Issue: Qualification – Discipline (counseling memo); Ruling Date: October 30, 2013; Ruling No. 2014-3735; Agency: University of Virginia Health System; 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 Number 2014-3735
October 30, 2013

The grievant has requested a ruling on whether his July 1, 2013 grievance with the University of Virginia Health System (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about March 28, 2013, the grievant received a Formal Performance Improvement Counseling Form ("Formal Counseling") pursuant to Medical Center Human Resources Policy 701, *Employee Standards of Conduct* (the "Policy"). The agency has indicated that a Formal Counseling is equivalent to a Group I Written Notice under DHRM Policy 1.60, *Standards of Conduct* (the "*Standards of Conduct*").[1] The grievant initiated a grievance to challenge the Formal Counseling on July 1, 2013. During the management steps, the third step-respondent reduced the Formal Counseling to an Informal Counseling Memo ("Informal Counseling"). The agency head subsequently 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 Policy uses a classification system for disciplinary actions that differs from the DHRM *Standards of Conduct*. The Policy classifies performance improvement counseling as a four-step process consisting of (1) informal counseling, (2) formal performance improvement counseling, (3) performance warning and/or suspension, and (4) termination. *See* Medical Center Human Resources Policy 701, *Employee Standards of Conduct*, at § D(3). The agency has indicated, and our review confirms, that the Policy's four steps are analogous to (1) verbal/written counseling, (2) a Group I Written Notice, (3) a Group II Written Notice, and (4) a Group III Written Notice under the *Standards of Conduct*, respectively. *See* DHRM Policy 1.60, *Standards of Conduct*, at § B.
[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(b), (c).

Further, 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]

The management action challenged in this grievance, an Informal Counseling, 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 his receipt of the Informal Counseling do not qualify for a hearing.[9]

While the Informal Counseling has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against him. Should the Informal Counseling 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 him 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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[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 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.*
[10] *See* Va. Code § 2.2-1202.1(5).