Issue: Qualification/Counseling Memorandum; Ruling Date: August 27, 2004; Ruling #2004-765, 2004-766, 2004-767; 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/ No. 2004-765, 2004-766, and 2004-767
August 27, 2004

The grievant has requested a ruling on whether her grievances filed on March 25, 2004 and April 14, 2004 with the Department of Corrections (DOC or the agency) qualify for a hearing. The grievant alleges that she has been subjected to harassment and retaliation, and that agency policy was unfairly applied and/or misapplied. For the following reasons, these grievances do not qualify for a hearing.

FACTS

The grievant is a Corrections Officer with DOC. On March 10, 2004, the grievant's immediate supervisor recommended to the Chief of Security that the grievant be disciplined for excessive use or abuse of sick leave. This recommendation was ultimately rejected, although the grievant was counseled on April 26, 2004 regarding appropriate documentation for sick leave and the need to schedule appointments to minimize absences from work. No disciplinary action was taken against the grievant in connection with this recommendation.

On March 11, 2004, the grievant's immediate supervisor counseled her verbally regarding an incident in which she allegedly failed to secure a janitor's closet. The supervisor's action was based on a complaint he received from the facility's safety specialist. Approximately one month prior to this incident, the grievant had questioned as unsafe a facility action authorized by the specialist.

On the basis of these incidents, the grievant initiated two grievances on March 25, 2004. One of these grievances (No. 2004-767) challenges the supervisor's recommendation for disciplinary action for excessive leave and the verbal counseling on the grounds that the agency's actions constitute harassment, are in retaliation for protected activity, and are unfair applications or misapplications of agency policy. The other grievance (No. 2004-766) charges that the safety specialist accused the grievant of leaving the janitor's closet unsecured in retaliation for her previous challenge to facility practice.

The grievant's third grievance (No. 2004-765), initiated on April 14, 2004, contends that the agency used its first-step response to her first March 25, 2004 grievance to retaliate against her for her grievance activity. At the first-step level, the agency modified the title of the supervisor's recommendation from "Excessive Use or Abuse of Time" to "Possible Abuse of Sick Leave," but otherwise left the recommendation unchanged, noting that it was the supervisor's responsibility to review leave records and to make referrals for discipline to the Chief of Security. The grievant claims this first-step response constitutes a second instance of informal counseling, and that the agency's actions were in retaliation for her March 25th grievance.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[1] Therefore, claims relating to issues such as informal counseling generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination or retaliation may have improperly influenced management's decision, or whether agency policy may have been misapplied or unfairly applied.

Such evidence in itself, however, is insufficient to qualify a grievance for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[2] The threshold question, therefore, is 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."[3] 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.[4]

In this case, the grievant has presented no evidence that she has suffered an adverse employment action. There is no allegation that any of the actions grieved—informal counseling, a recommendation for discipline which was not accepted, and an allegation of failing to secure a janitor's closet—had a significant detrimental effect on the grievant's employment status. Because the grievant has failed even to make the threshold showing of an adverse employment action, she is not entitled to a hearing.

---

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A).
[3] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[4] 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 2004-596, 2004-597.

We note, however, that 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.[5] 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.[6] Therefore, should the informal counseling 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 informal counseling through a subsequent grievance challenging the related adverse employment action.

We wish to note that mediation may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved.

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

Gretchen M. White

[5] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).
[6] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

EDR Consultant