

Issue: Qualification – Discipline (Counseling Memo); Ruling Date: April 3, 2013;
Ruling No. 2013-3566; Agency: Department of Corrections; 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 Corrections
Ruling Number 2013-3566
April 3, 2013

The grievant has requested a ruling on whether his December 2, 2012 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about November 27, 2012, the grievant received a Notice of Improvement Needed/Substandard Performance. The grievant initiated a grievance to challenge this management action on or about December 2, 2012. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management.

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 methods, means 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action

¹ See *Grievance Procedure Manual* §§ 4.1.

² Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

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 any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

The management action challenged in this grievance, a Notice of Improvement Needed/Substandard Performance, is a form of written counseling. It is not equivalent to a Written Notice of formal discipline. A 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.⁷ Therefore, the grievant’s claims relating to his receipt of the Notice of Improvement Needed/Substandard Performance do not qualify for a hearing.⁸

While the Notice of Improvement Needed/Substandard Performance has not had an adverse impact on the grievant’s employment, it could be used later to support an adverse employment action against the grievant. Should the Notice of Improvement Needed/Substandard Performance grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice 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.⁹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁵ Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

⁶ Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ See Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).

⁸ Although this 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 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.*

⁹ See Va. Code §§ 2.2-1202.1(5), 2.2-3003(G).