

Issue: Qualification – Discipline (Counseling Memo); Ruling Date: October 15, 2014;
Ruling No. 2015-4016; 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 & Developmental Services
Ruling Number 2015-4016
October 15, 2014

The grievant has requested a ruling on whether his July 7, 2014 grievance with the Department of Behavioral Health & Developmental Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The July 7, 2014 grievance challenges a Written Counseling received by the grievant on or about June 8, 2014. The Written Counseling indicates that the grievant displayed unprofessional and disruptive behavior during an in-service training session. The grievant asserts that his behavior was “within the context of ethical and professional practice” and further alleges that racial discrimination influenced his supervisor to issue him the Written Counseling. 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 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

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

² See Va. Code § 2.2-3004(B).

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

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

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 action challenged in this grievance is a counseling memorandum. 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 Written Counseling issued to him does not qualify for a hearing. However, should the Written Counseling 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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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).