIDATION RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling Numbers 2009-2127, 2009-2129, 2009-2130  
September 26, 2008

The grievant has requested a ruling on whether her May 21, 2008 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, the May 21, 2008 grievance (Grievance 1) is qualified and consolidated with the grievant's pending May 30, 2008 grievances for a single hearing. In addition, this ruling will address procedural abnormalities with these latter two grievances.

FACTS

On May 21, 2008, following a May 16, 2008 incident and related meetings with her supervisors, the grievant initiated Grievance 1 raising the issue of discrimination and harassment in the workplace. Subsequently, the grievant received a Group III Written Notice with suspension regarding the May 16, 2008 incident. Additionally, the grievant was given a Group II Written Notice with termination on May 30, 2008, arising from occurrences on May 21, 2008. The grievant challenged these Written Notices in grievances initiated on May 30, 2008 (Grievances 2 and 3). On August 11, 2008, the agency head qualified Grievances 2 and 3 with the following language on both Form A's: "Disciplinary actions are grievable. No evidence of harassment and discrimination was found— This issue is not qualified."<sup>1</sup> However, on the same date, the agency head declined to qualify Grievance 1 for hearing. The grievant now appeals that determination and requests that this Department qualify her grievance.

DISCUSSION

Grievance 1

*Qualification*

Grievances that may be qualified for a hearing include actions related to discrimination.<sup>2</sup> In this case, the management actions challenged in Grievance 1 appear to be significantly intertwined with the Written Notices addressed by Grievances 2 and 3 and issues raised therein. Because the grievant will be afforded a hearing to challenge the Written Notices, it simply makes

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<sup>1</sup> The agency has also submitted a Form B for Grievances 2 and 3 requesting the appointment of a hearing officer.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1(b).

sense to send her grievance challenging the broader issues of discrimination and harassment, which also allegedly influenced the disciplinary actions, to hearing as well.<sup>3</sup> The grievances all share common factual questions about the grievant's work performance and the agency's assessment of that performance, all of which the grievant appears to argue have been affected by discrimination and/or harassment. The incident and surrounding events that gave rise to the Group III Written Notice appears to be the same incident that led the grievant to initiate Grievance 1. 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 actions challenged by Grievance 1 were discriminatory or otherwise improper, but rather only determines 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>4</sup> This Department finds that consolidation of Grievances 1 – 3 is appropriate.<sup>5</sup> The grievances involve the same parties and share a related factual background. Moreover, consolidation is not impracticable in this instance. Therefore, Grievances 1 – 3 will be consolidated for a single hearing for adjudication by a hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

### Grievances 2 & 3

In the interests of expediency, this Department must also address issues raised by the agency's partial qualifications of Grievances 2 and 3. The agency head appears to have qualified the grievances for hearing with respect to the Written Notices only. He did not qualify for hearing the grievant's assertions of discrimination and harassment, also raised in Grievances 2 and 3.

There are instances when partial qualification of a grievance is appropriate.<sup>6</sup> For example, if one grievance raises two or more completely separate issues challenging different management actions -- for instance, a Written Notice and a selection -- then partial qualification of that grievance could be the correct result. That is not the case here, however. There is only one management action being challenged in Grievance 2 (a Group III with suspension) and only

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<sup>3</sup> See, e.g., EDR Ruling No. 2008-1955; EDR Ruling No. 2005-957.

<sup>4</sup> *Grievance Procedure Manual* § 8.5.

<sup>5</sup> During its investigation for this ruling, the grievant indicated that it made sense to consider these grievances at one time. In addition, the agency has already sought consolidation of Grievances 2 and 3. Further, it appears the agency attempted to handle all the grievances together during the management steps.

<sup>6</sup> See *Grievance Procedure Manual* § 4.3.

one management action in Grievance 3 (a Group II with termination).<sup>7</sup> Grievant's assertions of discrimination and harassment are the *theories* she advances to challenge the Written Notices and related discipline, and as such cannot be severed from those grievances. Accordingly, the agency's partial qualification of Grievances 2 and 3 was improper.<sup>8</sup> The entireties of both grievances qualify for hearing and this Department, pursuant to its authority under Va. Code §§ 2.2-1001(5) and 2.2-3004(D), qualifies Grievances 2 and 3 in full.

### CONCLUSION

Based on the foregoing, Grievances 1 – 3 are hereby qualified for hearing in full and consolidated for a single hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear these grievances, using the Grievance Form B. Further, the agency is ordered to submit updated Form B's for Grievances 2 and 3 reflecting the qualification of those grievances in full. This Department's rulings on compliance are final and nonappealable.<sup>9</sup>

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Claudia T. Farr  
Director

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<sup>7</sup> As this Department has ruled, the "claims" or "issues" raised by a grievance are the management actions being challenged. *See, e.g.*, EDR Ruling Nos. 2007-1561 & 2007-1587; EDR Ruling No. 2007-1457; EDR Ruling No. 2007-1444.

<sup>8</sup> Furthermore, if there were outstanding issues or claims that were not qualified, the Form A's should have been returned to the grievant for her to appeal the agency head's determination. *See Grievance Procedure Manual* § 4.3. Indeed, the agency's letter to the grievant following the partial qualification decision of the agency head makes no mention of such a partial qualification. The letter appears to indicate that the entirety of the grievances were qualified for hearing, which was not the intention of the agency head. Failing to indicate the partial nature of the qualification in this letter and the apparent failure of the agency to return the grievance paperwork to the grievant so that she could request qualification of the portions of the grievances not qualified by the agency head was inappropriate.

<sup>9</sup> Va. Code § 2.2-1001(5).