

Issue: Qualification – Management Actions (Assignment of Duties); Ruling Date: October 9, 2008; Ruling #2009-2135; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Mental Health,  
Mental Retardation and Substance Abuse Services  
Ruling Number 2009-2135  
October 9, 2008

The grievant has requested a qualification ruling on whether his June 26, 2008 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency) qualifies for hearing. The grievant alleges that the agency misapplied and/or unfairly applied policy in assigning him work and work hours. For the reasons discussed below, this grievance does not qualify for hearing.

**FACTS**

The grievant is a Transportation Operator II with the agency. At the time he initiated his grievance, he apparently was assigned to work on the food truck, with a schedule of four ten-hour days. According to the grievant, the agency has a long practice of moving the employee with the most seniority on the food truck to assignments with five eight-hour days, when such assignments become available. In his grievance, initiated on June 26, 2008, the grievant asserts that the agency failed to honor this practice when it allowed an employee with less food truck seniority than grievant to move to a 7 a.m.-3:30 p.m., Monday through Friday assignment.

During the course of the management steps, two new employees began working on the food truck and the grievant was given a five eight-hour day assignment. The grievant acknowledges that, as a result of his reassignment, the relief he now seeks through his grievance is to be given seniority with respect to being required to work the food truck during future absences and shortages.

On August 8, 2008, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied this request, and the grievant has appealed to this Department.

### DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the agency's actions result in an adverse employment action<sup>2</sup> and the grievant presents evidence raising a sufficient question as to whether the actions were taken for disciplinary reasons, were influenced by discrimination or retaliation, or were the result of a misapplication or unfair application of policy.<sup>3</sup>

Even if sufficient evidence exists, however, there are some instances when qualification may be inappropriate based upon the circumstances of the case. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In this case, it appears that there is no effectual relief that a hearing officer could award. While the hearing officer could order that the grievant be given a five eight-hour day assignment (if in fact the grievant were able to establish that the agency had misapplied or unfairly applied policy), the grievant has already been given such an assignment. The hearing officer could not award any additional relief in this case.

Moreover, with respect to the grievant's request that the hearing officer require the agency to choose him last when filling temporary staffing needs on the food truck, this request is premature. In the event the grievant is selected first to fill temporary needs, he may grieve the agency's action at that time. We note, however, that while the grievant may initiate a grievance challenging the agency's action, such a grievance would not qualify for hearing unless the grievant could show that he suffered an adverse employment action and he presents evidence raising a sufficient question as to whether the actions were taken for disciplinary reasons, were influenced by discrimination or retaliation, or were the result of a misapplication or unfair application of policy.

### 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 the

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<sup>1</sup> Va. Code § 2.2-3004(B).

<sup>2</sup> An "adverse employment action" is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>3</sup> Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (C).

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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 wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr  
Director