

Issue: Qualification/Discipline/Counseling letter; Ruling Date: November 19, 2003;
Ruling #2003-425; Agency: Virginia Department of Transportation; Outcome: not
qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2003-425
November 19, 2003

The grievant has requested a qualification ruling on whether his May 29, 2003 grievance with the Virginia Department of Transportation (VDOT or the agency), qualifies for hearing. The grievant claims that the counseling letter (reprimand) he received was unwarranted. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Technical Specialist III. On May 8, 2003, the grievant's supervisor sent the grievant an e-mail "documenting our incident today in hopes to improve service to our customers and to clarify my expectations of your job." Among other things, the e-mail memorandum addressed the grievant's "tone" and "ownership in the area of interpersonal skills." The supervisor stressed that the memo would not be retained in the grievant's personnel file and also offered the grievant training if he believed that it would be helpful. The grievant initiated a grievance challenging the counseling memo on May 29, 2003.

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

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

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).

the grievant affecting the terms, conditions, or benefits of his employment.³ A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁴ Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.⁵

In this case, the counseling e-mail did not, by itself, constitute an adverse employment action. Therefore, the issue of the counseling memo cannot qualify for a hearing as a separate claim for which relief can be granted. However, 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 address the underlying merits of the counseling memorandum through a subsequent grievance challenging the performance evaluation.⁶

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.

Claudia T. Farr
Director

William G. Anderson, Jr.
EDR Consultant, Senior

³ *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)).

⁴ *See Boone v. Golden*, 178 F.3d 253 (4th Cir. 1999).

⁵ Va. Code § 2.2-3004(A).

⁶ *See EDR Rulings # 2002-109 and # 2002-069.*