Issue: Qualification/counseling memoranda; Ruling Date: March 11, 2004, Ruling #2004-596, 2004-597; Agency: Department of Juvenile Justice; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/ No. 2004-596, 2004-597
March 11, 2004

The grievant has requested a ruling on whether his November 4, 2003 and November 8, 2003 grievances with the Department of Juvenile Justice (DJJ) qualify for a hearing. In his grievances, the grievant challenges the issuance of two counseling memoranda. For the following reasons, these grievances do not qualify for a hearing.

FACTS

The grievant is a Chief of Security with DJJ. On October 29, 2003, the grievant received a counseling memorandum for failing to ensure that his subordinates completed and signed their 28-day cycle sheets. On November 4, 2003, the grievant filed a grievance (Grievance 1) challenging the memorandum. The grievant claims that he does not have access to the 28-day cycle sheets and therefore has no way of verifying that they are complete and accurate. The agency claims that on two previous occasions, the grievant was informed that his subordinates were not signing their forms, but that he failed to correct the behavior.

Also on October 29, the grievant received a second counseling memorandum for failing to ensure that his subordinates recorded arrival and departure times on the facility's time clock. On November 8, 2003, the grievant filed a grievance (Grievance 2) challenging the memorandum. The grievant claims that he does not have access to the time clock system and was not able to monitor whether his subordinates were "punching in or out" on the clock as required. At the second management resolution step, the agency stated that the counseling memorandum was "removed from [the grievant's] file due to evidence presented in [the second-step meeting]."[1]

In addition, both Grievances 1 and 2 claim that the counseling memoranda amount to harassment. During this Department's investigation, the grievant stated that the harassment "goes a lot deeper" than the counseling memoranda and has been going on for two years. He claims that his workforce is constantly being depleted, yet he is

[1] Grievance Form A, Second Resolution Step, dated November 21, 2003.

expected to keep doing the same work. He also stated that since the arrival of this Superintendent, his performance ratings have gone down.

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.[2] Therefore, under the grievance procedure, informal supervisory actions, including counseling memoranda, generally do not qualify for a hearing.[3] Here, the grievant asserts that his supervisor's issuance of written counseling was an act of harassment.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[4] 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."[5]

Thus, for a grievance 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.[6] In this case, the grievant has presented no evidence that he has suffered an adverse employment action, because the informal counseling had no significant detrimental effect on the grievant's employment status. Rather, the grievant essentially challenges management's conclusion that his behavior warranted correction through written counseling, which had merely communicated to the grievant DJJ's perception that his responses to problems involving his subordinates was inadequate. Accordingly, although the grievant disagrees with management's perception of his performance, Grievances 1 and 2 do not qualify for a hearing.[7]

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[2] DHRM Policy No. 1.60(VI)(C).
[3] *Grievance Procedure Manual* § 4.1(c), page 11.
[4] Va. Code § 2.2-3004(A).
[5] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[6] 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)). *See also* EDR Ruling 2002-219.
[7] In addition, the grievant's harassment claim does not qualify for a hearing because such claims must involve "hostility or aversion towards a person on the basis of race, color, national origin, age, sex, religion, disability, marital status, or pregnancy." DHRM Policy 2.30, *Workplace Harassment.* Here, the grievant has not alleged that the two counseling memoranda were based on any of these factors.

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.[8] 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.[9] Therefore, should the counseling memoranda 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 contest the merits of the counseling memoranda through a subsequent grievance challenging the 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.

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Claudia T. Farr
Director

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

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