Issue: Qualification – Discipline (Counseling Memo); Ruling Date: April 30, 2014; Ruling No. 2014-3871; Agency: Department of Professional and Occupational Regulation; 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 Professional and Occupational Regulation
Ruling Number 2014-3871
April 30, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her March 16, 2014 grievance with the Department of Professional and Occupational Regulation (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about February 24, 2014, the grievant received a written Counseling Memorandum. She initiated a grievance to challenge the Counseling Memorandum on or about March 16, 2014. In the grievance, the grievant alleges that the agency issued the Counseling Memorandum as a form of retaliation based on her prior grievance activity.[1] After proceeding through 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.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] 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.[4]

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[1] The grievant previously filed a grievance challenging the agency's initial inquiry about and investigation of the incident that ultimately resulted in the issuance of the Counseling Memorandum. The grievant received the Counseling Memorandum at issue here while that grievance was in progress. See EDR Ruling Number 2014-3857 for further discussion of the factual background in this case.

[2] *See Grievance Procedure Manual* § 4.1.

[3] Va. Code § 2.2-3004(B).

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

While grievances that allege acts of retaliation may qualify for a hearing, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[5] Thus, typically, 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]

The management action challenged in this grievance, a Counseling Memorandum, 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.[8] Therefore, the grievant's claims relating to her receipt of the Counseling Memorandum do not qualify for a hearing.[9]

While the Counseling Memorandum 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 Counseling Memorandum 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.[10]

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Director
Office of Employment Dispute Resolution

[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 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 she wishes to challenge, correct, or explain information contained in her 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 her 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.*
[10] *See* Va. Code § 2.2-1202.1(5).