Issues: Qualification – Compensation (Other), Discipline (Counseling Memo), Management Actions (Assignment of Duties), Performance Evaluation (EWP), Retaliation (Fraud, Waste & Abuse, and Other Protected Right), Work Conditions (Other); Ruling Date: September 11, 2008; Ruling #2009-2090; Agency: Department of Veterans Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Veterans Services
Ruling No. 2009-2090
September 11, 2008

The grievant has requested a ruling on whether her July 4, 2008 grievance with the Department of Veterans Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On July 4, 2008, the grievant initiated a grievance to challenge many issues related to her employment with the agency. The grievant's supervisor issued her a written memorandum of counseling on June 5, 2008 regarding an allegedly "unprofessional and inappropriate" e-mail sent by the grievant accusing another agency employee of wasting her time. The grievant was counseled about working cooperatively with other members of the agency's staff. In conjunction with the counseling memo, the grievant's supervisor amended the "Measures" language for the Core Responsibility of "Other duties as assigned" on the grievant's Employee Work Profile (EWP). The language changed from "Performs other duties as may be assigned in support of the overall needs of the agency" to "Performs other duties as may be assigned by the Agency Head and/or other executive staff in support of the overall operation of the agency."[1]

The grievant alleges that these and other claims were in retaliation for various protected activities in which the grievant has participated: filing complaints with the State Employee Fraud, Waste and Abuse Hotline (2006), filing a complaint with the Equal Employment Opportunity Commission (February 2008), requesting a salary increase from management (April 2008), and submitting Freedom of Information Act requests to the agency (May 2008). The grievant also alleges that the agency has failed to provide her additional compensation for taking on additional duties. The grievant alleges that she has been assigned the tasks of coordinating changes to agency policy and serving as the agency's constituent affairs liaison. She also asserts a claim of discrimination based on age, race, and/or gender in relation to these issues, as well as an argument that her position is improperly classified.

Additional complaints against the agency include allegations that members of senior management have made "[u]nprofessional, condescending, disrespectful, and

[1] In addition, the relative percentages assigned to the Core Responsibilities were slightly modified.

defamatory" statements against her; that her supervisor has failed to provide consistent communication about his expectations as to her job duties; and that the agency has failed to fill vacant positions.

DISCUSSION

In short, this grievance challenges a number of alleged management actions (e.g., counseling memo, uncompensated added duties, improper classification, EWP changes, failure to fill vacancies, etc.), under a variety of theories (e.g., retaliation, discrimination, misapplication or unfair application of policy), with some theories overlapping the alleged management actions. For the sake of clarity, this ruling discusses each alleged management action separately, even though that approach involves some redundancy in explaining the accompanying theories.

Counseling Memo

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action. 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."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[4]

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.[5] Nor does the counseling memo constitute a "materially adverse action" required to establish a retaliation claim.[6]

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[2] *See Grievance Procedure Manual* § 4.1(b).
[3] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] *See* Boone v. Goldin, 178 F.3d 253, 255-56 (4th Cir. 1999).
[6] 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 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. However, in this case, the issuance of a single counseling memo is not even sufficient to establish a "materially adverse action." *See* Allen v. American Signature Inc., No. 07-3698, 2008 U.S. App. LEXIS 7714, at *8 (7th Cir March 26, 2008) (unpublished opinion) (written reprimand and criticism from co-workers not materially adverse); Chang v. Horizons, 254 Fed. Appx. 838, 839 (2nd Cir. 2007) (unpublished opinion) (oral and written warnings do not amount to materially adverse conduct); Martin v. Merck & Co., Inc., 446 F. Supp. 2d 615, 638 (W.D. Va. 2006) (a written warning for violating policy by wearing safety goggles on the head is "mild discipline" and "would not dissuade a reasonable employee from engaging in a protected activity."); Gordon v. Gutierrez, Case No. 1:06cv861, 2007 U.S. Dist. LEXIS 253, at *32 (E.D. Va. January 4, 2007) (a verbal counseling that is deserved, properly conducted, and resulted in no further disciplinary action

For this reason, the grievant's claim relating to the counseling memo does not qualify for a hearing.[7]

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.

Lack of Compensation for Additional Duties

The grievant alleges that the agency has refused to grant her request for a salary increase due to allegedly taking on additional duties. The duties cited by the grievant include coordinating agency policy changes, handling constituent affairs issues, and supervising a part-time staff member. As stated previously, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[8] Thus, by statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries and position classifications "shall not proceed to hearing"[9] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.

