

Issue: Qualification – Discipline (counseling memo); Ruling Date: December 17, 2014; Ruling No. 2015-4064; 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 Number 2015-4064
December 17, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his September 25, 2014 grievance with the Department of Behavioral Health and Developmental Services (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 2, 2014, the grievant received a written Notice of Improvement Needed/Substandard Performance based on an investigative finding that he engaged in abuse of a patient. The grievant initiated a grievance to challenge the Notice of Improvement Needed/Substandard Performance on September 25, 2014. In the grievance, the grievant appears to allege that the Notice of Improvement Needed/Substandard Performance was issued as the result of inaccurate and/or incomplete information discovered during an agency investigation, that the agency investigation’s findings did not support the conclusion that he engaged in abuse of a patient, and that the Notice of Improvement Needed/Substandard Performance was “uncalled for simply because it lacked merit.” After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.¹

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

¹ The grievant attached a copy of his Employee Work Profile (“EWP”) and 2013-2014 annual performance evaluation to the grievance record submitted to EDR. To the extent that he is attempting to challenge the content of the EWP and/or contest his performance rating from the evaluation, the grievance procedure provides that “challenges to additional management actions or omissions cannot be added” after a grievance is initiated. *Grievance Procedure Manual* § 2.4. We will consider information from the EWP and performance evaluation to the extent that it is relevant to the management actions challenged in the grievance, but will not address the merits of the EWP or the performance evaluation, as they were not issues cited in the grievance when it was filed.

² See *Grievance Procedure Manual* § 4.1.

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

Further, the grievance procedure generally limits grievances that qualify 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 grievant argues that the agency investigation that resulted in the issuance of the Notice of Improvement Needed/Substandard Performance was not conducted properly and its finding that his behavior constituted abuse of a patient is unfounded. Specifically, he claims that the investigation's findings were the result of "a complete biased mind and position and lack of full concept of what actually took place." The grievant further asserts that he "did not make the final decision" to carry out, or actually participate in, the act that the agency considered abuse of a patient, and thus he should not have been subject to counseling for his role, if any, in the incident. While the grievant may raise potentially legitimate questions about the agency investigation and its conclusions,⁸ the Notice of Improvement Needed/Substandard Performance challenged by the grievant 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.⁹ Therefore, the grievant's claims relating to his receipt of the Notice of Improvement Needed/Substandard Performance do not qualify for a hearing.¹⁰

³ Va. Code § 2.2-3004(B).

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

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 Indeed, although the agency determined that there was no basis to grant relief during the management resolution steps, the grievant's concerns about the investigation and Notice of Improvement Needed/Substandard Performance were ones with which the first step-respondent seemingly agreed.

⁹ *See Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

¹⁰ 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-

While the Notice of Improvement Needed/Substandard Performance has not had an adverse impact on the grievant's employment at this time, it could be used later to support an adverse employment action against the grievant. Should the Notice of Improvement Needed/Substandard Performance grieved in this instance later serve to support an adverse employment action against the grievant, such as such as a transfer, a demotion, 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 the Notice of Improvement Needed/Substandard Performance through a subsequent grievance challenging the related adverse employment action.

EDR's qualification rulings are final and nonappealable.¹¹



Christopher M. Grab
Director
Office of Employment Dispute Resolution

3806(A)). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

¹¹ See Va. Code § 2.2-1202.1(5).