

Issue: Qualification – Separation from State (Voluntary Resignation); Ruling  
Date: September 11, 2009; Ruling #2010-2401; Agency: Department of  
Corrections; Outcome: Qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Corrections  
Ruling No. 2010-2401  
September 14, 2009

The grievant has requested a ruling on whether his July 23, 2009 grievance with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant asserts that the agency wrongfully terminated him from employment. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The agency employed the grievant as a Senior Probation and Parole Officer. On March 10, 2009, the grievant was apparently injured in a work-related automobile accident; and as a result of these injuries, the grievant was absent from work for several months. By letter dated June 19, 2009, the grievant was advised by the agency that he had been released to return to work in a light duty status (a claim the grievant denies) and that his failure to return to work on June 24, 2009 would be deemed by the agency to be a “voluntary resignation.” The grievant informed the agency that he did not believe he had been released to return to work by his physicians and he asked the agency not to terminate his employment. Notwithstanding the grievant’s request, after the grievant failed to return to work as instructed, the agency “voluntarily resigned” the grievant from his employment effective June 29, 2009.

On July 23, 2009, the grievant initiated a grievance challenging his separation from employment. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant’s request, and he appealed to this Department.

DISCUSSION

The grievance statutes and procedure reserve to management 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

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<sup>1</sup> See Va. Code § 2.2-3004(B).

and the establishment or revision of compensation generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>2</sup> Here, the grievant asserts that he was wrongfully terminated from employment.

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by the Department of Human Resource Management (DHRM).<sup>3</sup> For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.<sup>4</sup> These safeguards are in place to ensure that disciplinary action is appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).<sup>5</sup>

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.<sup>6</sup> In this case, the grievant asserts that the agency wrongfully terminated his employment. Because termination clearly constitutes an adverse employment action, we find that the grievant has raised a sufficient question as to whether the grieved management conduct was an adverse employment action.

We also find that the grievant has presented sufficient evidence that the agency's primary intent was to correct or punish perceived poor performance to qualify for hearing. In this case, the agency appears to have been attempting to address the grievant's refusal to return to work in accordance with agency instructions.

As the grievant has presented evidence raising a sufficient question as to whether his separation from employment was an unwarranted informal disciplinary action, the grievance is qualified for hearing. Whether the agency's action was primarily to punish or correct the grievant's behavior is a factual determination that a hearing officer, not this Department, should make.

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<sup>2</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

<sup>3</sup> See Va. Code § 2.2-2900 *et seq.*

<sup>4</sup> DHRM Policy No. 1.60, "Standards of Conduct".

<sup>5</sup> See EDR Ruling Nos. 2002-227 & 230.

<sup>6</sup> See *e.g.*, *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

At the hearing, the grievant will have the burden of proving that his separation from employment was adverse and disciplinary. If the hearing officer finds that it was, the agency will have the burden of proving that the action was warranted. Should the hearing officer find that the separation was both disciplinary and unwarranted, he or she may rescind the separation, just as he or she may rescind any formal disciplinary action.<sup>7</sup>

We note that this qualification ruling in no way determines that the agency's actions with respect to the grievant constituted unwarranted informal discipline or were otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

*Alternative Theories and Claims*

Because the issue of wrongful termination qualifies for a hearing, this Department deems it appropriate to send any alternative theories and claims related to the grievant's separation from employment for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's July 23, 2009 grievance is qualified. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

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Claudia T. Farr  
Director

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<sup>7</sup> See EDR Ruling No. 2002-127.