

Issue: Qualification – Management Actions (Confidentiality/Records Disclosure);  
Ruling Date: February 11, 2013; Ruling No. 2013-3535; Agency: Department of  
Alcoholic Beverage Control; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**QUALIFICATION RULING**

In the matter of the Department of Alcoholic Beverage Control  
Ruling Number 2013-3535  
February 11, 2013

The grievant has requested a ruling on whether his December 11, 2012 grievance with the Department of Alcoholic Beverage Control (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In a prior grievance filed by the grievant, the agency presented as an exhibit, which was admitted into the record, a counseling memo, dated July 8, 1991.<sup>1</sup> The grievant filed his December 11, 2012 grievance to challenge the “unauthorized dissemination” of this record. The grievance proceeded through the management steps without resolution. The grievant now seeks to have his grievance qualified for a hearing by the Office of Employment Dispute Resolution (EDR).<sup>2</sup>

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> The grievant has alleged that the agency violated Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct, and/or Policy 6.05, Personnel Records Disclosure, in its use of the counseling memo at the grievance hearing. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

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<sup>1</sup> See EDR Ruling No. 2013-3501.

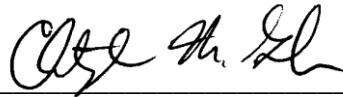
<sup>2</sup> Given that this grievance essentially challenges an evidentiary matter that has been previously raised and addressed in a prior case, *see id.*, it is not entirely clear whether this matter is the appropriate subject of a grievance or was initiated properly. See *Grievance Procedure Manual* §§ 2.2, 2.4. However, EDR will address the grievance substantively because it is clear that, even if appropriately initiated, it does not qualify for a hearing.

<sup>3</sup> See *Grievance Procedure Manual* § 4.1 (a) and (b).

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

Even assuming the grievant was able to demonstrate that an adverse employment action<sup>5</sup> has occurred, there is no indication that any policy has been misapplied, unfairly applied, or violated by the agency's use of the grievant's counseling memo at a grievance hearing. Indeed, the use of such records is specifically contemplated by DHRM Policy 1.60 to determine the appropriate disciplinary action.<sup>6</sup> Therefore, subsequent presentation of such a record at a grievance hearing cannot be construed to violate DHRM Policy 6.05.<sup>7</sup> To find otherwise would disallow an agency from presenting *any* personnel records of an employee at a grievance hearing without the employee's consent. Such a finding is incompatible with the grievance procedure.<sup>8</sup> Because there is no violation of policy here, the grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.<sup>9</sup>



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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> DHRM Policy 1.60, *Standards of Conduct* ("Counseling documentation should be retained in the supervisors' files, not in employees' personnel files, *except as necessary to support subsequent formal disciplinary action.*") (emphasis added).

<sup>7</sup> For purposes of this ruling, we have assumed that the counseling memo, though not specifically identified as covered by DHRM Policy 6.05, would fall under the definition of personal information.

<sup>8</sup> It is also notable that DHRM Policy 6.05 provides that certain individuals/agencies may have access to personal information of an employee without his/her consent and that the list of such exceptions in the policy is "not all inclusive."

<sup>9</sup> Va. Code § 2.2-1202.1(5).