

Issue: Qualification – Discipline (counseling memo); Ruling Date: July 3, 2014;
Ruling No. 2014-3912; Agency: Virginia Department of Fire Programs; 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 Fire Programs
Ruling Number 2014-3912
July 3, 2014

The grievant has requested a ruling on whether his April 24, 2014 grievance with the Department of Fire Programs (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The April 24, 2014 grievance challenges two communications received by the grievant from his supervisor: an April 3, 2014 memo for the supervisor's file documenting a conversation allegedly occurring on March 28, 2014, and a Supervisory Counseling Memo issued to the grievant on or about April 8, 2014. The April 3 memo indicates that the grievant offered to perform work for the supervisor if he retracted a Written Notice previously issued to the grievant. In the April 8 Counseling Memo, the grievant's supervisor advises the grievant of expectations regarding his performance and professionalism, specifically, that "the use of profanity in the work place will not be tolerated and the slamming of doors or other office items will also not be tolerated." The Counseling Memo further states that as "it is expected that [the grievant] will present [himself] in a professional manner at all times. . . . [T]he placement of [the grievant's] feet on [his] office desk should be discontinued immediately."

The grievant alleges that both memos were issued as retaliation for his prior use of the grievance procedure. He asserts that, directly following a second resolution step meeting regarding that grievance, his supervisor called him into a meeting and provided him with a copy of the April 3 supervisor's file memo. The grievant points out that the Counseling Memo was subsequently issued five days later, and argues that the proximity in time between these events demonstrates his supervisor's intent to retaliate against him should he continue to pursue his prior grievance. After proceeding through the management steps, the agency head declined to qualify this grievance for a hearing. The grievant now appeals that determination to the Office of Employment Dispute Resolution (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

¹ See *Grievance Procedure Manual* §§ 4.1 (a), (b).

Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁴ 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."⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁶

The management actions challenged in this grievance are essentially both counseling memoranda. A counseling memo 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.⁷ Therefore, the grievant's challenge to the memoranda issued to him on April 3 and April 8 does not qualify for a hearing. However, we note that while neither counseling memo has had an adverse impact on the grievant's employment, such memoranda could be used later to support an adverse employment action against the grievant. Therefore, should the memos 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.

EDR's qualification rulings are final and nonappealable.⁸



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² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ See, e.g., *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁷ See *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

⁸ Va. Code § 2.2-1202.1(5).