Issue: Qualification/misapplication of policy, counseling memo; Ruling Date: September 7, 2004; Ruling #2004-863; 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 2004-863
September 7, 2004

The grievant has requested a qualification ruling on whether her June 8, 2004 grievance with the Department of Corrections (DOC) qualifies for hearing. The grievant alleges that the agency misapplied and/or unfairly applied policy. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by DOC as a Corrections Officer. On May 15, 2004, the grievant was issued a counseling letter for unprofessional conduct after she hung up on her supervisor during a telephone conversation. On June 8, 2004, the grievant initiated the present grievance, asking that the counseling letter be rescinded on the grounds it was "false."[1]

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[2] 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."[3] The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

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[1] During the agency resolution steps, DOC amended the counseling letter to clarify that it was based on the grievant's inappropriate conduct in hanging up the phone on a supervisor, but otherwise denied the grievant's request for relief.
[2] Va. Code § 2.2-3004(B).
[3] Va. Code § 2.2-3004(A).

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."[4] 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.[5]

In this case, the counseling letter did not constitute an adverse employment action. A counseling memorandum, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[6] As the grievant has failed to show the existence of an adverse employment action, this issue does not qualify for a hearing.

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.[7] 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.[8] 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 also note that although this issue does not qualify for a hearing, mediation may be a viable option for the parties 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.

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[4] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[5] 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.
[6] *See* EDR Ruling 2003-425. *See also* Boone v. Golden, 178 F. 3d 253 (4th Cir. 1999).
[7] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).
[8] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

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 she wishes to conclude the grievance.

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Claudia T. Farr
Director

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EDR Consultant