

Issue: Discipline/counseling memorandum; Ruling Date: October 23, 2006; Ruling #2007-1455; Agency: Department of Corrections; Outcome: not qualified



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

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections  
Ruling Number 2007-1455  
October 23, 2006

The grievant has requested a ruling on whether her July 7, 2006 grievance against the Department of Corrections (the agency) regarding a Notice of Improvement Needed/Substandard Performance qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On June 11, 2006, the grievant was issued a Notice of Improvement Needed/Substandard Performance ("Notice of Improvement") because she had allegedly counted the number of inmates in a particular dormitory incorrectly the previous day. The grievant initiated this grievance on the grounds that not all agency employees are cited for miscounts consistently. Pursuant to an April 25, 2006 letter from agency management, all agency employees involved in a miscount are to be given a "needs improvement" letter for the first incident, and are potentially subject to further punishment for any subsequent miscount within a six-month period. The grievant has not challenged the factual validity of the Notice of Improvement, but rather points to other instances of alleged miscounts in which the grievant asserts other agency employees did not receive Notices of Improvement.<sup>1</sup>

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.<sup>2</sup> 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

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<sup>1</sup> The grievant also asserts that those other agency employees involved in miscounts should be given Notices of Improvement if they have not already received them. Whether management chooses to punish another employee is not an issue that can qualify for hearing because the grievant is not "personally involved." Va. Code § 2.2-3004(A). However, inconsistent treatment of employees who engage in the same type of misconduct can be relevant on the issue of mitigation of discipline received by a grieving employee. *See Rules for Conducting Grievance Hearings*, § VI(B)(1).

<sup>2</sup> Va. Code § 2.2-3004(B).

discrimination or retaliation may have improperly influenced management's decision or agency policy may have been misapplied or unfairly applied, and that the agency's conduct has resulted in an "adverse employment action."<sup>3</sup>

An adverse employment action is defined as a "tangible employment action constitut[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>4</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>5</sup>

In this case, 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.<sup>6</sup> For this reason, the grievant's claim relating to the Notice of Improvement does not qualify for a hearing.

We note, however, that while this Notice of Improvement 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>7</sup> Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider documentation of perceived performance problems when completing an employee's performance evaluation.<sup>8</sup> Therefore, should the Notice of Improvement in this case later serve to support an adverse employment action against the grievant, such as a Written Notice or a "Below Contributor" annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of the performance counseling through a subsequent grievance challenging the related adverse employment action.<sup>9</sup>

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<sup>3</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>4</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>5</sup> *See 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>6</sup> *See Boone v. Goldin*, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

<sup>7</sup> *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).

<sup>8</sup> DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.

<sup>9</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