Issue: Qualification-Methods/Means-Counseling Memorandum; Ruling Date: July 15, 2002; Ruling #2002-109; Agency: Radford University; Outcome: not qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Radford University
Ruling Number 2002-109
July 15, 2002

The grievant has requested a ruling on whether her March 19, 2002 grievance with Radford University qualifies for a hearing. The grievant claims that management discriminated and retaliated against her by issuing her a counseling memorandum. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Housekeeping & Apparel Services Worker. On or about February 14 and again on February 21, 2002, the grievant was instructed by her supervisors to provide a written statement regarding an incident that she had witnessed. The grievant refused to comply on both occasions because she contends that management does not equally investigate all reported incidents of alleged employee misconduct. As a result of her refusal, on March 13, 2002, she was issued a counseling memorandum for her failure to follow her supervisors' instructions.

DISCUSSION

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 memorandum as an informal means of communicating what management 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,

[1] *Grievance Procedure Manual*, § 4.1(c), page 11. *See also* Va. Code § 2.2-3004(B).
[2] See DHRM Policy Number 1.60(VI)(C).

or otherwise took an "adverse employment action"[3] against the grievant affecting the terms and conditions of his employment.[4] Here, the grievance alleges that management's action constituted discrimination and retaliation. These issues are discussed below.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.[5] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the grievant suffered an adverse employment action due to prohibited discrimination based on her race. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[6]

In this case, it is undisputed that as an African American, the grievant is a member of a protected class. However, the grievant has presented no evidence establishing that she was treated differently than other similarly situated employees with respect to the issuance of counseling memoranda or other corrective action. Further, as discussed below in the Retaliation section, counseling an employee about her work performance, without more, does not constitute an "adverse employment action."[7] Therefore, this issue does not qualify for a hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity; (2) the employee suffered an adverse employment action; and (3) a casual link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity.[8] If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency' stated reason was a mere pretext or excuse for retaliation.[9]

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[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] *Grievance Procedure Manual* §4.1(b), page 10.

[6] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

[7] Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999). Adverse employment action typically requires discharge, demotion, decrease in pay or benefits, loss of job title or supervisory responsibility, or reduced opportunity for promotion. Boone at 255-256.

[8] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 863 (4th Cir. 2001).

[9] *See* Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 658 (4th Cir. 1998).

Only the following activities are protected activities under the grievance procedure: (1) participating in the grievance process, (2) complying with any law or reporting a violation of such law to a governmental authority, (3) seeking to change any law before the Congress or the General Assembly, (4) reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or (5) exercising any right otherwise protected by law.[10] Here the grievant has presented no evidence that she engaged in any of the protected activities above. 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. In this case, the grievant has presented no evidence that she has suffered an adverse employment action.[11] Accordingly, this issue 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, the grievant 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 wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

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June M. Foy
Senior Employee Relations Consultant

[10] *Grievance Procedure Manual* § 4.1(b), pages 10-11.

[11] 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 merits of the counseling memorandum through a subsequent grievance challenging the performance rating.