Issue: Qualification – Grievance Procedure (Information Gathering); Ruling Date: October 20, 2011; Ruling No. 2012-3084; Agency: Department of State Police; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of State Police
Ruling Number 2012-3084
October 20, 2011

The grievant has requested a ruling on whether the issues in his July 5, 2011 grievance with the Department of State Police ("agency") qualify for a hearing. In his grievance, the grievant claims the agency unfairly conducted an internal administrative investigation which led to the formal discipline that he is challenging in his July 5th grievance. The agency qualified the Written Notice for hearing, but declined to qualify the investigation. For the reasons discussed below, the investigation is not qualified as a separate matter for which the hearing officer can grant relief. However, as explained further in this ruling, the grievant is free to challenge the conclusions of the investigation, in particular, those that were used to support the Written Notice.

FACTS

The grievant is employed as a Senior Trooper with the Department of State Police. On October 27, 2010, the agency initiated an internal administrative investigation after a fellow officer filed a complaint against the grievant alleging four violations of agency policy. The internal administrative investigation was finalized and the case file was forwarded to the Field Office for final disposition on May 24, 2011. Based upon the findings and recommendation in the internal administrative investigation report, the agency issued the grievant a Group III Written Notice on June 6, 2011, for violating two sections in General Order ADM 12.02 policy. Specifically, the Written Notice stated the grievant violated paragraph 13(b)(28) of General Order ADM 12.02 and paragraph 12(b)(1) of General Order ADM 12.02 from January 19, 2010 through August 16, 2010.

The grievant alleges that the internal administrative investigation was "selective, flawed, and biased" because key witnesses were not interviewed for the administrative investigation, the grievant was interviewed after all the witnesses and the complainant were interviewed, and the officer who filed the initial complaint was also the first officer to endorse and sign-off on the internal administrative investigation report. The July 5th grievance proceeded through the management resolution steps without resolution, and the agency qualified the Group III Written Notice for hearing on August 12, 2011. However, the agency denied qualification of the administrative investigation findings and the grievant's assertion that the agency unfairly and inconsistently applied agency policies, procedures, rules, and regulations while investigating the

grievant. The grievant now seeks a qualification determination from this Department regarding the investigation.

DISCUSSION

Although state employees with access to the grievance procedure may grieve anything related to their employment, only certain grievances qualify for a hearing.[1] By statute and under the grievance procedure, the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, as well as the work activity accepted by an employee as a condition of employment or which reasonably may be expected to be part of the content of the job, "shall not proceed to a hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.[2] In this case, the grievant argues the agency misapplied and unfairly applied its internal administrative investigation policies and procedures.

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[3] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.[4] An adverse employment action is defined as a "tangible employment action constitute[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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6] An adverse employment action occurred in this case because the grievant was issued a Group III Written Notice.

In this case, it is far from clear whether the administrative investigation, in and of itself, rises to the level of an adverse employment action. Furthermore, assuming without deciding that it could be viewed as an adverse action, it would make little sense to qualify the investigation as an independent matter for adjudication by a grievance hearing. First, with claims of misapplication of policy, the relief typically available is for the hearing officer to order the agency to reapply policy at the point at which it became tainted. In a case such as this, redoing the investigation makes little sense because the grievant will have a full opportunity at hearing to

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[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).
[3] *See Grievance Procedure Manual* § 4.1(b).
[4] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a somewhat lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[5] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Washington Homes, Inc., 487 F. 3d. 208, 219 (4th Cir. 2007).

challenge the investigation and, more importantly, any associated conclusions that may have led to his discipline. Moreover, we note that a hearing officer has the authority to modify a grievant's discipline if warranted under the particular facts of a case,[7] but the hearing officer has no authority to order the agency to modify its written investigatory findings, even if the hearing officer were to find that agency policy had been inconsistently or unfairly applied. In EDR Ruling No. 2011-2988, this Department explained that while a hearing officer has no authority to order an agency to revise or amend any reports, summaries, emails, or other documents, such modification is unnecessary because a hearing decision itself can vacate *for all personnel purposes* erroneous investigation findings. Thus, for all of these reasons, the issue of the investigation itself is not qualified for a hearing.

The fact the investigation has not been qualified for hearing in no way means that the grievant is precluded from attempting to challenge the propriety of the investigation and, most importantly, any associated conclusions resulting from the investigation, particularly those used to support the discipline taken against the grievant. Not qualifying the investigation simply means that the hearing officer does not have any authority to award any relief with respect to the investigation itself, with the exception that if the hearing officer concluded that the findings of the investigation were flawed, he could so state in his hearing decision, and, if those flawed findings served as the underpinning for the discipline, the hearing officer could modify or remove the discipline as appropriate under the facts.

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 the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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 wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

[7] Va. Code § 2.2-3005.1.