Issue: Qualification/performance evaluation/notice of improvement needed; Ruling Date: December 19, 2005; Ruling #2006-1124; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Mental Health, Mental Retardation and Substance Abuse Services
Ruling Number 2006-1124
December 19, 2005

The grievant has requested a ruling on whether his July 26, 2005 grievance with the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS or the agency), qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Carpenter Supervisor. On June 29, 2005, the grievant was issued a Notice of Improvement Needed/Substandard Performance Plan (Notice). The grievant challenged the Notice by initiating his July 26th grievance. In his grievance, the grievant challenges the concerns raised in the Notice and asserts that his supervisor has created a hostile work environment by undermining his authority. As relief he seeks to have the Notice removed and have his shop manned with adequate personnel, under his direct supervision, to meet the shop's workload.

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.[1] 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 decision, or whether agency policy may have been misapplied or unfairly applied, resulting in an "adverse employment action."[2]

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

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. The Notice of Improvement Needed/Substandard Performance does not constitute an adverse employment action, because 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.

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.[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 Notice 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.[8]

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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] *See* 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.

[8] 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).

Harassment/Hostile Work Environment

The grievant claims that his supervisor has undermined his authority by aligning himself with the grievant's subordinate employees on "each and every issue," creating a hostile work environment. For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his protected status or prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[9] Here, the grievant has not alleged that the agency actions outlined above were based on the grievant's protected status or prior protected activity.[10] Accordingly, the grievant's claim of a hostile work environment does not qualify for hearing.

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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William G. Anderson, Jr.
EDR Consultant, Sr.

[9] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004).
[10] *See generally* Chaloupka v. M. Financial Holdings, Inc., 2001 U.S. Dist. LEXIS 8287 (D. Ore. June 5, 2001); Stevens v. Henderson, 2000 U.S. Dist. LEXIS 22498 (S.D. Ohio Sept. 19, 2000).