

Issue: Qualification/Methods/Means/Counseling (oral or written memorandum)- Work  
Conditions/Supervisory Conflict; Ruling Date: September 16, 2002; Ruling #2002-049;  
Agency: Department of Corrections; Outcome: Not qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections/ No. 2002-049  
September 16, 2002

The grievant has requested a ruling on whether his January 8, 2002 grievance with the Department of Corrections (DOC) qualifies for a hearing. The grievant challenges counseling that he received from his supervisor on January 7, 2002, and claims that he has been subjected to a hostile work environment. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with DOC. On January 2, 2002, the grievant had a telephone conversation with the superintendent. The superintendent claims that the grievant hung up on her before the end of the conversation, which the grievant denies. On January 7, the superintendent verbally counseled the grievant regarding the incident. She warned him that hanging up the telephone while in the middle of a conversation with a supervisor is unprofessional behavior, and that if it happened again, she would issue him a Group I Written Notice. The grievant asserts that the counseling session and threatened written notice were unwarranted because the unprofessional conduct did not occur. Moreover, he claims that this counseling is the latest example of a pattern of harassing treatment by the superintendent.<sup>1</sup>

DISCUSSION

*Counseling Session*

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. Inherent in this authority is the responsibility to advise employees of perceived performance problems. The Department of Human Resource Management (DHRM) has sanctioned the use of counseling as an informal means for management to communicate to an employee

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<sup>1</sup> As examples of a hostile work environment, the grievant claims that he (1) has been suspended twice without cause, (2) received a group notice and counseling notices that were later rescinded, (3) has been cursed at on the telephone by the superintendent, who was later admonished by the regional director, and that (4) his job duties were removed and assigned to another employee.

concerns about his or her behavior, conduct, or performance. DHRM does not recognize such counseling as disciplinary action under the Standards of Conduct.<sup>2</sup> Further, under the grievance procedure, informal supervisory actions, including counseling, do not qualify for a hearing absent a claim of discrimination, retaliation, or misapplication or unfair application of policy.<sup>3</sup>

In this case, the superintendent's January 7th conversation with the grievant communicated her perception that the grievant had acted unprofessionally when he hung up the phone. This counseling was not an "adverse employment action" affecting the terms, conditions or benefits of the grievant's employment.<sup>4</sup> Further, the grievance does not allege discrimination, retaliation, or a misapplication of policy. Accordingly, the issue of counseling does not qualify for a hearing.<sup>5</sup>

#### *Harassment/Hostile Work Environment*

The grievant also claims that management has created a harassing and hostile work environment. However, because this grievance neither alleges nor presents sufficient evidence of improper discrimination, retaliation, or a misapplication of policy, the harassment and hostile work environment claims do not qualify for a hearing. Rather, the facts cited in support of this grievance can best be summarized as ongoing conflict and disagreement with the superintendent.

Indeed, the grievance record reflects significant interpersonal conflict between the grievant and his superintendent. Mediation through DOC or through EDR may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which two mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved.

#### APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court

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<sup>2</sup> DHRM Policy No. 1.60(VI)(C).

<sup>3</sup> *Grievance Procedure Manual* § 4.1(c), page 11.

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

<sup>5</sup> To the extent that the grievant may have intended to frame his grievance as one asserting a discrimination or retaliation claim, his grievance would still not have qualified for hearing as each of those claims requires that the employee suffer an "adverse employment action." See *Boone v. Goldin*, 178 F.3d 253 (4<sup>th</sup> Cir. 1999). See also *Von Gunten v. Maryland Department of the Environment*, 2001 U.S. App. LEXIS 4149 (4<sup>th</sup> Cir. 2001)(citing *Munday v. Waste Mgmt. Of North America, Inc.*, 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)). The agency's notification that further acts of misconduct could lead to disciplinary action is, without more, not an adverse employment action.

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should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr  
Director

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Leigh A. Brabrand  
Employment Relations Consultant