

Issue: Qualification/performance/notice of improvement needed/substandard performance; ruling
Date: June 8, 2005; Ruling #2005-1050; Agency: Department of Mental Health, Mental
Retardation, and Substance Abuse Services; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Mental Health,
Mental Retardation, and Substance Abuse Services
Ruling No. 2005-1050
June 8, 2005

The grievant has requested a ruling on whether her challenge to a March 8, 2005 Notice of Improvement Needed/Substandard Performance, as raised in her March 17, 2005 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS 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 registered nurse. On March 8, 2005, the agency issued the grievant a Notice of Improvement Needed/Substandard Performance for continuing to utilize Nursing Reports to communicate her dissatisfaction with administrative issues, despite repeated requests that she communicate any concerns or suggestions in a separate memorandum, rather than using Nursing Reports for this purpose. On March 17, 2005, the grievant initiated a grievance challenging the Notice of Improvement Needed/Substandard Performance. After the completion of the agency resolution steps, the agency denied the grievant's request for a grievance hearing.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.¹ 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."²

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

¹ Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(A).

benefits.”³ 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.⁴

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.⁵ 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 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.⁶

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

⁴ 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.

⁵ *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

⁶ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).