

Issue: Qualification – Management Actions (Assignment of Duties); Ruling
Date: June 1, 2009; Ruling #2009-2273; Agency: Department of Corrections;
Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2009-2273
June 1, 2009

The grievant has requested a ruling on whether her December 11, 2008 grievance¹ with the Department of Corrections (DOC or the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify.

FACTS

The grievant is employed by the agency as a Correctional Officer. She asserts that on November 8, 2008, she was assigned to work in a housing unit in which smoking is permitted. She states that, due to a medical problem, she asked the captain to immediately reassign her to a non-smoking area. Although the grievant made her request for a medical reason, she asserts that this was not a request for "special accommodations" or for a temporary work assignment.

The grievant states that when she spoke to the captain about her need to be removed, he told her that he could not accommodate her and that she needed to discuss her need for accommodations with the major. The grievant apparently did not speak to the major that day, but instead left work early to seek medical treatment. Once the grievant provided the agency with medical documentation regarding her need for a reassignment, the agency granted her reassignment on a temporary basis as an accommodation. The grievant admits that once she "went to the doctor," she requested and received "special accommodations." The agency states, and the grievant does not apparently dispute, that she had never previously provided the agency with documentation regarding her inability to work in a smoking building.

The grievant initiated a grievance challenging the agency's alleged failure to immediately remove her from the smoking building. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify her grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

¹ Because the grievant did not date her Grievance Form A, we will assume, for purposes of this ruling only, that the grievance was initiated on December 11, 2008, the date of the first-step response.

DISCUSSION

The grievant asserts that the agency's alleged failure to remove her immediately from the smoking building violated "the policies and procedures that govern[] DOC." She also asserts that the agency's alleged actions were in retaliation for an earlier grievance.

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;² (2) the employee suffered a materially adverse action;³ and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity.

However, there are some cases where qualification is inappropriate even if a grievant raises a sufficient question of misapplication of policy or retaliation. 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 where the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

In the present case, the only relief sought by the grievant is that the captain who did not grant her request for an immediate reassignment be disciplined under the Standards of Conduct. This is not relief that a hearing officer could order. Further, a hearing officer could not award any monetary relief to compensate the grievant for any harm she may have suffered as a result of the agency's alleged actions. At most, if the grievant prevailed, the hearing officer could order the agency to provide accommodations for the grievant's medical condition in the future. However, it appears to be undisputed that as soon as the grievant provided the agency with medical documentation, her request for reassignment was granted. Thus, further effectual relief is unavailable. Accordingly, because a hearing officer could not provide the grievant with any further meaningful relief, this grievance is not qualified for hearing.

² See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

³ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

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 this Department's 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 notifies the agency that he wishes to conclude the grievance.

Claudia Farr
Director