Issue: Qualification/counseling memorandum; Ruling Date: June 8, 2005; Ruling #2005-1038; Agency: Virginia 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. 2005-1038
June 8, 2005

The grievant has requested a ruling on whether her September 2, 2004 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant challenges a counseling memorandum, as well as a discussion with her supervisors in which her performance was discussed. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as an Engineering Tech. The grievant states that on August 12, 2004, she met with three of her supervisors to discuss her documentation of projects assigned to her.[1] The grievant claims that as a result of this meeting, she was asked to be more detailed in her documentation in the future. She also states that she "came out of that meeting feeling belittle[d]." Several days later, on August 18, 2004, the grievant received a counseling memorandum from her immediate supervisor for failing to complete a project in a timely manner.

On September 2, 2004, the grievant initiated a grievance challenging the August 12th meeting and the August 18th counseling memorandum. Although the grievant did not make any specific allegations of discrimination or retaliation, on her Grievance Form A, she checked the box indicating that she was not presenting the grievance to her immediate supervisor because of alleged discrimination or retaliation. She also stated that the relief she sought as a result of the grievance was a copy of the procedures she had been accused of failing to follow.

Although the agency states that the grievant was provided with the requested relief at the first resolution step, the grievant elected to advance her grievance to the second step. After receiving the agency's first-step response, which indicated that a copy of the requested procedure had been provided, the grievant wrote on her Grievance Form A that she also wanted the counseling letter removed.[2]

[1] The agency claims that this meeting occurred on August 11, 2004.
[2] In addition, she clarified that her claim of retaliation did not involve her immediate supervisor.

The parties failed to resolve the grievance during the resolution steps, and the grievant requested that the agency head qualify the grievance for hearing. The agency head denied the grievant's request, and she has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] 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, resulting in an "adverse employment action."[4]

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."[5] 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.[6]

In this case, the grievant has presented no evidence that she has suffered an adverse employment action. There is no allegation that either the August 12th verbal counseling or the August 18th counseling memorandum had a significant detrimental effect on the grievant's employment status.[7] Because the grievant has failed to make the threshold showing of an adverse employment action, she is not entitled to a hearing.[8]

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

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[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A).
[5] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[6] 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.
[7] Although the grievant does not specifically raise a claim of retaliatory harassment, her grievance also would not qualify for hearing under this analysis, as the two alleged acts of retaliation are not sufficiently severe or pervasive so as to alter her conditions of employment and create an abusive or hostile work environment. *See* EDR Ruling No. 2004-750.
[8] We note that under the grievance procedure, a grievance involving formal disciplinary action automatically qualifies for hearing. Va. Code § 2.2-3004; *Grievance Procedure Manual* § 4.1(a). However, informal counseling, such as the written and verbal counseling received by the grievant, does not constitute formal discipline, and therefore does not qualify for hearing. *See* DHRM Policy 1.60 (distinguishing "corrective action," such as informal counseling, from formal disciplinary action); *see also Grievance Procedure Manual* § 4.1(c) (stating that claims relating solely to informal supervisory actions (including counseling memoranda and oral memoranda) do not qualify for hearing).

Conduct, repeated misconduct may result in *formal* disciplinary action, which *would* have a detrimental effect on the grievant's employment and which automatically qualifies for a hearing under the grievance procedure.[9] 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.[10] 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 prevent 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 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
EDR Consultant

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