Issue: Qualification – Discipline (Counseling Memo); Ruling Date: May 8, 2009; Ruling #2009-2295; Agency: Department of Juvenile Justice; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice
Ruling Number 2009-2295
May 8, 2009

The grievant has requested a ruling on whether her January 30, 2009 grievance with the Department of Juvenile Justice (the agency) qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

On January 8, 2009, the grievant received a Group II Written Notice. In her grievance concerning that disciplinary action, the agency rescinded the Written Notice[1] and instead issued the grievant a written counseling memorandum to be placed in her supervisor's employee fact file. Though she has now received the relief she requested on her Form A, the grievant has still sought to pursue her grievance and now requests qualification for a hearing.[2]

DISCUSSION

Although this grievance initially challenged a Written Notice, the agency has since rescinded that disciplinary action and issued a written counseling memo instead. Therefore, the grievant's continuation of this grievance is a challenge to that counseling memo. 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.[3]

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, a threshold

[1] According to the agency, the Written Notice was removed from her personnel file on April 3, 2009.
[2] It appears that the grievant initially chose to request qualification because the Written Notice had not yet been rescinded.
[3] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[4] *See Grievance Procedure Manual* § 4.1(b).

question is whether the grievant has suffered an adverse employment action.[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

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.[8] For this reason, the grievant's claim relating to the counseling memo does not qualify for a hearing.[9]

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.

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

---

[5] 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.

[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

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

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

[9] 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).

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