

Issue: Qualification – Performance Evaluation (Notice of Improvement Needed);
Ruling Date: May 2, 2008; Ruling #2008-1998; Agency: Department of
Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Corrections
Ruling Number 2008-1998
May 2, 2008

The grievant has requested qualification of his January 31, 2008 grievance with the Department of Corrections (DOC or the agency). In his grievance, the grievant challenges his receipt of a Notice of Improvement Needed/Substandard Performance form. For the reasons set forth below, this grievance is not qualified for hearing.

FACTS

The grievant is employed as a Corrections Major with DOC. On January 30, 2008, the grievant received a Notice of Improvement Needed/Substandard Performance for his purportedly insubordinate behavior during a January 23, 2008 meeting. On January 31, 2008, the grievant initiated a grievance challenging the Notice of Improvement Needed/Substandard Performance form.

DISCUSSION

Claims relating solely to the issuance of a Notice of Improvement Needed/Substandard Performance ("notice") generally do not qualify for a grievance hearing because receipt of a notice does not rise to the level of an "adverse employment action."¹ 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."² 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.³

In this case, the grievant has presented no evidence that he has suffered an adverse employment action. The notice does not constitute an adverse employment

¹ Va. Code § 2.2-3004(A).

² Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

³ 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 2007-1565, 2007-1566.

action, because such a notice, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁴ 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 the notice has not had 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.⁵ 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 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 notice through a subsequent grievance challenging the related adverse employment action.⁷

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.

Claudia T. Farr
Director

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

⁵ In addition, 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."

⁶ See generally DHRM Policy 1.60, Standards of Conduct; see also *Grievance Procedure Manual* § 4.1(a).

⁷ Also, 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).