Issue: Qualification/counseling memorandum (topic of discussion); Ruling Date: February 3, 2005; Ruling #2005-953; 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. 2005-953
February 3, 2005

The grievant has requested a ruling on whether his grievance filed on July 20, 2004 with the Department of Corrections (DOC or the agency) qualifies for a hearing. The grievant challenges an informal counseling memorandum (termed by the agency as a "Topic of Discussion") issued to him by agency management. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a Corrections Officer. On June 21, 2004, the agency issued the grievant a counseling memorandum based on his receipt of a Uniform Summons to General District Court from the Department of Game and Inland Fisheries for exceeding the daily catch limit for trout (a Class II Misdemeanor, according to the agency). The counseling memorandum reminded the grievant of the "importance of obeying all state laws and ordinances" and was not accompanied by any formal discipline against the grievant such as a group notice, demotion, suspension, or any other action. The grievant initiated the present grievance challenging the counseling memorandum on July 20, 2004. The agency denied the grievant's request for relief on the grounds that there was no evidence that the agency had misapplied policy or treated the grievant unfairly by issuing the counseling.

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 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

[1] Va. Code § 2.2-3004(B).
[2] Va. Code § 2.2-3004(A).

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 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 grievant has presented no evidence that he has suffered an adverse employment action. There is no allegation that the counseling memorandum 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.[5]

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.[6] 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.[7] 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 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

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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] 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).

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

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

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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William G. Anderson, Jr.
EDR Consultant