

Issue: Qualification/Counseling Memorandum; Ruling Date: October 14, 2004; Ruling #2004-871; Agency: Department of Environmental Quality; Outcome: not qualified, Appealed in the Circuit Court of the City of Richmond, John Marshall Courts Building; Case #CH04-1786-4; Decision: Reversed; Issued on December 16, 2004.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality/ No. 2004-871  
October 14, 2004

The grievant has requested a ruling on whether his June 3, 2004 grievance with the Department of Environmental Quality (DEQ or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied and unfairly applied agency policy and has retaliated against him for engaging in protected activity. For the following reasons, the grievance does not qualify for a hearing.

FACTS

The grievant is employed with DEQ as an Environmental Engineer Consultant. In March 2004, the grievant asked a co-worker to remove a posting the grievant found offensive from his office door. The posting consisted of a photograph of Saddam Hussein, altered to show him holding a sign stating "Will Tyrannize For Food." After the co-worker failed to comply with the grievant's request, the grievant took down the posting. The co-worker then posted the image again, both on his door and in his office, and the grievant again removed the postings. After several repetitions of this activity by the grievant and his co-worker, the co-worker complained to the Office Director about the grievant's conduct, and the grievant complained to the agency's Human Resources Office.

After investigation, the Office Director concluded that no disciplinary action was necessary, but sent an e-mail to both the grievant and his co-worker asking them to be sensitive to others' perceptions in posting materials in and around their offices and to address any concerns about the conduct of other employees through supervisory channels rather than through self-help. The grievant alleges that he subsequently complained to the Human Resources Office that he was not satisfied with the Office Director's investigation or his conclusion, but that the Human Resources Office closed the matter without further investigation.

The grievant claims that the Office Director's e-mail constitutes an unfair application of agency policy and was in retaliation for the grievant's protected activity,<sup>1</sup> and he seeks retraction of this e-mail "in all aspects that pertain to [him]." The grievant further charges that the agency's investigation of his conduct was "conducted through misapplication of agency procedures" and that the agency wrongly closed its review of this incident without having interviewed him.

### DISCUSSION

The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."<sup>2</sup> 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."<sup>3</sup> Retaliation for protected activity or the misapplication or unfair application of policy may constitute an adverse employment action if, but only if, the conduct results in a significant adverse effect on the terms, conditions, or benefits of one's employment.<sup>4</sup>

In this case, it is clear that the June 3, 2004 grievance does not involve an adverse employment action. Although the grievant characterizes the Office Director's e-mail as a "reprimand," this e-mail was merely informal counseling, which, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>5</sup> Further, there is no evidence that the agency's investigation of this matter resulted in a significant adverse effect on the terms, conditions, and/or benefits of his employment, particularly as the investigation did not lead to any disciplinary action against the grievant.<sup>6</sup> Accordingly, as the grievant has failed to make the threshold showing of an adverse employment action, this grievance does not qualify for hearing.

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<sup>1</sup> The grievant alleges that shortly after his co-worker complained, he learned that he had not received a promotion for which he had applied and had advised the Office Director of his intent to file a grievance regarding the promotion decision.

<sup>2</sup> Va. Code § 2.2-3004(A).

<sup>3</sup> Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

<sup>4</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>5</sup> See EDR Ruling 2003-425. See also Boone v. Golden, 178 F. 3d 253 (4<sup>th</sup> Cir. 1999).

<sup>6</sup> The grievant asserts that the agency was without authority to investigate his dispute with his co-worker because it involved what the agency characterized as an "altercation"—a term the grievant understands to be an allegation of criminal conduct, which the grievant contends could only be investigated by law enforcement. While we disagree with the grievant's understanding of the term "altercation" and note that the agency may investigate allegations of workplace misconduct even if the misconduct is also criminal in nature, these issues are ultimately immaterial, as the grievant has failed to show that the investigation constituted an adverse employment action.

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.<sup>7</sup> 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.<sup>8</sup> 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 the grievance 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. For more information on this Department's Workplace Mediation program, call Patricia Morrison, EDR Mediation Coordinator, at 804-786-7994.

#### 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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Gretchen M. White

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<sup>7</sup> See generally DHRM Policy 1.60, Standards of Conduct; see also *Grievance Procedure Manual* § 4.1(a).

<sup>8</sup> DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

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