Issue: Qualification/Discipline/counseling memorandum; Ruling Date: November 17, 2003; Ruling #2003-175; Agency: Department of Juvenile Justice; Outcome: not qualified (keyword=letter of reprimand)

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling Number 2003-175
November 17, 2003

The grievant has requested a ruling on whether his July 17, 2003 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for a hearing. The grievant challenges a letter of reprimand that is to be issued in place of a rescinded June 24, 2003 Group II Written Notice.[1] For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Juvenile Corrections Officer Senior with DJJ. On June 24, 2003, the grievant received a Group II Written Notice with suspension for "failure to maintain sight and sound supervision of the cadets at all times." The second step-respondent rescinded the Group II Written Notice and restored the grievant's lost pay; however, due to the seriousness of the grievant's actions, he instructed the grievant's supervisor to place a letter of reprimand in the grievant's fact file. The grievant, unsatisfied with a letter of reprimand, sought qualification of his grievance. The agency head denied qualification, stating that informal supervisory actions, such as letters of reprimand and counseling memorandum, are not among the issues that may qualify for hearing.

DISCUSSION

Because the Group II Written Notice was rescinded and the grievant's pay restored, the only issue to be determined for qualification is the letter of reprimand.[2] Under the grievance procedure, management is reserved the exclusive right to

[1] During this Department's investigation, the agency confirmed that a letter of reprimand would be issued to the grievant, prior to November 1, 2003 as part of the grievant's performance evaluation.
[2] As relief, the grievant also sought 4 hours of annual leave that was lost due to his suspension; however, during this Department's investigation, the grievant stated that he does not know whether the annual leave was restored and at this point is not concerned with the restoration of leave. He is challenging only the letter or reprimand.

manage the affairs and operations of state government.[3] Inherent in this authority is the responsibility and discretion to communicate to employees perceived performance 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*.[4]

Under the grievance procedure, counseling memorandum and letters of reprimand 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.[5] A letter of reprimand, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[6] Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.[7]

A letter of reprimand does not, by itself, constitute an adverse employment action. Therefore, the issue of the 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 letter of reprimand 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 letter through a subsequent grievance challenging the performance evaluation.[8]

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

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[3] *Grievance Procedure Manual*, § 4.1(c), page 11. *See also* Va. Code § 2.2-3004(B).
[4] *See* DHRM Policy Number 1.60(VI)(C).
[5] *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)).
[6] *See* Boone v. Golden, 178 F.3d 253 (4th Cir. 1999).
[7] Va. Code § 2.2-3004(A).
[8] *See* EDR Rulings # 2002-109 and # 2002-069.

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
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