

Issue: Qualification/grievant claims counseling letter (reprimand) was unwarranted;
Ruling Date: March 12, 2004; Ruling #2003-529; 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 2003-529
March 12, 2004

The grievant has requested a qualification ruling on whether his August 12, 2003 grievance with the Department of Corrections (DOC) 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 Corrections Officer. On August 7, 2003, the grievant's supervisor presented the grievant a counseling letter citing him for a security breach. The letter reprimanded the grievant for leaving two uniform shirts on his post after closing, which "could result in a possible escape attempt or hostage situation." The grievant was also informed that further recurrences could result in disciplinary action. The grievant initiated a grievance challenging the letter of counseling on August 12, 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 the grievant affecting the term, conditions, or benefits of his employment.³ A counseling

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).

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,

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 letter did not, by itself, constitute an adverse employment action. Therefore, the issue of the counseling letter cannot qualify for a hearing. 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

As part of the relief requested, the grievant asks that he not be retaliated against in any form. Under the grievance procedure, employees are protected from retaliation for participating in the grievance process. Any such claim may be the basis for a subsequent grievance challenging the alleged retaliatory action.⁷

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

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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.

⁷ See *Grievance Procedure Manual*, § 4.1 (b) (4), page 10.

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