Issue: Qualification – Discipline (Termination); Ruling Date: October 11, 2011; Ruling No. 2012-3119; 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 2012-3119
October 11, 2011

The grievant has requested a ruling on whether his June 3, 2011[1] 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

The agency sent the grievant a letter, dated May 17, 2011, requesting an update as to his status while he was on suspension pending resolution of court matters. The grievant was instructed to contact the agency by May 23, 2011, or his failure to respond would be considered a resignation. The grievant states he did not receive this letter until May 25, 2011. However, on May 23, 2011, the grievant was terminated for absence in excess of three days and failure to keep the facility abreast of his pending criminal charges. The grievant submitted the June 3, 2011 grievance to challenge his termination, any disciplinary action,[2] and/or his status of being deemed as resigned. The agency head declined to qualify the grievance for a hearing and the grievant now appeals that determination.

DISCUSSION

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 must be followed.[4] These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

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[1] This date is listed next to the grievant's signature on his Grievance Form A. It is unclear whether this is the actual date the grievant submitted his grievance. However, the actual date of initiation is not pertinent to this ruling.
[2] The agency's May 17, 2011 letter indicated that absence in excess of three days without authorization was a Group III violation of the Standards of Conduct.
[3] Va. Code § 2.2-2900 *et seq.*
[4] DHRM Policy No. 1.60, *Standards of Conduct*.

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 little question that this case involves a disciplinary action by the agency for the grievant's alleged misconduct, i.e., an alleged absence in excess of three days without authorization. An absence in excess of three workdays without authorization is typically categorized as Group III offense under the Standards of Conduct.[9] 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 action was unwarranted, he or she may rescind the termination, just as he or she may rescind any formal disciplinary action.[10]

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.

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[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 1.60, *Standards of Conduct*, Attach. A.

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

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's June 3, 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