

Issue: Qualification/Performance/Notice of Improvement Needed; Ruling Date: September 2, 2005; Ruling #2006-1116; Agency: University of Virginia; Outcome: Not qualified.

*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of the University of Virginia  
Ruling Number 2006-1116  
September 2, 2005

The grievant has requested a ruling on whether her challenge to a May 19, 2005<sup>1</sup> Notice of Improvement Needed/Substandard Performance, as raised in her June 15, 2005 grievance with the University of Virginia (UVA or the University), qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an Administration and Program Specialist III with UVA. On May 19, 2005, the grievant was issued a Notice of Improvement Needed/Substandard Performance. The grievant challenged the Notice of Improvement Needed by initiating her June 15, 2005 grievance. In her June 15<sup>th</sup> grievance, the grievant alleges that (1) she was denied a “pre-determination hearing” prior to the issuance of the Notice of Improvement Needed; (2) the agency misapplied and unfairly applied policy; (3) the Notice of Improvement Needed is arbitrary and capricious; and (4) the Notice of Improvement Needed “exceeds the limits of reasonableness.”<sup>2</sup>

DISCUSSION

*Notice of Improvement Needed*

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Therefore, claims relating to 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

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<sup>1</sup> The University signed and dated the Notice of Improvement Needed/Substandard Performance May 13, 2005. However, it appears that the grievant did not sign the Notice of Improvement Needed/Substandard Performance until May 19, 2005. Accordingly, for purposes of this ruling, the Notice of Improvement Needed/Substandard Performance will be considered issued on May 19, 2005.

<sup>2</sup> In addition, during the management resolution steps, the grievant raised an additional claim of retaliation for participating in the grievance process. However, because the issue of retaliation was not raised on Form A or in an attachment thereto when the grievant initiated her grievance, it will not be addressed here. See *Grievance Procedure Manual* § 2.4 (“[o]nce the grievance is initiated, additional claims may not be added.”)

<sup>3</sup> Va. Code § 2.2-3004(B).

decision, or whether agency policy may have been misapplied or unfairly applied, resulting in an “adverse employment action.”<sup>4</sup>

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.”<sup>5</sup> 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.<sup>6</sup>

In this case, the grievant has presented no evidence that she has suffered an adverse employment action. 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.<sup>7</sup> 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 while a Notice of Improvement Needed/Substandard Performance 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.<sup>8</sup> 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.<sup>9</sup> Therefore, should the 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.<sup>10</sup>

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<sup>4</sup> Va. Code § 2.2-3004(A).

<sup>5</sup> Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

<sup>6</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)). *See also* EDR Ruling 2004-596, 2004-597.

<sup>7</sup> *See* Boone v. Goldin, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

<sup>8</sup> *See generally* DHRM Policy 1.60, Standards of Conduct; *see also* *Grievance Procedure Manual* § 4.1(a).

<sup>9</sup> DHRM Policy 1.40, Performance Planning and Evaluation, “Documentation During the Performance Cycle,” page 4 of 16.

<sup>10</sup> 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

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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