

Issue: Qualification – Discipline (Counseling Memo); Ruling Date: September 14, 2015; Ruling No. 2016-4208; Agency: Department of Conservation and Recreation; 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 Conservation and Recreation  
Ruling Number 2016-4208  
September 14, 2015

The grievant has requested a ruling on whether her July 10, 2015 grievance with the Department of Conservation and Recreation (the agency) qualifies for a hearing. For the reasons discussed below, the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management finds that this grievance does not qualify for a hearing.

FACTS

The July 10, 2015 grievance challenges a letter issued to the grievant by a supervisor on or about June 13, 2015. The letter indicates that the grievant missed certain deadlines in her work and failed to correct the situation after being provided additional direction. The grievant disputes the statements contained in the letter and further alleges that racial discrimination influenced the supervisor to issue her this letter. After proceeding through the management steps, the agency head declined to qualify this grievance for a hearing. The grievant now appeals that determination.

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.<sup>1</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>2</sup> 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 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.<sup>3</sup> In this case, the grievant asserts that the agency has discriminated against her on the basis of her race in issuing her a letter which documents her allegedly unsatisfactory performance.

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> See Va. Code § 2.2-3004(B).

<sup>3</sup> *Id.* § 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.”<sup>4</sup> 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.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup>

The management action challenged in this grievance is a type of 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.<sup>7</sup> Therefore, the grievant’s challenge to the counseling letter issued to her does not qualify for a hearing. However, should the letter 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, including, but not limited to, that such action is tainted by any alleged impropriety arising out of the letter challenged in this grievance.

EDR’s qualification rulings are final and nonappealable.<sup>8</sup>



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Director  
Office of Employment Dispute Resolution

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<sup>4</sup> See *Grievance Procedure Manual* § 4.1(b).

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

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

<sup>7</sup> See, e.g., *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

<sup>8</sup> Va. Code § 2.2-1202.1(5).