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against the plaintiff is not a materially adverse action); and Allen, et.al. v. National Railroad Passenger Corporation (AMTRAK), 228 Fed. Appx. 144, 149 (3rd Cir. 2007) (unpublished opinion) (a written reprimand for improperly communicating with a co-worker during a rest period was not materially adverse as it the plaintiff did not deny its allegations and the reprimand did not appear to affect the plaintiff's employment in any material way.); Dehart v. Baker Hughes Oilfield Operations, Inc., 214 Fed. Appx. 437, 442 (5th Cir. 2007) (unpublished opinion) (a written warning for insubordination, for being argumentative and for excessive absenteeism is not a materially adverse action as there were "colorable grounds for the warning and a reasonable employee would have understood a warning under these circumstances was not necessarily indicative of a retaliatory mind-set."); Philips-Clark v. Philadelphia Housing Authority, Civil Action No. 04-2474, 2007 U.S. Dist. LEXIS 12710, at *29 (E.D. Pa. February 22, 2007) (charging the plaintiff with being absent without leave is not a materially adverse action as the plaintiff conceded that she had an unexcused absence and failed to follow instructions to call); Breech v. Scioto County Regional Water Dist. # 1, Case No. 1:03cv360, 2006 U.S. Dist. LEXIS 58545, at *24 (S.D. Ohio August 21, 2006) ("a reasonable person would not be dissuaded by a reprimand given for not completing an assigned task.").

[7] 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 accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

[8] *See* Va. Code § 2.2-3004(B).

[9] Va. Code § 2.2-3004(C).

Misapplication or Unfair Application of Policy

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[10] For purposes of this ruling only, it will be assumed that the grievant has alleged an "adverse employment action" as to this claim in that she potentially asserts issues with her compensation.

The primary policy implicated by this claim is Department of Human Resource Management (DHRM) Policy 3.05. This policy provides that "[a]gencies may provide temporary pay to an employee who is assigned different duties on an interim basis, or because of the need for additional assignments associated with a special time-limited project, or for acting in a higher-level position in the same or different Role in the same or a higher Pay Band, or for military pay supplements. Temporary pay is a non-competitive management-initiated practice paid at the discretion of the agency."[11] DHRM Policy 3.05 further requires agencies to continuously review agency compensation practices and actions to ensure that similarly situated employees are treated the same.[12] When an agency determines that similarly situated employees are not being comparably compensated, it may increase the salary of the lesser paid employee by up to 10% each fiscal year through an in-band salary adjustment.[13] In-band adjustments and other pay practices are intended to emphasize merit rather than entitlements, such as across-the-board increases, while providing management with great flexibility and a high degree of accountability for justifying their pay decisions.[14]

In assessing whether to grant pay actions, an agency must consider, for each proposed adjustment, each of the following thirteen pay factors: (1) agency business need; (2) duties and responsibilities; (3) performance; (4) work experience and education; (5) knowledge, skills, abilities and competencies; (6) training, certification and licensure; (7) internal salary alignment; (8) market availability; (9) salary reference data; (10) total compensation; (11) budget implications; (12) long term impact; and (13) current salary.[15] Some of these factors relate to employee-related issues, and some to agency-related business and fiscal issues, but the agency has the duty and the broad discretion to weigh each factor. Thus, DHRM Policy 3.05 appears to reflect the intent to invest in agency management broad discretion for making individual pay decisions and the corresponding accountability in light of each of the 13 enumerated pay factors. The need for internal

[10] *See Grievance Procedure Manual* § 4.1(b); *see also supra* notes 2 - 4 and accompanying text.
[11] DHRM Policy 3.05, *Compensation*, "Temporary Pay."
[12] *See* DHRM Policy 3.05.
[13] *See id*.
[14] *See* DHRM Human Resource Management Manual, Chapter 8, *Pay Practices*.
[15] DHRM Policy 3.05, *Compensation*.

salary alignment is just one of the 13 different factors an agency must consider in making the difficult determinations of whether, when, and to what extent in-band adjustments should be granted in individual cases and throughout the agency.

Even though agencies are afforded great flexibility in making pay decisions, agency discretion is not without limitation. Rather, this Department has repeatedly held that even where an agency has significant discretion to make decisions (for example, an agency's assessment of a position's job duties), qualification is warranted where evidence presented by the grievant raises a sufficient question as to whether the agency's determination was plainly inconsistent with other similar decisions within the agency or otherwise arbitrary or capricious.[16]

The grievant states that she performed additional duties regarding policy coordination, constituent affairs, and supervising a part-time staff member. First, it appears that policy coordination has always been a part of the grievant's EWP. Consequently, it cannot be said that these duties were in any way additional to her job functions. Therefore, the only duties that were at some point "additional" are those involving constituent affairs and the grievant's supervision of a part-time staff member. However, the grievant has not shown that the agency's refusal to grant her a pay increase violated a specific mandatory policy provision or was outside the scope of the discretion granted to the agency by the applicable compensation policy. The grievant has also presented no evidence that the agency's denial of a pay increase was inconsistent with other decisions made by the agency or otherwise arbitrary or capricious. Although the grievant received the additional duties, those duties were not so substantial to find that the agency was arbitrary or capricious in refusing to grant her an increase in pay, temporary or otherwise.[17]

