

Issue: Qualification – Discipline (Counseling); Ruling Date: January 27, 2015; Ruling No. 2015-4081; Agency: Department of Veterans Services; 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 Veterans Services
Ruling Number 2015-4081
January 27, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) on whether her November 10, 2014 grievance with the Department of Veterans Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as a General Administration Supervisor I/Coordinator I. On or about October 16, 2014, the grievant was issued a Group I Written Notice for failing to follow instructions and/or policy. On November 10, 2014, the grievant initiated a grievance challenging the disciplinary action. In the second step response, the second step-respondent stated that “on several occasions [the grievant] failed to follow [her] supervisor’s instructions” and that such conduct could have justified the issuance of a Group II Written Notice. “Based on errors in the Group I Written Notice,” however, the second step-respondent determined that the discipline should be rescinded.

At the conclusion of the resolution steps, the grievant requested that the agency head qualify her grievance for a hearing. The agency head declined to qualify the grievance, explaining that “there is no longer a basis for a hearing” because the Group I Written Notice had been rescinded. The grievant now appeals that decision 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.¹ Furthermore, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² By statute and under the grievance procedure, all formal disciplinary actions (i.e., Written Notices, terminations, suspensions, demotions, transfers and assignments resulting from formal discipline) automatically qualify for a hearing.³ Claims relating to issues such as the methods, means and personnel by which work

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004 (A); *Grievance Procedure Manual* § 4.1(a).

activities are to be carried out, on the other hand, 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

Written Notice

EDR has further recognized that, even if a grievance challenges a management action that would ordinarily qualify for a hearing (e.g., a Written Notice of formal discipline), there are still 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.

In this case, the agency rescinded the Group I Written Notice at the second step. As a result, a hearing officer would be unable to provide the grievant with any additional relief beyond that which has already been granted to her by the agency. Accordingly, there is no reason for this issue to proceed to a hearing. It would be pointless to hold a grievance hearing to determine whether the Group I Written Notice was warranted and appropriate when, as here, the agency has rescinded the disciplinary action. This issue is, therefore, not qualified and will not proceed further.

Second Step Response

The grievant also asserts that her grievance should be qualified for a hearing based on the statements contained in the second step response. The grievance procedure generally limits grievances that qualify for a hearing 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

In her request for qualification, the grievant states that she is seeking qualification from EDR "due to the comments that were made in second resolution step [sic]." Specifically, the grievant disputes the second step-respondent's conclusion that she did not follow instructions and that her conduct could have supported the issuance of a Group II Written Notice, and wishes to have those statements removed from the second step response. Based on EDR's review of the grievance, it appears that the second step-respondent's comments essentially amount to a form of

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

⁵ *See id.* § 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).

written counseling. 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 the second step response do not qualify for a hearing.⁹

CONCLUSION

For the foregoing reasons, the grievant's request for qualification of her grievance for a hearing is denied. EDR's qualification rulings are final and nonappealable.¹⁰



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⁸ See *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

⁹ The grievant appears to argue further that the agency failed to comply with the grievance procedure by not providing her with sufficient notice of when the second step meeting would be held or informing her that she could bring witnesses to the meeting. The *Grievance Procedure Manual* states that “[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.” *Grievance Procedure Manual* § 6.3; see also, e.g., EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036. Any noncompliance that may have occurred at the second step has been waived by the grievant based on her continuation of the grievance.

¹⁰ Va. Code § 2.2-1202.1(5).