

Issue: Qualification; Methods/Means; Counseling (oral or written memorandum); Ruling
Date: June 26, 2002; Ruling #2002-071; Agency: Department of State Police; Outcome:
not qualified.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police
Ruling Number 2002-071
June 26, 2002

ISSUE:

Does the grievant's claim that he received an unwarranted counseling memorandum (sustained complaint) qualify for hearing?

RULING:

The grievance does not qualify for a hearing. For information regarding the grievant's options as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal this determination to the circuit court, the grievant should notify the Human Resources Office, in writing, within five workdays of the receipt of this ruling. If the court should qualify the grievance, within five workdays of the receipt of the court's decision, the agency will request the appointment of a hearing officer, unless the grievant notifies the agency that he does not want to proceed.

EXPLANATION:

The grievant is employed as a State Trooper II. On or about January 18, 2002, he was issued a counseling memorandum (sustained complaint) for engaging in what management believed was inappropriate conversation with a motorist. The grievant contends that the counseling memorandum was unjustified in view of the circumstances surrounding the incident.

Under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ Inherent in this authority is the responsibility and discretion to communicate to employees perceived behavior problems. The Department of Human Resource Management (DHRM) has sanctioned the issuance of counseling memoranda as an informal means of communicating what management

¹ *Grievance Procedure Manual*, § 4.1(c), page 11. See also Va. Code § 2.2-3004(B).

notes as problems with behavior, conduct, or performance. However, DHRM does not recognize such counseling as formal disciplinary action under the *Standards of Conduct*.² Thus, under the grievance procedure, grievances challenging counseling memoranda may not be qualified for a hearing, unless there is evidence raising a sufficient question as to whether, through the issuance of the memorandum, management may have misapplied or unfairly applied policy, engaged in retaliation or discrimination, or otherwise took an “adverse employment action”³ against the grievant affecting the terms and conditions of his employment.⁴ Here, the grievance does not allege nor present any evidence of those grounds. Rather, the grievance essentially challenges management’s decision that the grievant’s behavior warranted correction through a counseling memorandum. Accordingly, this grievance does not qualify for a hearing.⁵

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Director

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² See DHRM Policy Number 1.60(VI)(C).

³ 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).

⁴ *Grievance Procedure Manual*, § 4.1, pages 10-11.

⁵ Should the counseling memorandum later serve to support an adverse employment action against the grievant, e.g., a “Below Contributor” performance rating, the grievant may challenge the merit of the counseling memorandum through a subsequent grievance challenging the performance evaluation.