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination.[18] 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. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for

[16] *See Grievance Procedure Manual* § 9 (defining arbitrary or capricious as a decision made "[i]n disregard of the facts or without a reasoned basis"); *see also, e.g.*, EDR Ruling 2008-1879.
[17] Nothing in this ruling is meant to indicate that the grievant could not have been awarded or may not still be deserving of temporary pay or another upward adjustment based on the duties she performs. Indeed, analysis of the pay factors and policy provisions might justify such pay actions if the agency chose to take it. This ruling finds only that the grievant has failed to show sufficient evidence that the agency misapplied or unfairly applied policy or otherwise abused the discretion granted under DHRM Policy 3.05.
[18] *See Grievance Procedure Manual* § 4.1(b).

hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[19]

The grievant alleges that the agency's decision not to pay her for alleged additional duties was, at least in part, the result of discrimination based on race, age, and/or gender. To support her claim, the grievant has stated only that the agency hired an African-American male, who may be younger than her, with allegedly less experience, into an administrative support position with the agency at a pay rate close to her own salary. The grievant also refers to the agency's allegedly discriminatory treatment of another female employee in the past. Even if the grievant's allegations are assumed to be true, they are insufficient to demonstrate that the compensation decision in grievant's case was driven by a discriminatory motive. This is especially the case in light of the agency's stated rationale for denying the pay increase: that certain of the duties were not "additional" and the agency had already provided a pay increase for a change in duties in the past. Thus, grievant's discrimination claim does not qualify for hearing.

Retaliation

For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[20] (2) the employee suffered a materially adverse action;[21] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[22] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[23]

The grievant has clearly engaged in protected activities (e.g., filing complaints with the State Employee Fraud, Waste and Abuse Hotline and filing a complaint with the EEOC).[24] However, the grievant has presented no evidence of a causal link between the grievant's prior protected acts and the denial of a salary increase, in other words, that the agency's denial was motivated by retaliation. Though there is a proximity in time

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[19] *See* Hutchinson v. INOVA Health System, Inc., C.A. No. 97-293 A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. Apr. 8, 1998).

[20] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[21] Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); s*ee, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[22] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

[23] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[24] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

between the grievant's protected activities and the agency's denial of her request for a salary increase, that alone does not raise sufficient question of retaliation to qualify for hearing in light of the agency's stated rationale. As discussed above, the agency assessed that the duties the grievant performed were not "additional" and, moreover, that she had already been granted a salary increase in the past for additional duties performed. The grievant's evidence is insufficient to show that the agency's stated rationale is pretextual. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, this claim does not qualify for hearing.

Alleged Wrong Classification

The grievant has also alleged that the agency has failed to classify her position accurately, based on the higher classification of a Former Agency Employee[25] who allegedly performed similar work. Although statutory provisions evince a policy that would require state agencies and institutions to allocate positions having substantially the same duties and responsibilities to the same role,[26] the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. Thus, a grievance that challenges the substance of an agency's assessment of a position's job duties does not qualify for a hearing, unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions within the agency or that the assessment was otherwise arbitrary or capricious.[27]

This Department cannot find that the agency's classification of the grievant was in disregard of the facts, without a reasoned basis, or plainly inconsistent with other similar job classification decisions. The higher pay band of the Former Agency Employee who allegedly performed similar duties apparently was held over from her transfer from another state agency. More importantly, the grievant has not provided sufficient evidence that the position of the Former Agency Employee was comparable to hers. While she has submitted information suggesting that the Former Agency Employee performed some administrative tasks, this evidence alone does not show that the positions were sufficiently similar, or that the agency's determination of the grievant's classification was otherwise without a reasoned basis or arbitrary or capricious. As such, this claim does not qualify for a hearing.

Alleged Improper Changes to EWP

DHRM Policy 1.40, *Performance Planning and Evaluation*, permits modification of the performance plan during the performance cycle. There is no indication that the

[25] The Former Agency Employee left the agency in early 2007.
[26] The Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title." Va. Code § 2.2-103(B)(1).
[27] *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made "[i]n disregard of the facts or without a reasoned basis."

change made by the grievant's supervisor was a misapplication or unfair application of policy. The grievant does point out that DHRM Policy 1.40 requires that the "reviewer" approve changes to Core Responsibilities during the performance cycle. Here, however, because the grievant's supervisor is at such a high level of management, there is no other supervisor within the agency to serve as the "reviewer." Consequently, the grievant's supervisor's approval of the change to the EWP appears to satisfy the provisions of DHRM Policy 1.40.

