

Issues: Qualification – Performance (Arbitrary/Capricious Evaluation and Notice of Improvement Needed); Ruling Date: February 18, 2009; Ruling #2009-2215; Agency: Virginia Department of Transportation; Outcome: Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2009-2215
February 18, 2009

The grievant has requested qualification of his October 27, 2008 grievance. In his grievance, the grievant alleges that, among other things, the Virginia Department of Transportation (VDOT or the agency) (1) wrongfully suspended him, (2) inappropriately disciplined him via a Written Notice, (3) unfairly rated him as a "Below Contributor" on his annual performance evaluation, (4) failed to utilize progressive discipline, (5) failed to provide him with documentation, and (6) belatedly issued him two Notices of Improvement Needed for issues already corrected. The agency qualified the Written Notice and suspension but denied qualification of all other issues. For the reasons set forth below, the remainder of issues raised in the grievance are qualified.

FACTS

The grievant is employed as Bridge/Structure Inspection Team Leader. On or about September 25, 2008, the grievant allegedly failed to comply with a medical examination by refusing to complete a medical questionnaire, in a purportedly disruptive manner. Accordingly, on October 3, 2008, the agency issued the grievant a Group III Written Notice with a 10 day suspension. Also on October 3rd, the agency issued the grievant two Notices of Improvement Needed/Substandard Performance (NIN's), one of which appears to reference the events of September 25, 2008. In addition, that same day, the grievant was presented with his annual performance evaluation, in which he received an overall "Below Contributor" rating.

The agency qualified the issues of a Group III Written Notice and 10 day suspension but denied qualification of the remaining issues raised in his grievance. Accordingly, the grievant has appealed to this Department.

DISCUSSION

Qualification

Under the grievance procedure, formal discipline automatically qualifies for a grievance hearing.¹ On the other hand, grievances that challenge performance

¹ *Grievance Procedure Manual*, § 4.1(a).

evaluations are generally not qualified for hearing unless the grievant provides sufficient evidence in support of his claim. However, as the grievant in this case will be afforded a hearing to challenge Group III Written Notice, we find that his grievance challenging his annual performance evaluation and potentially related NIN's should be qualified for hearing as well, without further exploration of the merits of his October 27, 2008 grievance at the qualification stage.

In making this determination, we note that the agency presented the grievant, all on a single day, two NIN's, a Written Notice, and a "Below Contributor" rating on his annual performance evaluation. At least one of the NIN's and the Written Notice both appear to relate to the September 25th incident. Furthermore, state policy requires that in order to rate an employee as a "Below Contributor" the employee must receive at least one sustainable NIN or Written Notice within the performance cycle.² Here, the agency has already granted the grievant a hearing to challenge the Written Notice and suspension. Without qualification of the entire grievance, even if the grievant were to establish that the Written Notice and suspension were unwarranted, the "Below Contributor" rating could presumably be sustained as there would still remain the second NIN. As a matter of fairness and procedural economy, it simply makes sense to allow the grievant to present his evidence regarding the alleged impropriety of both NIN's while at hearing.³ Thus, the entire grievance is qualified for hearing.⁴ We further note, that this qualification ruling in no way determines that the discipline issued to the grievant was unwarranted nor that the agency's actions were a misapplication or unfair application of policy or otherwise improper, but only that further exploration of the facts by a hearing officer is appropriate.

In the interests of efficiency, as the agency has already requested the appointment of a hearing officer for adjudication of the Written Notice, this Department shall assume that the grievant wishes to advance his entire grievance to hearing and appoint a hearing officer to hear the entire grievance. If the grievant does not wish to pursue his entire October 27th grievance to hearing, he should notify this Department within 5 days of the date of this ruling.

Claudia T. Farr
Director

² Department of Human Resources Management (DHRM) Policy 1.40.

³ The grievant asserts that the issues in the NIN's had been corrected prior to the date that they were issued and that the NIN's should have been issued earlier in the performance cycle.

⁴ See EDR Ruling No. 2006-1354 (related claims qualified for hearing).