

Issue: Qualification – Discipline (Counseling Memorandum); Ruling Date: June 13, 2008; Ruling #2008-2031; Agency: Virginia Polytechnic Institute and State University; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Polytechnic Institute and State University
Ruling Number 2008-2031
June 13, 2008

The grievant has requested a ruling on whether his March 12, 2008 grievance with Virginia Polytechnic Institute and State University (the University) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On March 11, 2008, the grievant received a counseling memo regarding a situation that occurred on March 5, 2008. The grievant initiated this grievance to challenge the basis of the counseling memo and to assert that his supervisors have subjected him to a hostile work environment. The grievant now seeks qualification of the grievance for hearing.

DISCUSSION

Counseling Memo

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.¹ Claims relating to a counseling memo 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 agency policy may have been misapplied or unfairly applied.² Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."³ Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.⁴ An adverse employment action is defined as a "tangible

¹ Va. Code § 2.2-3004(B).

² Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

³ See *Grievance Procedure Manual* § 4.1(b).

⁴ While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title

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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

In this case, the counseling memo does not constitute an adverse employment action, because such a document, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁷ For this reason, the grievant’s claim relating to the counseling memo does not qualify for a hearing.⁸

We note, however, that while this counseling memo 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. Therefore, should the counseling memo 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 counseling memo through a subsequent grievance challenging the related adverse employment action.

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 a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.⁹ The grievant has not stated that he was subjected to the alleged hostile work environment based on any protected status from which such a claim might arise.¹⁰ Rather, the hostile work environment claim appears to be based on disagreements regarding work duties and performance that have occurred during the relationship between the grievant and his

VII law, this Department substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

⁵ Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

⁶ See, e.g., Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

⁷ See Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

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).

⁹ See Gilliam v. S.C. Dep’t of Juvenile Justice, 474 F.3d 134, 142 (4th Cir. 2007).

¹⁰ See, e.g., *Grievance Procedure Manual* § 4.1(b).

supervisors, which, as alleged in this case, is not a claim that qualifies for hearing under the grievance procedure.¹¹

We note further that although the grievance may not proceed, 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, within five workdays of receipt of this ruling, the grievant should notify the human resources office, in writing, and pursue an appeal to the circuit court pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the University will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the University of that desire.

Claudia T. Farr
Director

¹¹ See *Grievance Procedure Manual* § 4.1.