Issue: Qualification/Methods/Means/Counseling; Ruling Date: January 10, 2003; Ruling #2002-219; 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
Ruling Number 2002-219
January 10, 2003

The grievant has requested a qualification ruling on whether his May 2, 2002 grievance with the Department of Corrections (DOC or the agency), qualifies for hearing. The grievant claims that the counseling letter he received was unwarranted because (1) the investigation into his January 31, 2002 behavior determined that he acted in self-defense; and (2) he had no previous knowledge that his clinical decisions were inappropriate. For the reasons discussed below, this grievance does not qualify for hearing.

## FACTS

The grievant is employed as a Clinical Social Worker Supervisor (CSWS) with a treatment facility within DOC. As a supervisor, the grievant also serves as a trainer of other clinical social workers. Part of the grievant's duties include addressing negative behavior by inmates through the use of confrontation tools. One type of confrontation tool is termed a "haircut" or "therapeutic peer reprimand (TPR)".[1]

On January 31, 2002, the grievant employed a haircut to address the negative behavior of an inmate. During the confrontation session, the grievant felt threatened by the inmate and used physical force to protect himself. An investigation into the grievant's actions revealed that the grievant had acted in self-defense. On April 2, 2002, however, the grievant was issued a counseling letter to document the incident and the need for improvement in certain areas, as well as serve as a guide for the appropriate counseling procedures to utilize in the future. On May 2, 2002, the grievant initiated a grievance challenging the counseling letter.

[1] "The purpose of the haircut is to address serious problems when other interventions have not been effective in confronting negative behavior." Therapeutic Community Inmate Orientation Handbook, page 73. A haircut or TPR is most often reserved as a last resort within the confrontation tool continuum. TC Counselor Training: Skills Building, 1998. A how-to manual on clinical tools common to therapeutic communities, page 36.

## DISCUSSION

Under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[2] 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*.[3]

Under the grievance procedure, counseling memorandum do not qualify for hearing unless there is evidence raising a sufficient question as to whether, through the issuance of the memorandum, management took an "adverse employment action" against the grievant affecting the terms, conditions, or benefits of his employment.[4] A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[5] Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.[6]

In this case, the counseling letter did not, by itself, constitute an adverse employment action. Therefore, the issue of the counseling letter cannot qualify for a hearing as a separate claim for which relief can be granted. This Department has long held, however, that should the counseling letter later serve to support an adverse employment action against the grievant, e.g., a "Below Contributor" performance rating, the grievant may challenge the underlying merits of the counseling letter through a subsequent grievance challenging the performance evaluation.[7]

Similarly, the grievant's allegations of discrimination and retaliation, through the box checked on his Grievance Form A, would also fail to qualify for hearing because claims of retaliation and discrimination both require that the grievant suffer an adverse employment action.[8]

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[2] *Grievance Procedure Manual*, § 4.1(c), page 11. *See also* Va. Code § 2.2-3004(B).
[3] *See* DHRM Policy Number 1.60(VI)(C).
[4] *Grievance Procedure Manual* § 4.1, pages 10-11. 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). An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[5] *See* Boone v. Golden, 178 F.3d 253 (4th Cir. 1999).
[6] Va. Code § 2.2-3004(A).
[7] *See* EDR Rulings # 2002-109 and # 2002-069.
[8] Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998). (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

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 notifies the agency that he wishes to conclude the grievance.

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Claudia T. Farr
Director

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Jennifer S.C. Alger
Employment Relations Consultant

(3) a causal link exists between the adverse employment action and the protected activity. (emphasis added)). Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin. To establish a prima facie case of disparate treatment, an employee must show: (1) he is a member of a protected class; (2) he has satisfactory job performance; (3) *he was subjected to adverse employment action;* and (4) similarly situated employees outside his class received more favorable treatment. *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207,101 S. Ct. 1089 (1981). (emphasis added).