

Issue: Qualification/counseling memoranda; Ruling Date: September 27, 2004; Ruling #2004-875; Agency: Department of Transportation; Outcome: not qualified



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*  
**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Transportation  
No. 2004-875  
September 27, 2004

The grievant has requested a ruling on whether his grievance filed on May 10, 2004 with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant challenges two counseling memoranda issued to him. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Trades Technician IV. On April 16, 2004, the agency issued the grievant a counseling memorandum for failing to identify project requirements, to have a “plan of action to offset unscheduled work changes,” to “demonstrate the ability to motivate performance to the accomplishment of tasks,” and to ensure that work “is performed according to applicable codes and safety regulations.” No formal disciplinary action was taken against the grievant in connection with the shortcomings identified in this counseling memorandum, although the grievant was advised that continued failure to satisfy the agency’s requirements would result in progressive discipline under the Standards of Conduct.

On April 22, 2004, the agency issued a second counseling memorandum to the grievant for disruptive behavior toward the Facility Manager and the Superintendent of Maintenance. The agency did not take disciplinary action against the grievant in relation to his alleged disruptive behavior, but advised the grievant that any further re-occurrences of “disruptive, non-cooperative, and/or impeding behavior” would result in progressive disciplinary action.

The grievant initiated the present grievance challenging these two counseling memoranda on May 10, 2004. The agency denied the grievant’s request for relief on the ground that the actions taken by the agency were appropriate responses to the grievant’s conduct.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Therefore, claims

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<sup>1</sup> Va. Code § 2.2-3004(B).

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, resulting in an "adverse employment action."<sup>2</sup>

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> 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.<sup>4</sup>

In this case, the grievant has presented no evidence that he has suffered an adverse employment action. There is no allegation that two counseling memoranda 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, he is not entitled to 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.<sup>5</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>6</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.

#### 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

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<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)). See also EDR Ruling 2004-596, 2004-597.

<sup>5</sup> See generally DHRM Policy 1.60, Standards of Conduct; see also *Grievance Procedure Manual* § 4.1(a).

<sup>6</sup> DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

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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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