

Issue: Qualification – Discipline (counseling memo); Ruling Date: December 30, 2014; Ruling No. 2015-4066; Agency: Department of Taxation; 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 Taxation
Ruling Number 2015-4066
December 30, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management on whether her July 24, 2014 grievance with the Department of Taxation (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about July 8, 2014, the grievant received a revised written Counseling Memorandum to address complaints that her customer service was unsatisfactory. She initiated a grievance to challenge the Counseling Memorandum on or about July 24, 2014. In her grievance, the grievant alleges that the agency should not have issued the Counseling Memorandum because she was sick on the day the complaints occurred and she had not been given customer service training by the agency.¹ After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EDR.²

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.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out, as well as the

¹ The grievant further asserted in the grievance that she had not been permitted to review the customer complaints that prompted the Counseling Memorandum. On the day after she initiated the grievance, July 25, the agency provided her with the requested documentation.

² In information that the grievant has submitted to EDR, it appears that she is attempting to challenge several additional issues that were not raised in the grievance. Because additional management actions or omissions cannot be added to a grievance after it is filed, this ruling will not address these claims. *See Grievance Procedure Manual* § 2.4. The grievant may file another grievance if she wishes to challenge additional management actions or omissions. The grievant also alleges that the second step-respondent “should have recused himself . . . due to bias.” The *Grievance Procedure Manual* states that “[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time.” *Id.* § 6.3; *see also, e.g.*, EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036. Any noncompliance that may have occurred at the second step has been waived by the grievant based on her continuation of the grievance.

³ *See Grievance Procedure Manual* § 4.1.

⁴ *See Va. Code* § 2.2-3004(B).

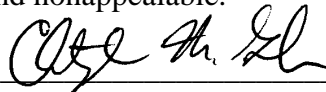
contents of statutes, ordinances, personnel policies, procedures, rules, and regulations, generally do not qualify for a hearing unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.⁵

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸

The management action challenged in this grievance, a Counseling Memorandum, 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 her receipt of the Counseling Memorandum do not qualify for a hearing.¹⁰

While the Counseling Memorandum has not had an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. Should the Counseling Memorandum 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 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.¹¹



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⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ *See Grievance Procedure Manual* § 4.1(b).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *See, e.g., Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

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 she wishes to challenge, correct, or explain information contained in her 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 her position regarding the information. Va. Code § 2.2-3806(A). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

¹¹ Va. Code § 2.2-1202.1(5).