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## QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services  
Ruling Number 2022-5422  
July 7, 2022

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Virginia Department of Human Resource Management (“DHRM”) on whether his April 25, 2022 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

### FACTS

On March 24, 2022, the grievant received a Formal Written Counseling alleging he had failed to follow instructions “by failing to and refusing to wear an authorized face mask when directed by your supervisor.” The grievant initiated a grievance on April 25, arguing that the Formal Written Counseling was an “[u]nfair application [or] misapplication of state and agency personnel policies, procedures, rules, and regulations,” constituted “[r]etaliation for … exercising any right otherwise protected by law,” and amounted to an act of informal discipline because it was a “verbal warning of subsequent termination.”<sup>1</sup> As relief, the grievant requested removal of the Formal Written Counseling, “to be able to function in a role that is based on the improvement of the treatment of our population,” “to have supervision based on ethics and integrity,” and “[t]o be moved to an area where those concepts are welcomed.” Following the management resolution steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that 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.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Thus, claims relating to issues such as the means,

<sup>1</sup> The grievant also referenced allegations of disability discrimination in relation to the Formal Written Counseling, but he has indicated these were not issues to be addressed in the grievance.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

<sup>3</sup> Va. Code § 2.2-3004(B).

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 discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.<sup>4</sup>

Further, while grievances that allege retaliation or other misapplication of policy may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."<sup>5</sup> 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."<sup>6</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>7</sup>

The grievant has challenged the receipt of a Formal Written Counseling on March 24, 2022 on the basis that it is a misapplication or unfair application of policy, that it is retaliatory, and that it constitutes informal discipline. EDR has considered the grievant's allegations about the events that led to the issuance of the Formal Written Counseling and we find that such counseling is an example of informal supervisory action. It is not equivalent to a written notice of formal discipline.<sup>8</sup> Written counseling does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>9</sup> Because the record does not raise a sufficient question as to whether the grievant has experienced an adverse employment action in relation to the receipt of the Formal Written Counseling, this grievance does not qualify for a hearing.<sup>10</sup>

The Formal Written Counseling has not had a tangible adverse effect on the grievant's employment at this time, but it could be used to support a future adverse employment action against the grievant.<sup>11</sup> Should the written counseling grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or an annual

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<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>5</sup> Va. Code § 2.2-3004(A); see *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>8</sup> See DHRM Policy 1.60, *Standards of Conduct*.

<sup>9</sup> See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

<sup>10</sup> Because the issue before EDR is whether this grievance qualifies for a hearing, our ruling does not address the merits of the written counseling. In addition, while the grievance does not qualify for an administrative hearing under the grievance process, 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 they wish to challenge, correct, or explain information contained in their 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 their 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.*

<sup>11</sup> The Formal Written Counseling advises the grievant that "[a]ny future violation of policy . . . may result in disciplinary actions, up to and including Written Notices and/or termination."

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.<sup>12</sup>

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<sup>12</sup> See Va. Code § 2.2-1202.1(5).