Issue: Qualification/Discipline/Counseling (Memorandum or Oral); Ruling Date: August 31, 2005; Ruling #2006-1085; Agency: Virginia Department of State Police; Outcome: not qualified. Appealed to Circuit Court of the County of Prince William; Chancery No. LA66648; Decision rendered on October 3, 2005; Outcome: decision of EDR is reversed and cause remanded for hearing.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Virginia State Police
Ruling Number 2006-1085
August 31, 2005

The grievant has requested a ruling on whether his April 26, 2005 grievance with the Virginia State Police (VSP or the agency) qualifies for hearing. The grievant alleges that the agency improperly sustained a citizen complaint against him. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Law Enforcement Officer III with the VSP. On November 19, 2004, there was a citizen complaint made against the grievant for alleged inappropriate conduct. The citizen complaint resulted in an internal affairs investigation into the grievant's behavior. The internal affairs investigation ultimately founded the allegations against the grievant and on April 13, 2005, the grievant received a letter from management advising him of why his behavior was inappropriate and instructing him that in the future he is to "stick to the prescribed policies when dealing with violators and submit any necessary written reports in a professional manner."

According to VSP, the April 13, 2005 letter and sustained finding alone do not affect the grievant's promotional or career progression opportunities and remains in the grievant's supervisor's file, not the grievant's personnel file. Likewise, the grievant alleges that the April 13th letter and sustained finding have not hurt him financially or emotionally and that there has been "no harm done." However, the grievant further alleges that the April 13th letter does serve to limit his discretion as a police officer.

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.

[1] Va. Code § 2.2-3004(B).

Such evidence in itself, however, is insufficient to qualify a grievance for a hearing. The General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[2] The threshold question, therefore, is whether or not the grievant has suffered an adverse employment action.

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]

Although not specifically denoted as such on its face, based on the parties' assertions regarding the effect of the letter as well as the content of the letter, it appears that the April 13, 2005 letter is equivalent to a counseling memorandum. A counseling letter, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment and thus, does not constitute an adverse employment action.[5] Likewise, even if true, limiting an employee's discretion by invoking or implementing a policy regarding behavior deemed inappropriate by management is not an adverse employment action. As the grievant has failed to show the existence of an adverse employment action, this issue does not qualify for a 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.[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.

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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. Goldin, 178 F. 3d 253 (4th Cir. 1999).
[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.

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 this 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 notifies the agency that he wishes to conclude the grievance.

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Claudia T. Farr
Director

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Jennifer S.C. Alger
EDR Consultant