Issue: Qualification – Performance (arbitrary/capricious performance evaluation) and Discipline (counseling memo); Ruling Date: January 28, 2015; Ruling No. 2015-4072, 2015-4073; Agency: University of Virginia Medical Center; Outcome: Not Qualified.

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

QUALIFICATION RULING

In the matter of the University of Virginia Health System
Ruling Numbers 2015-4072, 2015-4073
January 28, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether his two September 15, 2014 grievances with the University of Virginia Health System (the "agency") qualify for a hearing. For the reasons discussed below, both grievances are not qualified for a hearing.

FACTS

On or about August 29, 2014, the grievant received his annual performance appraisal for 2013-2014, on which he received an overall rating of "Does Not Fully Meet Expectations." The grievant filed a grievance to challenge his performance evaluation on or about September 15, 2014 ("Grievance 1"). In Grievance 1, the grievant alleged that the performance appraisal was arbitrary and capricious, that it "lack[ed] detail or explanation for many conclusions," that "there [was] documented evidence to refute" some of the performance issues cited in the evaluation, and that the agency misapplied and/or unfairly applied the policies relating to his performance evaluation. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head, and the grievant now appeals that decision to EDR.

On or about September 15, 2014, the grievant received an Informal Counseling Memo pursuant to Medical Center Human Resources Policy 701, *Employee Standards of Performance and Conduct*.[1] The grievant initiated a grievance to challenge the Counseling Memo on September 15 ("Grievance 2"), the date it was issued, claiming that "[t]he entire situation [was] misdirected and inaccurate." After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.

DISCUSSION

Grievance 1

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] The grievance statutes and

[1] The agency uses a classification system for disciplinary actions that differs from the DHRM *Standards of Conduct*. Agency policy classifies performance improvement counseling as a four-step process consisting of: (1) Informal Counseling, (2) Formal Counseling, (3) Performance Warning and/or Suspension, and (4) Termination. *See* Medical Center Human Resources Policy 701, *Employee Standards of Performance and Conduct*, § D. Agency Policy 701 further indicates that the four steps are analogous to (1) verbal/written counseling, (2) Group I Written Notice, (3) Group II Written Notice, and (4) Group III Written Notice under the DHRM *Standards of Conduct*. *See id.* § D (classifying Steps 2, 3, and 4 as "formal discipline"); DHRM Policy 1.60, *Standards of Conduct*, § B.

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

procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.[3] Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts raising a sufficient question as to whether the grievant's performance rating, or an element thereof, was "arbitrary or capricious."[4]

EDR has further recognized that, even if a grievance challenges a management action that might qualify for a hearing, there are some cases when qualification is inappropriate. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

Without deciding whether the grievant has raised a question as to whether his performance evaluation was arbitrary or capricious, events that happened after Grievance 1 was initiated have rendered the grievant's claims regarding his performance evaluation moot in this case. It appears that, on or about December 18, 2014, the grievant was issued two Step 4 – Formal Performance Improvement Counseling Forms and terminated from his employment with the agency. At a hearing to determine whether grievant's performance evaluation was arbitrary or capricious, "the only remedy" that could be ordered by a hearing officer would be "for the agency to repeat the evaluation process and provide a rating with a reasoned basis . . . ."[5] Even if the grievant were able to establish that his evaluation was arbitrary or capricious, the available relief would be meaningless because the grievant is no longer employed by the agency. It would be pointless to hold a grievance hearing to determine whether the grievant's performance evaluation was arbitrary or capricious where, as here, repeating the evaluation process would not, on its own, modify the agency's decision to terminate the grievant. Accordingly, there is no reason for Grievance 1 to proceed to a hearing at this time.[6] This issue is, therefore, not qualified and will not proceed further.

Grievance 2

Additionally, the grievance procedure generally limits grievances that qualify to those that involve "adverse employment actions."[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

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[3] *See* Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[5] *Rules for Conducting Grievance Hearings* § VI(C)(2).
[6] The grievant has grieved his termination and the two Step 4 – Formal Performance Improvement Counseling Forms. Should the grievant be reinstated at a hearing on those matters, EDR would entertain a renewed request for qualification from the grievant after his return to employment with the agency. At that point, a hearing to address the issues raised in Grievance 1 could in theory be warranted to determine whether the performance evaluation was arbitrary or capricious.
[7] *See Grievance Procedure Manual* § 4.1(b).
[8] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

The management action challenged in Grievance 2, an Informal Counseling Memo, 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.[10] Therefore, the grievant's claims relating to his receipt of the Informal Counseling Memo do not qualify for a hearing.[11]

While the Informal Counseling Memo 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 Informal Counseling Memo 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.

CONCLUSION

For the foregoing reasons, Grievance 1 and Grievance 2 are not qualified for a hearing.[12] EDR's qualification rulings are final and nonappealable.[13]

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Director
Office of Employment Dispute Resolution

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

[11] 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.*

[12] It is EDR's understanding that the grievant has filed several additional grievances to challenge formal discipline issued by the agency, as well as his termination. To the extent that it is relevant to any issues raised at hearing, evidence related to the performance evaluation and Informal Counseling Memo discussed in this ruling may be presented by the grievant as background information.

[13] *See* Va. Code § 2.2-1202.1(5).