

Issue: Qualification – Separation from State (disciplinary termination); Ruling Date: May 12, 2010; Ruling #2010-2540; 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. 2010-2540
May 12, 2010

The grievant has requested a ruling on whether her December 16, 2009¹ grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

On November 18, 2009, the grievant was removed from state employment for alleged job abandonment (unauthorized leave of absence for three days) and listed as ineligible for rehire. The grievant was notified of her removal in a letter dated December 18, 2009.² According to the agency, the grievant had also exhausted her Family and Medical leave. The grievant has submitted the December 16, 2009 grievance to challenge her termination. She seeks to be reinstated and to have her ineligibility for rehire reversed. The grievant also asserts that the agency discriminated against her on the basis of a medical problem. The agency head declined to qualify the grievance for a hearing and the grievant now appeals that determination.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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 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.⁴

¹ This date is listed next to the grievant's signature on her Grievance Form A. It is unclear whether this is the actual date the grievant submitted her grievance. However, the actual date of initiation is not pertinent to this ruling.

² The grievant was initially removed from employment effective November 8, 2009. The agency sent the grievant a letter, dated November 17, 2009, notifying her of the removal. However, because of extensions to the grievant's VSDP benefits, her effective date of removal was later changed to November 18, 2009.

³ See Va. Code § 2.2-3004(B).

⁴ Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

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).⁵ For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.⁶ These safeguards are in place to ensure that disciplinary actions are 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 action⁷ against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).⁸

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.”⁹ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.¹⁰ 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.

There is little question that this case involves a disciplinary action by the agency for the grievant’s alleged misconduct, i.e., a failure to return to work after allegedly being cleared to do so by her physicians. Absences in excess of three workdays without authorization, the stated reason for the grievant’s removal, is typically categorized as a Group III offense under the Standards of Conduct.¹¹ In addition, it appears that the agency gave the grievant notice of the basis for her termination.

As the grievant’s separation from employment was clearly a disciplinary action, the grievance is qualified for hearing. At the hearing, the agency will have the burden of proving that the disciplinary termination was warranted. Should the hearing officer find that the agency’s

⁵ Va. Code § 2.2-2900 *et seq.*

⁶ DHRM Policy No. 1.60, *Standards of Conduct*.

⁷ The grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.” *See Grievance Procedure Manual* § 4.1(b).

⁸ *See, e.g.*, EDR Ruling No. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227 & 230; *see also* Va. Code § 2.2-3004(A) (indicating that grievances involving “dismissals resulting from formal discipline or unsatisfactory job performance” can qualify for hearing).

⁹ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

¹⁰ *See, e.g.*, *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

¹¹ DHRM Policy 1.60, *Standards of Conduct*, Attach. A.

action was unwarranted, he or she may rescind the separation, just as he or she may rescind any formal disciplinary action.¹²

This qualification ruling in no way determines that the agency's actions with respect to the grievant violated policy 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 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 December 16, 2009 grievance is qualified. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

Claudia T. Farr
Director

¹² See EDR Ruling No. 2002-127. In essence, this case will progress as if it was a termination based on a Written Notice.