

Issues: Qualification – Discipline (Counseling Memo) and Work Conditions (Supervisor/
Employee Conflict); Ruling Date: August 21, 2013; Ruling No. 2014-3682, 2014-
3683; Agency: Department of Behavioral Health and Developmental 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 Behavioral Health and Developmental Services
Ruling Numbers 2014-3682, 2014-3683
August 21, 2013

The grievant has requested a ruling from the Office of Employment Dispute Resolution at the Department of Human Resource Management on whether the two grievances she initiated on or about April 2, 2013 with the Department of Behavioral Health and Developmental Services (“agency”) qualify for a hearing.¹ For the reasons discussed below, neither grievance qualifies for a hearing.

FACTS

The first April 2, 2013 grievance challenges a written Counseling Form received by the grievant on or about March 8, 2013. On the Counseling Form, the grievant’s supervisor indicated that the grievant was deficient in completing required training, despite having been instructed to complete this task. The grievant asserts that retaliation for reporting alleged misconduct by other employees influenced her supervisor to issue the Counseling Form regarding the incomplete training.

The second April 2, 2013 grievance cites as the issue an occurrence on or about March 3, between the grievant and her supervisor. The grievant alleges that she was working on the computer when her supervisor approached, grabbed the computer’s mouse and started to review and rearrange the grievant’s emails. The grievant’s supervisor disputes the grievant’s version of events on the day in question and asserts that she approached the grievant in a professional and respectful manner.

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

¹ The grievances were treated in a joint manner by the agency pursuant to *Grievance Procedure Manual* § 8.5.

² See *Grievance Procedure Manual* §§ 4.1 (a), (b).

³ See Va. Code § 2.2-3004(B).

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

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ Thus, typically, a 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

Counseling Form

A Counseling Form 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 challenge to the Counseling Form in the first April 2, 2013 grievance does not qualify for hearing. However, should the Counseling Form grieved in this case 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.⁹

Unfair Treatment/Interaction with Supervisor

The grievant appears to allege that her supervisor treats her unfairly, improperly favoring other employees and engaging in frequent disrespectful treatment towards her, culminating in the incident on March 3 involving the grievant's computer. However, there is no indication that the grievant has experienced any significant effect as a result of the March 3 occurrence that would rise to the level of an adverse employment action. This ruling does not mean that EDR deems the alleged actions by the grievant's supervisor, if true, to be appropriate, only that this grievance does not qualify for a hearing based on the information presented to EDR. To the extent that the grievant also argues that her supervisor engaged in a pattern of behavior that could constitute workplace harassment, based on a review of the facts as stated in her grievance, we cannot find

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

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

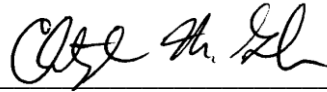
⁷ See, e.g., *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

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

⁹ To the extent that the grievant alleges that the Counseling Form was issued in retaliation for her reporting employee misconduct to management, EDR has not been presented with facts sufficient to raise a question as to whether retaliation occurred in this instance.

that the grieved issues rose to a “sufficiently severe or pervasive” level such that an unlawfully abusive or hostile work environment was created.¹⁰ Thus, the grievance does not qualify for a hearing on this basis.

EDR’s qualification rulings are final and nonappealable.¹¹



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¹⁰ See generally *Gilliam v. S.C. Dep’t of Juvenile Justice*, 474 F.3d 134, 142 (4th Cir. 2007).

¹¹ Va. Code § 2.2-1202.1(5).