

Issue: Qualification/Methods/Mean-Counseling(oral or written memorandum); Ruling Date: August 16, 2002; Ruling #2002-067; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not qualified.



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health Mental Retardation  
and Substance Abuse Services/ No. 2002-067  
August 16, 2002

The grievant has requested a ruling on whether her January 10, 2002 grievance initiated with the Department of Mental Health Mental Retardation and Substance Abuse Services (“agency”) qualifies for a hearing. The grievant alleges that a counseling memo she received on December 21, 2001 contains statements that are wrong, and she asserts that her job performance was satisfactory. As relief, the grievant requests that the counseling memo be rescinded and that agency management be made aware that her judgement as a nurse was correct. For the reasons discussed below, the issue raised in her grievance does not qualify for a hearing.

FACTS

The grievant has been employed at the agency as a Registered Nurse II since March 10, 1998. On September 10, 2001, while the grievant was on duty, a client was able to leave the bedroom without the alarm sounding. On December 21, 2001 the grievant was issued a corrective counseling form for unsatisfactory job performance, which stated that the grievant “used poor judgement in not recognizing the importance of assuring the alarm was in proper working order.”<sup>1</sup>

The grievant filed her grievance on January 10, 2002, challenging the issuance of the counseling memo. Specifically, she challenges statements that her judgement was poor and claims that she “was not aware or made aware of [the] alarm not working.”<sup>2</sup> Further, the grievant asserts that her job performance was satisfactory as no clients were harmed, she fixed the alarm as soon as the unit was safe, and that “the unit was left in a safer condition than when [she] came on duty.”<sup>3</sup> Management notes that although it had “investigated and substantiated a charge of client neglect, it mitigated the discipline to a counseling memo due to the grievant’s tenure, extensive nursing experience, and the circumstances related to the incident.”<sup>4</sup>

The agency upheld the issuance of the counseling memo and the grievant requested a qualification ruling from this Department.

DISCUSSION

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<sup>1</sup> See Employee Counseling Form signed and dated by supervisor 12/21/01.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

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 observed performance problems. The Department of Human Resource Management (DHRM) has sanctioned the use of counseling memoranda as an informal means for management to communicate to an 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>5</sup> Further, under the grievance procedure, informal supervisory actions, including counseling memoranda, do not qualify for a hearing absent a claim of discrimination, retaliation, or misapplication or unfair application of policy.<sup>6</sup> Additionally, counseling memoranda generally cannot be qualified for a hearing because they do not constitute an “adverse employment action” affecting the terms and conditions of employment.<sup>7</sup>

In this case, the grievant has presented no evidence that she has suffered an adverse employment action.<sup>8</sup> Rather, the grievant essentially challenges management’s conclusion that her behavior warranted correction through a counseling memorandum, which had merely, communicated to the grievant the agency’s perception that she had not satisfactorily performed her job duty that past September. Accordingly, although the grievant disagrees with management’s perception of her performance, this grievance does not qualify for a hearing.

#### 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 this determination to the circuit court, she should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court 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 notifies the agency that she does not wish to proceed.

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Claudia Farr  
Director

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Deborah M. Amatulli  
Employment Relations Consultant

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<sup>5</sup> DHRM Policy No. 1.60(VI)(C).

<sup>6</sup> *Grievance Procedure Manual* § 4.1(c), page 11.

<sup>7</sup> An adverse employment action is defined as a tangible employment act constituting 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. *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, 2268 (1998).

<sup>8</sup> Should the counseling memorandum later serve to support an adverse employment action against the grievant, e.g., a “Below Contributor” annual performance rating, the grievant may challenge the merits of the counseling memorandum through a subsequent grievance challenging the annual performance rating.

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