

Issues: Qualification – Discipline (Failure to Follow Instructions, Unsatisfactory Performance and Termination), and Grievance Procedure (Documents); Ruling Date: July 17, 2009; Ruling #2010-2369; Agency: Department of Veterans Services; Outcome: Qualified for Hearing.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Veteran Services
Ruling No. 2010-2369
July 17, 2009

The grievant has requested a ruling on whether her June 12, 2009 grievance with the Department of Veteran Services (DVS or the agency) qualifies for a hearing. In her June 12th grievance, the grievant challenges the issuance of a Group II Written Notice with termination. As discussed below, this grievance qualifies for a hearing.

FACTS

Prior to her termination, the grievant was an Administrative and Office Specialist III with the agency. On May 15, 2009, management issued the grievant a Group II Written Notice (Written Notice) with termination for "Unsatisfactory Performance and Failure to Follow Instructions and/or Policy." On June 12, 2009, she timely initiated an expedited grievance requesting the removal of the Written Notice and reinstatement to her position. The grievance advanced through the management resolution steps and on June 25, 2009, the grievant advanced her grievance to the qualification phase for the agency head to determine whether the issue presented qualified for a hearing. Subsequently, the agency head denied qualification, asserting that the agency's actions were fairly and appropriately administered in accordance with policy. The grievant has asked this Department to qualify her grievance for hearing. The grievant also asserts that management has improperly denied her requested documents relevant to her grievance.¹

¹ According to the grievant, she has repeatedly asked the agency for documentation supporting the issuance of the Group II Written Notice with termination, but has failed to receive any such documents.

DISCUSSION

Qualification

The Commonwealth's policy "as an employer, [is] to encourage the resolution of employee problems and complaints."² To that end, the General Assembly has determined that "the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes that may arise between state agencies and those employees who have access to the procedure."³ While most grievances may proceed through the management resolution steps if the grievant so chooses,⁴ only grievances that challenge certain actions can proceed to a hearing before a hearing officer.⁵ Importantly here, by statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices and those suspensions, demotions, transfers and assignments, and dismissals resulting from formal discipline) *automatically* qualify for a hearing.⁶

In this case, the grievant challenges a disciplinary action by management -- the issuance of a Written Notice with termination. Therefore, although the agency contends that management's actions were warranted and appropriate under the given circumstances, the grievant is entitled by statute and the grievance procedure to advance this grievance to a hearing, at which time each party may present their case.

For the reasons set forth above, the grievant's June 12, 2009 grievance is qualified for hearing. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer using the Grievance Form B.

Documents

In a case such as this where the June 12, 2009 grievance challenges formal discipline with termination and has been qualified for hearing by this Department, it makes little sense to halt the grievance process so that EDR can sort out the document production dispute. At this late stage in the grievance process, the *only* purpose for which the requested documents have any bearing is the grievance hearing. Moreover, the hearing officer who will preside over the hearing will be called upon to make relevancy determinations on *all* evidence presented at hearing. For both the hearing officer and this

² Va. Code § 2.2-3000(A).

³ *Id.*

⁴ If the employee does not have access to the grievance procedure at the time of the initiation of the grievance, then management is not required to proceed with the resolution step process. *See Grievance Procedure Manual* § 2.3; *see also Grievance Procedure Manual* § 2.4, for instances where the agency may administratively close a grievance for noncompliance with the grievance procedure.

⁵ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(a)-(c). For purposes of determining qualification for a hearing, agency actions are divided into three categories: Actions Which *Automatically* Qualify, Actions Which *May* Qualify and Actions Which *Do Not* Qualify.

⁶ *Id.* Dismissals for unsatisfactory performance also automatically qualify for a hearing.

Department to rule on the document issues *at this stage in the grievance process* would be redundant and an inefficient use of state resources. Thus, allowing the hearing officer to make the determination of whether a particular document should be produced, once the grievance has been qualified, is simply a matter of administrative efficiency.⁷

Accordingly, all remaining disputes relating to the production of documents should be presented to the hearing officer once appointed for his determination. If either party to this grievance later believes that the hearing officer exceeded his authority or failed to comply with the grievance procedure by ordering or failing to order the production of specific documents, that party may then request a compliance ruling from this Department.

The parties are advised to contact the hearing officer prior to the scheduled hearing date to request and discuss the production of documents in this matter. This Department's rulings on matters of compliance are final and nonappealable.⁸

Claudia T. Farr
Director

⁷ If the grievance were still at the resolution steps stage of the grievance process or even at the agency head's qualification stage, the grievance process would have halted, as the requested documents may have had some bearing on an agency respondent's response or the agency head's determination. Because this grievance has proceeded through all resolution steps and has now been qualified by this Department, the requested documents could have no bearing on any agency management action. Therefore, there is no reason to stop the grievance process. We note also that §8.2 of the *Grievance Procedure Manual* states that if documents are denied prior to the appointment of a hearing officer, the requesting party *may* seek relief from this Department. This provision is intended to provide general guidance to parties as to whom they should direct their request for relief. This provision does *not* divest from this Department the discretion to pass to the hearing officer the initial determination of document relevancy when, as in this case, the grievance has passed through each of the resolution steps and has been qualified for hearing.

⁸ See Va. Code § 2.2-1001(5) and Va. Code § 2.2-3003(G).