

Issue: Discipline/counseling memoranda; Ruling Date: October 27, 2006; Ruling #2007-1449; Agency: Rappahannock Community College; Outcome: not qualified



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of the Rappahannock Community College  
Ruling Number 2007-1449  
October 27, 2006

The grievant has requested a ruling on whether his grievance challenging three memoranda qualifies for hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

**FACTS**

The grievant is employed as a Technician III by the Rappahannock Community College (the College or agency). On May 25, 2006, the grievant's immediate supervisor, the Buildings and Grounds Supervisor, issued a memorandum stating that "[i]t has come to my attention that members of the maintenance team have been lodging complaints in an attempt to change my supervision style." The memo further stated that the supervisor's attempts to provide corrective criticism verbally were "apparently not satisfactory to all involved," thus henceforward all corrective actions would be dealt with through the issuance of written reprimands.

On June 22, 2006, the grievant was issued a written counseling memorandum for purportedly hanging the United States flag upside down on a day when the College was hosting a war memorial ceremony. The author of the memorandum, the Facility Manager, stated that he was "appalled" when he found out about the alleged flag incident which he labeled as "inexcusable."

On June 26, 2006, the grievant's supervisor presented the grievant and several other employees with a "Task list for week of 6-26-06" which set forth jobs that the Supervisor expected the listed employees to complete. The grievant was instructed to "Weedeat all areas, THAT MEANS AROUND TREES, FLOWER BEDS, DITCHES, TENNIS COURT, ETC. (WHEN COMPLETE HAVE [co-worker] INSPECT AND VERIFY THAT ALL AREAS ARE DONE TO MY SATISFACTION." Other employees were assigned tasks such as mowing and spraying.

**DISCUSSION**

*Counseling Memoranda*

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>1</sup> Moreover, the General Assembly has limited issues that may qualify for a hearing to those that involve “adverse employment actions.”<sup>2</sup> 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 action constitute[ing] 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>3</sup> 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 his employment.<sup>4</sup>

The June 22<sup>nd</sup> flag-raising memorandum is essentially a counseling memorandum, which by itself does not have a significant detrimental effect on the terms, conditions, or benefits of the grievant’s employment. Thus, the memo does not constitute adverse employment action.<sup>5</sup> Similarly, while the May 25, 2006 memorandum might be viewed as an informal counseling or perhaps a personnel policy or procedure, in either case, the grievant has not suffered an adverse employment action by the supervisor’s decision to counsel his employees via written memoranda rather than verbal instruction. The same is true of the June 26, 2006 duty roster. While the grievant, a Technician III, finds the June 26<sup>th</sup> roster objectionable because his grass trimming work for that day was to be inspected by a Technician I, such an action, by itself, does not rise to the level of an adverse employment action. Indeed, the decision to have grass trimming reviewed by the individual who has primary responsibility for grounds keeping appears reasonable.<sup>6</sup> In any event, because the grievant has failed to show the existence of an adverse employment action, this issue does not qualify for a hearing.<sup>7</sup>

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<sup>1</sup> Va. Code § 2.2-3004(B).

<sup>2</sup> Va. Code § 2.2-3004(A).

<sup>3</sup> Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

<sup>4</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>5</sup> *See* EDR Ruling No. 2003-425. *See also* Boone v. Goldin, 178 F. 3d 253 (4<sup>th</sup> Cir. 1999).

<sup>6</sup> The primary duty of the Trade Tech I who was designated to inspect the grievant’s weed removal work is grounds keeping. The grievant’s area of expertise, on the other hand, is electrical. Also, the grounds keeping Trade Tech I was instructed by the grievant’s supervisor to direct the grounds keeping work of two other Trade Tech III employees. For instance, the June 26<sup>th</sup> memo leaves to the discretion of the grounds keeping Tech I the decision of whether to call off the day’s work on account of inclement weather, and the memo further states that she is responsible for designating the areas to be sprayed and mowed by the other two Trade Tech IIIs.

<sup>7</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 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

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.<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 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.

Finally, we note that although this 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, the parties should call 888-232-3842 (toll free) or 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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accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

<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.