Additionally, there is no indication of a retaliatory motive behind the change. The agency states that the EWP was changed to clarify that the grievant's supervisor previously expected that the grievant would assist other executive staff but had apparently not made his intentions sufficiently clear. This rationale is understandable because in the materials submitted by the grievant she argues that she had not been assigned to support the other members of the executive staff. Further, there is insufficient evidence indicating that this change amounted to a materially adverse action to qualify for a hearing.[28] The change on the EWP is minor, if it was a change at all. The expectation that the grievant assist other executive staff members could naturally have been a part of the grievant's performance plan prior to the change under the pervious language of "Other duties as assigned." In sum, there is no basis to qualify the claim regarding a clarification to the grievant's EWP for a hearing.

Failure to Fill Vacancies

By statute and under the grievance procedure, complaints relating solely to hiring, promotion, transfer, assignment, and retention of employees within the agency "shall not proceed to hearing"[29] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has presented no evidence that the agency's failure to fill certain positions was discriminatory or retaliatory with respect to her. Moreover, there is no indication of an improper motive not based on business judgment.[30] Further, the grievant has not cited, and this Department has not found, any provision of policy or law that the agency violated by not filling these positions.[31] Therefore, this claim does not qualify for a hearing.

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[28] In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. at 69. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

[29] Va. Code § 2.2-3004(C).

[30] Indeed, it is difficult to understand how the grievant's protected activities in February, April, and May 2008, caused the agency to decide not to fill, for instance, the position vacated by the Former Agency Employee in early 2007.

[31] The grievant cites to DHRM Policy 1.90, which requires agencies to "[a]ssess agency workforce requirements and develop plan out-lining issues and options for addressing needs." DHRM Policy 1.90,

Alleged Failure to Communicate Employee Expectations

By statute and under the grievance procedure, complaints relating solely to the methods, means, and personnel by which work activities are to be carried out "shall not proceed to hearing"[32] unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy. The grievant has presented no evidence that the alleged miscommunications or changes were retaliatory, discriminatory, or a misapplication or unfair application of policy. Furthermore, even if true, such allegations do not constitute adverse employment actions. Indeed, the grievant argues that the lack of clarity in her supervisor's expectations has the "potential" to impact her job in the form of "future adverse employment actions." There is no basis to qualify this claim for a hearing.

Negative Statements By Senior Staff

The grievant has alleged that certain members of senior management have made "[u]nprofessional, condescending, disrespectful and defamatory" statements about her verbally and in e-mails. While this Department does not condone the conduct as alleged by the grievant, this is not a claim that qualifies for a hearing. In some cases, qualification may be inappropriate when a hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available. It appears that this is such a case, at least regarding this particular claim. Hearing officers cannot order agencies to take corrective action against employees,[33] or order agency employees to apologize to the grievant, as requested in her grievance. Because relief is unavailable to the grievant through the hearing process, this claim does not qualify for a hearing.

Other Acts of Retaliation

The grievant also claims retaliation with respect to the following: 1) removal of a duty to track the assignments and tasks of senior staff, 2) exclusion from senior management team meetings she used to attend, and 3) removal of a duty to handle confidential materials.

In short, the grievant has alleged that she has had certain duties removed or modified after she engaged in protected activity. However, there is no evidence of a causal relation between her protected activity and the modifications to her duties, except a proximity in time. Additionally, there is no indication that the grievant suffered a

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Workforce Planning. The agency's alleged failure to fill the positions cited by the grievant does not appear to violate any mandatory provision of this policy. The agency's assessment of its workforce requirements is so fundamentally within the agency's discretion, *see*, *e.g.*, Va. Code § 2.2-3004(B), that absent some materially adverse effect on the grievant, combined with an improper motive, such a claim cannot qualify for a hearing.

[32] Va. Code § 2.2-3004(C).

[33] *Grievance Procedure Manual* § 5.9(b).

materially adverse action, even taking together all of the grievant's allegations. Although changes in an employee's duties could amount to a materially adverse action in some cases,[34] the changes in this case do not. As noted by the Supreme Court, "normally petty slights, minor annoyances, and simple lack of good manners" do not establish "materially adverse actions" that are necessary to establish a retaliation claim.[35] Because the grievant has not presented evidence raising a sufficient question as to the elements of a claim of retaliation, this grievance does not qualify for hearing.

Finally, 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 and file a notice of appeal with 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 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

[34] *See, e.g.*, Kessler v. Westchester County Dep't of Soc. Servs., 461 F.3d 199, 209 (2d Cir. 2006); Flanagan v. Office of the Chief Judge, No. 06 C 1462, 2007 U.S. Dist. LEXIS 75208, at *28-33 (N.D. Ill. Sept. 28, 2007); Pedicini v. United States, 480 F. Supp. 2d 438, 452-53 (D. Mass. 2007).
[35] *Burlington N.*, 548 U.S. at 68.