

Issue: Qualification – Discipline (Counseling Memo) and Work Conditions (Shift Change and Supervisory Conflict); Ruling Date: March 5, 2010; Ruling #2010-2542; 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 2010-2542
March 5, 2010

The grievant has requested a ruling on whether his November 7, 2009 grievance with the Department of Corrections (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant states that on October 7, 2009, the Chief of Security acted in an “unprofessional, disrespectful, [and] intimidating” manner toward him during a counseling session. The grievant further asserts that on October 8, 2009, he received a “Corrective Counseling” from the Chief of Security for allegedly having physical contact with a detainee. In addition, the grievant claims that the Chief of Security moved him from the day shift to the night shift.

On November 7, 2009, the grievant initiated a grievance challenging the Chief of Security’s alleged actions. After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify his grievance for hearing. The agency head denied the grievant’s request, and he has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.¹ Thus, claims relating to issues such as the method, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation, or discipline may have influenced management’s decision, or whether state policy may have been misapplied or unfairly applied.² In this case, the grievant alleges that he has been subjected to harassment by a supervisor, wrongfully issued a “Corrective

¹ See Va. Code § 2.2-3004(B).

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

Counseling,” and improperly moved from day to night shift. Each of these claims will be addressed below.

Supervisory Harassment

While grievable through the management resolution steps, claims of workplace harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, sex, color, national origin, religion, age, veteran status, political affiliation, or disability.³ Here, the grievant has not alleged that management’s actions were based on any of these factors. Rather, the facts cited in support of the grievant’s claim can best be summarized as describing general work-related conflict between the grievant and a supervisor. Claims of general work-related conflict such as those at issue in this case are not among the issues identified by the General Assembly that may qualify for a hearing.⁴

Corrective Counseling and Shift Change

In cases involving discrete management actions, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ Thus, typically, the threshold question in such cases is whether the grievant has suffered an adverse employment action.⁶ 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.”⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁸

A counseling does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.⁹ For this reason, the grievant’s claims relating to the “Corrective Counseling” do not qualify for a hearing.¹⁰

³ *Grievance Procedure Manual* § 4.1(b)(2); *see also* DHRM Policy 2.30 Workplace Harassment.

⁴ *See* Va. Code § 2.2-3004 (A).

⁵ *See Grievance Procedure Manual* § 4.1(b).

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. In this case, the grievant does not assert that the Chief of Security’s alleged actions were in retaliation for any protected activity.

⁷ *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007).

⁹ *See Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

¹⁰ 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-

A transfer or reassignment may constitute an adverse employment action if a grievant can show that it had some significant detrimental effect on the terms, conditions, or benefits of his employment.¹¹ Based on the information presented in this grievance, the grievant was merely transferred from one shift to another. Thus, it does not appear that the agency's action had a significant detrimental effect on the grievant or deprived him of a significant change in employment status such as a promotion, higher level responsibilities, or an increase in salary or benefits and was therefore not an adverse employment action. Accordingly, the grievant's claims relating to the shift change also do not qualify for a hearing.

Mediation

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

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). In addition, we note that should the allegations grieved 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 these allegations through a subsequent grievance challenging the related adverse employment action.

¹¹ See *Holland*, 487 F.3d at 219.