Issue: Qualification – Discipline (termination); Ruling Date: September 6, 2011; Ruling No. 2012-3072; 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 Number 2012-3072
September 6, 2011

The grievant has requested a ruling on whether her May 19, 2011 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

Effective April 2, 2011, the grievant was removed from state employment for failure to return to work after approved leave. The grievant was notified of her separation in a letter dated May 5, 2011. She submitted the May 19, 2011 grievance to challenge her termination. She seeks various forms of relief, including to receive due process and her job back. 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.[1] 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.[2]

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).[3] For example, when a disciplinary action is taken against an employee, certain policy provisions

[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[3] Va. Code § 2.2-2900 *et seq.*

must be followed.[4] 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 action[5] against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).[6]

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."[7] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[8] 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 also little question that this case involves a de facto disciplinary action by the agency for the grievant's alleged misconduct, i.e., a failure to return to work after the expiration of her approved leave. Pursuant to DHRM Policy 4.30, an employee who is not approved to be absent from work may be subject to certain actions, including disciplinary action.[9] Indeed, an absence in excess of three workdays without authorization is typically categorized as a Group III offense under the Standards of Conduct.[10] In the agency's March 4, 2011 letter, this was precisely the offense mentioned to the grievant.

As the grievant's separation from employment was clearly a disciplinary matter, 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 action was unwarranted, he or she may rescind the separation, just as he or she may rescind any formal disciplinary action.[11]

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[4] DHRM Policy No. 1.60, *Standards of Conduct,* establishing required procedures for disciplinary actions and removals. Of potential significance here as well, the *Standards of Conduct* also expressly states that when an agency "removes" an employee from state service for an inability to meet working conditions, final notification of removal should be via memorandum or letter, not by a Written Notice form and that employees may challenge removals through the grievance procedure.

[5] 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).

[6] *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).

[7] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

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

[9] DHRM Policy 4.30, *Leave Policies – General Provisions*.

[10] DHRM Policy 1.60, *Standards of Conduct*, Attach. A.

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

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 May 19, 2011 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.

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Claudia T. Farr
Director