Issue: Qualification/grievant claims agency misapplied and unfairly applied agency policy; Ruling Date: February 8, 2005; Ruling #2005-958; Agency: Department of Juvenile Justice; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice
Ruling No. 2005-958
February 8, 2005

The grievant has requested a ruling on whether her October 13, 2004 grievance with the Department of Juvenile Justice (DJJ or the agency) qualifies for a hearing. The grievant claims that the agency has misapplied and unfairly applied agency policy. For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with DJJ as a Rehab Counselor II. On September 15, 2004, the grievant received a written "reprimand" for hand-writing, rather than typing, an inter-facility correspondence form. The grievant states that she had received permission from her supervisor to hand-print the form in ink because the typewriter was broken.

On October 13, 2004, the grievant initiated a grievance challenging the agency's action. Specifically, the grievant argues that there is no policy requiring inter-facility correspondence forms to be typewritten. Moreover, she asserts that the issuance of a written reprimand is "too harsh" a penalty for violation of a non-existent policy of which she was unaware.

After the parties failed to resolve the grievance in the management resolution steps, the grievant requested that the agency qualify her grievance for hearing. The agency denied the grievant's request. The grievant now appeals the agency's determination 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 generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination

[1] Va. Code § 2.2-3004(B).

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 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, it is clear that the October 13, 2004 grievance does not involve an adverse employment action. Although the September 15, 2004 communication to the grievant was styled a "reprimand," this document was merely informal counseling, which, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[5] The reprimand was not placed in the grievant's personnel file and no discipline was taken against the grievant in connection with the reprimand.[6] Further, the grievant does not allege that her position was changed or that she suffered a loss of pay or benefits. Accordingly, as the grievant has failed to make the threshold showing of an adverse employment action, this grievance does not qualify for hearing.

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.[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 in this case later

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[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* EDR Ruling 2003-425. *See also* Boone v. Golden, 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 reprimand 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).
[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."

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.

We also note that although the grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, call 804-786-7994.

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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