Issues: Compliance/Grievance Procedure/Documents, Qualification/Discrimination/ Race, Qualification/Performance Evaluation/Notice of Improvement Needed; Ruling Date: March 26, 2007; Ruling No. 2007-1565, 2007-1566; Agency: Department of Corrections; Outcome: Agency in compliance, not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2007-1565 and 2007-1566
March 26, 2007

The grievant has requested qualification of his October 19, 2006 grievance with the Department of Corrections (DOC or the agency). In his grievance, the grievant states that his receipt of the Notice of Improvement Needed/Substandard Performance (1) is an unfair application of policies and procedures; (2) creates a hostile work environment; and (3) constitutes discrimination based on race.[1] In addition to his request for qualification, the grievant claims that the agency has failed to provide him with requested documents related to his October 19, 2006 grievance. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

The grievant is employed as a Corrections Sergeant with DOC. On October 17, 2006, the grievant received a Notice of Improvement Needed/Substandard Performance for failing to ensure that an inmate count was conducted properly and that the count sheet was reviewed. On October 19, 2006, the grievant initiated a grievance challenging the Notice of Improvement Needed/Substandard Performance.

During the management resolution steps of the grievance process, the grievant requested documents relevant to his October 19th grievance. When the agency failed to respond to the grievant's document requests, the grievant sought a compliance ruling

[1] The management action challenged by this grievance is the grievant's receipt of a Notice of Improvement Needed/Substandard Performance. In response to the Warden's response to his request for documents, the grievant challenged the informal counseling as discriminatory on the basis of race in an attachment to his Form A. While the theory of race discrimination was not expressly stated on the Form A as filed, the management action being grieved (the informal counseling) was. For that reason the grievant's theories as to *why* that management action was improper will be addressed in this ruling. *See* EDR Ruling # 2007-1444. Addressing the grievant's theories on the alleged impropriety of the management action is consistent with EDR's strong preference to have grievances challenging management actions decided on their merits, rather than on procedural technicalities. *E.g.,* EDR Ruling No. 2007-1450. This Department's rulings on matters of compliance are final and nonappealable. Va. Code § 2.2-1001(5).

from this Department. In EDR Ruling #2007-1515, this Department found the grievant's request for a ruling premature as he had not notified the agency head of the alleged noncompliance. The grievant subsequently notified the agency head of the alleged noncompliance and received a response to his document request on February 6, 2007. Dissatisfied with the agency's response, the grievant requested another compliance ruling from this Department on February 14, 2007. The grievant also seeks qualification of his October 19th grievance for hearing.

DISCUSSION

Compliance – Document Request

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to the actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[2] "Just cause" is defined as "a reason sufficiently compelling to excuse not taking a required action in the grievance process."[3] Examples of "just cause" include, but are not limited to, (1) the documents do not exist, (2) the production of these documents would be unduly burdensome, or (3) the documents are protected by a legal privilege. This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

In this case, the grievant requested the following: (1) "documentation that other supervisors at [the facility] have received substandard write-ups for miscounts;" and (2) "policy or procedure that requires a watch commander to conduct an investigation when a miscount occurs." The agency responded to the grievant's request as follows:

> You have requested that we present to you documentation that other supervisors at the facility have received substandard write-ups for miscounts. The reason that you have not been given that documentation is that substandard notices have only a one year active life. They are not placed in the personnel files. Once the year is up, they are destroyed unless needed to accompany a below contributor rating. As this has not been the case at [the facility] and I reviewed the folder of active substandard notices, there were no copies to provide to you of any other supervisor involved in a miscount.
>
> You also requested a copy of the policy or procedure that required a watch commander to conduct an investigation when a miscount occurs. The policy that addresses count procedures is Operating Procedure 410.2. Policy prohibits the 400 series from being copied. It is available to be

[2] Va. Code § 2.2-3003(E); *Grievance Procedure Manual,* § 8.2.
[3] *Grievance Procedure Manual* § 9.

viewed in either the Watch Commanders office or the Operations Officer's office.

The agency has identified "just cause" for its failure to provide the grievant with documentation regarding substandard write-ups to supervisors for miscounts (i.e., the documents do not exist). Additionally, the agency has articulated "just cause" for its failure to provide the grievant with a copy of Operating Procedure 410.2. More specifically, the operating procedure at issue, and all 400 series policies, addresses security procedures at DOC facilities. If copied, public safety and the security of the institution could be compromised should the policy fall into the "wrong hands" (e.g., an inmate or a member of his family). Moreover, it should be noted that although policy prevents the grievant from receiving a copy, the agency has made available to the grievant the policy requested and he has reviewed that policy.

This Department's rulings on matters of compliance are final and nonappealable.[4]

Qualification

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[5] 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."[6]

<u>Misapplication/Unfair Application of Policy</u>

An adverse employment action is defined as a "tangible employment action that constitutes 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."[7] 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.[8]

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

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[4] Va. Code § 2.2-1001(5).
[5] Va. Code § 2.2-3004(B).
[6] Va. Code § 2.2-3004(A).
[7] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[8] 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.

and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[9] 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, such as formal disciplinary action.[10] 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.[11] Therefore, should the Notice in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice, 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.[12]

Hostile Work Environment/Harassment

For a claim of harassment based on race to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his race; (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.[13] "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically

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[9] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

[10] Moreover, as a general rule, a supervisor may consider informal documentation of perceived performance problems when completing an employee's performance evaluation. DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16. In this case, it does not appear that the Notice of Improvement Needed/Substandard Performance detrimentally altered the grievant's 2006 performance evaluation as he received an overall rating of "Contributor" and a "Contributor" rating in the area where miscounts are evaluated. The grievant's 2006 performance evaluation states "[Grievant] has had two miscounts during this performance period. [The grievant] needs to monitor this area closer."

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

[12] 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).

[13] *See* Spriggs v. Diamond Autoglass, 242 F.3d 179 (4th Cir. 2001).

threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[14]

Even if the grievant could demonstrate all the other elements required for a hostile work environment claim based on race (elements (1), (2), and (4)), his receipt of a Notice of Improvement Needed/Substandard Performance alone is not sufficiently severe or pervasive so as to alter the conditions of his employment (element (3)). Accordingly, this issue does not qualify for a hearing.

Race Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.[15] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status, in other words, that because of the grievant's race, he was treated differently than other "similarly-situated" employees. To do this a grievant must first establish a prima facie case of discrimination, i. e., that (1) he "is a member of a protected class"; (2) that he "suffered adverse employment action"; (3) that he "was performing [his] job duties at a level that met [his] employer's legitimate expectations at the time of the adverse employment action"; and (4) the adverse employment action occurred under circumstances raising an inference of unlawful discrimination.[16] As explained above, the grievant has not suffered an adverse employment action and therefore the issue of discrimination is not qualified 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

[14] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23, 114 S.Ct. 367 (1993).
[15] *See* Grievance Procedure Manual § 4.1(b).
[16] Hill v. Lockheed Martin Logistics Mgmt., Inc., 354 F.3d 277, 285 (4th Cir. 2004) (en banc).