

Issue: Qualification/performance/Notice of Improvement Needed; Ruling Date: October 12, 2004; Ruling #2004-876; 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  
Ruling No. 2004-876  
October 12, 2004

The grievant has requested a ruling on whether his challenge to a May 25, 2004 Notice of Improvement Needed/Substandard Performance, as raised in his June 17, 2004 grievance with the Department of Transportation (VDOT or the agency), qualifies for a hearing. For the reasons set forth below, this issue does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Survey Field Office Manager. On May 25, 2004, the agency issued the grievant a Group II Written Notice and a Notice of Improvement Needed/Substandard Performance for failing to follow agency policy and for creating a hostile work environment through a "harassing" management style. In addition, the agency suspended the grievant for a week in conjunction with the Written Notice.

On June 17, 2004, the grievant initiated a grievance challenging the Written Notice, the suspension, and the Notice of Improvement Needed/Substandard Performance. After the completion of the agency resolution steps, the agency qualified for hearing the grievant's challenge to the Written Notice and suspension, but denied the grievant's request for a hearing with respect to the Notice of Improvement Needed/Substandard Performance.

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 relating to issues such as a Notice of Improvement Needed/Substandard Performance 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

---

<sup>1</sup> Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(A).

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 Notice of Improvement Needed/Substandard Performance does not constitute an adverse employment action. Such a notice, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>5</sup> Because the grievant has failed to show the existence of an adverse employment action, this grievance does not qualify for a hearing.

We note, however, that while the Notice of Improvement Needed/Substandard Performance does not qualify for a hearing as a separate claim for which relief can be granted, the grievant may present evidence at hearing regarding the Notice if the hearing officer determines that it has some bearing on the issue of whether the Group II Written Notice was warranted and appropriate. We also note that although the Notice of Improvement Needed/Substandard Performance does not, in itself, have an adverse impact on the grievant’s employment, it could be used later to support an adverse employment action against the grievant. If this occurs, this ruling does not foreclose the grievant from attempting to contest the merits of the Notice of Improvement Needed/Substandard Performance 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 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  
EDR Consultant

---

<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* Boone v. Golden, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

October 12, 2004  
Ruling #2004-876  
Page 4