

Issue: Qualification/discipline-counseling memorandum/performance-notice of improvement needed; Ruling Date: June 22, 2005; Ruling #2005-1056; Agency: Department of Corrections; Outcome: not qualified



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

In the matter of Department of Corrections
No. 2005-1056
June 22, 2005

The grievant has requested a ruling on whether his grievance filed on April 7, 2005 with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant alleges that the agency misapplied and/or unfairly applied policy when management verbally counseled him and gave him a Notice of Improvement Needed/Substandard Performance. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Corrections Officer Senior. He alleges that on April 2, 2005, Supervisor L verbally counseled him in front of other employees and inmates for using the public address system to advise inmates that if they did not report to the medical department for a test, they would receive a disciplinary charge. Several days later, the grievant received a Notice of Improvement Needed/Substandard Performance. This Notice was based on the grievant's public address announcement of April 2nd, as well as his subsequent behavior, which Supervisor L considered to be insubordinate.

The grievant initiated a grievance challenging the verbal counseling and the Notice on April 7, 2005. He alleges that the agency's actions constitute a misapplication and/or unfair application of policy because the counseling was not done in private, his immediate supervisor was not involved in the process, the Notice of Improvement Needed established an unobtainable future training goal, and the Notice failed to list an improvement period and to identify any core responsibilities that the grievant had failed to meet. As relief, the grievant requested mediation with Supervisor L, removal of the Notice, and "freedom to communicate" with his supervisor.

After the first-step respondent denied the grievant's request for relief, the grievant advanced his grievance to the second management resolution step. The second-step respondent advised the grievant that Supervisor L would not agree to mediation, but that the Notice would be rescinded and revised to remove references identified by the grievant as not pertaining to the incident. The second-step respondent also advised the grievant that he would not be restricted from communicating with his supervisor, and in fact, was encouraged to do so. The grievant found this relief unsatisfactory and continued to advance his grievance. On June 9, 2005, the agency head denied the grievant's request for qualification of his grievance for hearing. The grievant subsequently appealed the denial of qualification 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.¹ Therefore, claims relating to issues such as informal counseling or 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 benefits."³ Thus, for a grievance to qualify for a hearing, the actions 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 grievant has presented no evidence that he has suffered an adverse employment action. While we acknowledge the grievant's apparent frustration with being admonished in front of other employees and inmates, there is no evidence that the verbal counseling had a significant detrimental effect on the grievant's employment status. Similarly, the Notice of Improvement Needed/Substandard Performance does not constitute an adverse employment action, as 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.⁶

We note, however, that while informal counseling and a Notice of Improvement Needed/Substandard Performance do not have an adverse impact on the grievant's employment, either 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

¹ Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(A).

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 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 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).

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.⁷ 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.⁸ Therefore, should the informal counseling and/or Notice of Improvement Needed 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.⁹

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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Director

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

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

⁹ 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 he wishes to challenge, correct or explain information contained in his 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 his 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).