Issue: Qualification/retaliation/grievance activity; Ruling Date: September 4, 2003; Ruling #2003-144; Agency: University of Virginia; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of University of Virginia/ No. 2003-144
September 4, 2003

The grievant has requested a ruling on whether her May 8, 2003 grievance with the University of Virginia (University or UVA) qualifies for a hearing. The grievant claims that her supervisor discriminated and retaliated against her when she issued the grievant a written counseling memorandum. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is a Human Resource Analyst II with UVA. On April 21, 2003, the grievant notified the Director of the department, via email, that she intended to file a formal grievance challenging additional responsibilities given to two of her co-workers.[1] Later that day, the grievant received a written counseling memorandum concerning her conduct during a telephone conversation on April 18. According to the counseling memorandum, the grievant was speaking with a job applicant who believed she was the victim of age discrimination. During the conversation, the Director allegedly overheard the grievant referring to a Lead Analyst in the department as having no management experience, thus undermining the effectiveness of that individual and "[setting] the Lead up for failure."[2] The counseling memorandum further states that it was inappropriate for the grievant to refer the caller to the Lead Analyst when higher levels of management had previously spoken with the caller.

The grievant disagrees with her supervisor's description of the phone conversation in question.[3] She further claims that the counseling memorandum was issued in retaliation for the grievant's intention to use the grievance procedure. In an April 24 response to her counseling memorandum, the grievant agreed to not file another grievance if her supervisor would "tear up" the counseling memorandum.[4] The grievant's supervisor declined to accept the grievant's offer, reiterating her position that the grievant handled the telephone conversation inappropriately.

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[1] According to management, the two employees were given additional responsibilities and "Lead" titles based on the needs of the department. The grievant challenged the establishment of the lead roles in another May 8 grievance. In addition to this ruling request, the grievant has also requested a ruling on whether her other May 8 grievance qualifies for a hearing. The issues in that grievance will be addressed in a separate ruling from this Department.

[2] Counseling Memorandum from Director to grievant, "Counseling," dated April 21, 2003.

[3] *See* Memorandum from grievant to Director, "Response to your Memorandum to me of 4/21/3," pages 1-2, dated April 24, 2003.

[4] *Id*. at page 3.

DISCUSSION

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.[5] Therefore, under the grievance procedure, informal supervisory actions, including counseling memoranda, generally do not qualify for a hearing.[6] Here, the grievant asserts that her supervisor's issuance of written counseling was an act of discrimination and retaliation. Specifically, she claims that her supervisor (1) retaliated against her when she learned that the grievant intended to challenge through a grievance additional duties given to two of her co-workers and (2) discriminated against her based on her advocacy of minority hiring and recruitment.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[7] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. 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."[8]

Thus, for a claim of discrimination or retaliation to qualify for a hearing, the action taken against the grievant must result in an adverse effect *on the terms, conditions, or benefits* of one's employment.[9] In this case, the grievant has presented no evidence that she has suffered an adverse employment action, because the informal counseling had no significant detrimental effect on the grievant's employment status. Rather, the grievant

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[5] DHRM Policy No. 1.60(VI)(C).
[6] *Grievance Procedure Manual* § 4.1(c), page 11.
[7] Va. Code § 2.2-3004(A).
[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)). Claims of retaliation and discrimination both require that the grievant suffer an adverse employment action. *See* 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 (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). *See also* EDR Ruling 2002-219.

essentially challenges management's conclusion that her behavior warranted correction through written counseling, which had merely communicated to the grievant that her handling of a caller complaint was unprofessional. Accordingly, although the grievant disagrees with management's perception of her performance, this grievance does not qualify for a hearing.

While informal counseling does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant's employment and automatically qualifies for a hearing under the grievance procedure.[10] Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider informal documentation of perceived performance problems when completing an employee's performance evaluation.[11] Therefore, should the counseling memorandum in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a "Below Contributor" annual performance rating, this ruling does not foreclose the grievant from attempting to challenge the merits of the counseling memorandum through a subsequent grievance contesting any related adverse employment action.

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 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.

Claudia T. Farr
Director

Leigh A. Brabrand
EDR Consultant

[10] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a), page 10.

[11] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.