EMILY S. ELLIOTT
DIRECTOR

COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

James Monroe Building
101 N. 14th Street, 12th Floor
Richmond, Virginia 23219
Tel: (804) 225-2131
(TTY) 711

QUALIFICATION RULING

In the matter of the Virginia Board of Accountancy
Ruling Number 2022-5380
April 1, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her grievance filed with the Virginia Board of Accountancy (the "board" or "agency") on November 19, 2021 qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On October 1, 2021, the grievant received a phone call at her office from a member of the public (the "Complainant") who expressed frustration with the board and with the grievant. The Complainant later emailed the grievant's supervisor to object to the grievant's words and/or tone during the call. As a result of that complaint, the board issued a Group I Written Notice to the grievant, alleging that she violated DHRM Policy 2.35, *Civility in the Workplace*, during the phone call. On or about November 19, 2021, the grievant initiated a grievance to challenge the Written Notice. Initially, the board declined to rescind its discipline and accordingly indicated on the Grievance Form A that the grievance was qualified for a hearing. However, on February 17, 2022, the board revised its response, articulating the same substantive allegations but reducing the discipline to a written counseling. Based on that change, the board indicated that it would now determine that the grievance was not qualified for a hearing. The grievant now appeals the agency's amended qualification determination to EDR.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[1] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the means, methods, 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

[1] *See Grievance Procedure Manual* § 4.1.
[2] Va. Code § 2.2-3004(B).

discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Typically, then, the threshold question is whether the grievant has suffered an adverse employment action. 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."[5] Adverse employment actions include agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

Finally, qualification may not be appropriate even if a grievance challenges a management action that might ordinarily qualify for a hearing. For example, an issue may have become moot during the management resolution steps, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.[7]

Here, the grievant disputes the basis of the written counseling she received. Specifically, the written counseling alleged that, during the phone call with the Complainant, the grievant was "overheard raising [her] voice and being less than professional," and that the Complainant had independently complained about the interaction. The written counseling maintained that such conduct violated DHRM Policy 2.35, *Civility in the Workplace*. The grievant denies raising her voice or otherwise speaking rudely to the Complainant, and she has submitted her own detailed account of the call along with a written account by a witness who corroborated her demeanor during the call. She further alleges that the Complainant was subjecting her to verbal abuse, such that ending the discussion was appropriate.

Although it appears that the board initially issued to the grievant a Group I Written Notice related to this incident, management later decided to reduce this discipline to a written counseling memorandum. Written counseling, such as the memorandum the grievant received in this matter, is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.[8] Such written counseling would not generally constitute an adverse employment action because it does not, in and of itself, have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] Although the grievant clearly disputes the factual basis for the written

---

[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *See*, *e.g.*, EDR Ruling No. 2017-4477; EDR Ruling No. 2017-4509.
[8] *See* DHRM Policy 1.60, *Standards of Conduct*, at 6-7 (June 1, 2011) (distinguishing between "counseling" such as a written memorandum and "disciplinary actions," typically via formal Written Notice). DHRM revised Policy 1.60 as of March 7, 2022, while this grievance was pending. All policy citations herein shall refer to the previous version of Policy 1.60 that was in effect during the events at issue in this matter.
[9] The grievant has argued that the board's disciplinary action was "used as the bas[i]s for [her] 2021 Performance Evaluation." Upon review of the grievant's performance evaluation, it appears that the grievant's manager noted the

counseling, such disagreement, even if reasonable, does not change the effect of the informal disciplinary action.[10] Therefore, the written counseling issued to the grievant does not qualify for a hearing.[11]

Although the written counseling has not had a tangible adverse effect on the grievant's employment at this time, it could be used to support a future adverse employment action against the grievant. Should the written counseling grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or an annual performance rating of "Below Contributor," this ruling does not prevent the grievant from contesting the merits of these issues through a subsequent grievance challenging such a future related adverse employment action.

EDR's qualification rulings are final and nonappealable.[12]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

---

call with the Complainant as an "exception" to otherwise "prompt" and "professional" communications with the public, though it is not specifically identified. The grievant received a rating of "Contributor" both in the category of Communication and as an overall rating. In general, a satisfactory performance evaluation is not an adverse employment action. *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that, while an employee's performance rating was lower than on his previous evaluation, there was no adverse employment action where he failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

[10] Because the only issue before EDR is whether this grievance qualifies for a hearing, this ruling does not address the merits of the written counseling or whether the grievant engaged in the conduct described therein. While the grievance does not qualify for an administrative hearing under the grievance procedure, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the "Act"). Under the Act, if the grievant gives notice that she wishes to challenge, correct, or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged and, if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

[11] EDR acknowledges that the board initially determined that the grievance was qualified for a hearing, presumably because it had issued a written notice of formal discipline that automatically qualifies for a hearing under the grievance procedure. *Grievance Procedure Manual* § 4.1(a). We perceive nothing in the grievance procedure that would prevent the board from subsequently reconsidering and reducing its disciplinary action as it appears to have done in this case. Where the qualifying issue has become moot or no longer exists, and absent evidence of bad faith, EDR will generally accept an agency head's decision to amend their qualification determination accordingly.

[12] *See* Va. Code § 2.2-1202.1(5).