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QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2019-4932
May 31, 2019

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) on whether his January 25, 2019 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

On or about January 24, 2019, the agency issued to the grievant a Notice of Improvement Needed/Substandard Performance documenting an alleged violation of the agency’s Operating Procedure 040.1 on confidentiality. The Notice related to an automobile crash between an agency vehicle and the grievant’s personal vehicle. Following the incident, the grievant obtained the agency’s internal incident report, which was considered confidential under OP 040.1, and forwarded it to his personal insurer. The grievant asserts that the Notice is unfounded because he believes an agency representative voluntarily provided him with the report for the express purpose of providing necessary information to his insurer. He seeks removal of the Notice from his record.

After the grievance proceeded through the management steps, the agency head denied the requested relief and 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² See *Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.³ 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 discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁴

Further, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷

Here, the grievant asks the agency to rescind the Notice of Improvement Needed/Substandard Performance on grounds that the agency's cited policy did not apply to him. The Notice challenged here is an instance of written counseling, a type of informal supervisory action. It is not equivalent to a Written Notice of formal discipline, which the agency declined to issue. A Notice of Improvement Needed does not generally constitute an adverse employment action because the Notice, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁸ Therefore, the grievant's claims relating to the Notice do not qualify for a hearing.⁹

Although the Notice has not adversely affected the grievant's terms, conditions, or benefits of employment, it could be used to support an adverse employment action against the grievant in the future. Should the informal supervisory action grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or a "Below Contributor" overall annual performance rating, this ruling does not prevent the grievant from contesting the merits of these allegations through a subsequent grievance challenging a related adverse employment action.

³ Va. Code § 2.2-3004(B).

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

⁵ *See Grievance Procedure Manual* § 4.1(b).

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

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

⁸ *See Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

⁹ Although this issue 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 he wishes to challenge, correct, or explain information contained in his 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 his 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.*

EDR's qualification rulings are final and nonappealable.¹⁰



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¹⁰ See Va. Code § 2.2-1202.1(5).