

Issue: Qualification – Discipline (counseling memo); Ruling Date: July 19, 2017;  
Ruling No. 2017-4573; Agency: Department of Historic Resources; Outcome: Not  
Qualified.



**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Equal Employment and Dispute Resolution<sup>1</sup>**

**QUALIFICATION RULING**

In the matter of the Department of Historic Resources  
Ruling Number 2017-4573  
July 19, 2017

The grievant has requested a ruling on whether her March 22, 2017 grievance with the Department of Historic Resources (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Equal Employment and Dispute Resolution (EEDR) at the Virginia Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

The March 22, 2017 grievance challenges an informal counseling memorandum received by the grievant on or about February 22, 2017.<sup>2</sup> The counseling memo indicates that the grievant failed to follow instructions regarding the submission of leave requests. The grievant disputes the statements contained in the letter and alleges that no policies exist regarding this issue and she was never provided with written instructions regarding her submission of leave requests. After the grievance proceeded through the management steps, the agency head declined to qualify this grievance for a hearing. The grievant now appeals that determination.

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>3</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>4</sup> Thus, claims relating to issues such as

---

<sup>1</sup> Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.

<sup>2</sup> The documentation provided to EEDR appears also to pertain to workplace accommodation(s) received by the grievant. It is not clear what, if any, accommodations (including the use of leave) may be provided to the grievant at this time. However, it does not appear that this grievance squarely raises the issue of workplace accommodations, and indeed, the grievant explicitly states in various communications to the agency that she is not requesting any additional accommodations. Thus, EEDR will not further address this issue. Should the grievant wish to initiate a subsequent grievance to challenge the denial of accommodations under the Americans with Disabilities Act, she is free to do so.

<sup>3</sup> See *Grievance Procedure Manual* § 4.1.


<sup>4</sup> See Va. Code § 2.2-3004(B).

the methods, means and personnel by which work activities are to be carried out, as well as the contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, 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>5</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>6</sup> Thus, typically, a 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>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>8</sup>

The management action challenged in this grievance is a type of counseling memorandum. A counseling memo 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> Therefore, the grievant's challenge to the counseling memorandum issued to her does not qualify for a hearing. However, should the counseling memorandum grieved in this case later serve to support an adverse employment action against the grievant, such as a formal disciplinary action or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

EDR's qualification rulings are final and nonappealable.<sup>10</sup>



\_\_\_\_\_  
Christopher M. Grab  
Director  
Office of Equal Employment and Dispute Resolution

---

<sup>5</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>6</sup> *See Grievance Procedure Manual* § 4.1(b).

<sup>7</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *See, e.g., Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

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

<sup>10</sup> Va. Code § 2.2-1202.1(5).