Issues: Qualification – Discipline (Counseling Memo) and Discrimination (Race); Ruling Date: August 13, 2010; Ruling #2011-2716, 2011-2717; Agency: Virginia Department of Transportation; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling Numbers 2011-2716, 2011-2717
August 13, 2010

The grievant has requested a ruling on whether his two April 29, 2010 grievances with the Department of Transportation (the agency) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

On or about March 30, 2010, the Assistant Residency Administrator issued a schedule for coverage of a ferry to agency employees who were authorized to operate the ferry, including the grievant. The grievant and a co-worker apparently expressed some concerns over the schedule and a meeting occurred between the grievant, the co-worker, the Assistant Residency Administrator, and the Residency Administrator. In that meeting, the grievant expressed that he "could not" work the ferry on the assigned dates because he had a lot going on in his life. He was apparently asked for more details about why he was not able to work, but the grievant did not provide any further information,[1] though he did indicate he would provide documentation. The co-worker also stated in the meeting that he "preferred not" to work the ferry. On April 1, 2010, the Assistant Residency Administrator issued the grievant a Group I Written Notice for insubordination due to his alleged refusal to work the ferry. The grievant later presented information about why he was unable to work on the scheduled dates. However, it appears that both the grievant and the co-worker ultimately worked the ferry on the days assigned. The Assistant Residency Administrator rescinded the Written Notice on April 13, 2010. The grievant was issued a counseling memorandum instead.

The grievant disputes the basis for the counseling memorandum. He also asserts that the original disciplinary action demonstrated discrimination on the basis of race. The grievant states that he is African-American, while the co-worker is Caucasian. The grievant asserts that both he and the co-worker expressed reticence to work the ferry, but only he received a disciplinary action. The grievant also alleges that another Caucasian employee, Employee S, stated that he did not want to work the ferry and was not disciplined.

[1] The grievant states that the request to provide additional detail with his co-worker in the meeting ran afoul of privacy protections.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[3] Thus, claims relating to issues such as the methods, 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied.[4]

As a preliminary matter, we note the grievant appears to request that the agency take disciplinary actions against various members of management due to their alleged conduct in relation to the incidents grieved. A hearing officer has no authority to order an agency to take disciplinary action against a particular employee.[5] Therefore, a grievance cannot be qualified based on such a request and the issue will be addressed no further in this ruling. We also note the grievant requests that he receive "no retaliation" as a result of filing his grievances. This request addresses the prospect of future retaliation, however, and does not challenge any management actions occurring prior to the initiation of the grievance, as required under the grievance procedure. Consequently, there is no basis to qualify that request for hearing and the retaliation issue will be addressed no further in this ruling. This ruling will address the grievant's challenge to the counseling memorandum and claim of discrimination.

Counseling Memorandum

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[6] Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.[7] 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."[8] Adverse employment actions include any agency actions that have an adverse effect on the terms, conditions, or benefits of one's employment.[9]

The Written Notice the grievant originally received has been rescinded and replaced with a counseling memorandum. A counseling memorandum does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant

[2] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[3] *See* Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[5] *E.g., Grievance Procedure Manual* § 5.9(b).
[6] *See Grievance Procedure Manual* § 4.1(b).
[7] 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.
[8] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[9] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).

detrimental effect on the terms, conditions, or benefits of employment.[10] Therefore, the grievant's claims relating to his receipt of the counseling memorandum do not qualify for a hearing.[11]

We note, however, that while the counseling memorandum 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 a formal Written Notice or a "Below Contributor" annual performance rating. If that should happen, this ruling does not prevent the grievant from attempting to contest the merits of the allegations in the counseling memorandum through a subsequent grievance challenging the related adverse employment action.

Discrimination

We need not decide whether the rescinded Written Notice challenged by the grievant in this case amounts to an adverse employment action,[12] because even if it did, the grievant's claim of discrimination does not qualify for a hearing. To qualify a grievance alleging discrimination 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 (in this case, race). If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[13]

To support his claim of discrimination, the grievant relies on his allegation that he was originally subjected to disciplinary action for stating he "could not" work the ferry, but a co-worker of a different race said he "preferred not" to work the ferry and was not disciplined. However, when an employee states that he "could not" work, those words convey a more direct refusal to work than one who states he "prefers not" to work. Reasonable minds could disagree as to what an employee might intend by using these different phrases. Indeed, it appears that the grievant did not actually intend to convey a refusal to work but rather an inability to work. While that may be the case, disciplining the grievant and not the co-worker does not support an inference of discrimination on the basis of race. A supervisor could reasonably address an

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

[11] 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).

[12] Courts have found that even if an employer remedies the action taken against an employee, it can still be considered an adverse employment action. *See, e.g.*, Phelan v. Cook County, 463 F.3d 773, 780-81 (7th Cir. 2006) (finding that employee who was terminated and reinstated with backpay four months later still suffered an adverse employment action). On the other hand, courts have also held that when an otherwise adverse employment action is quickly reversed, before the employee suffers a tangible harm, the employee has not suffered an adverse employment action. *See, e.g.*, Keeton v. Flying J, Inc., 429 F.3d 259, 263 (6th Cir. 2005); Pennington v. City of Huntsville, 261 F.3d 1262, 1267 (11th Cir. 2001).

[13] *See* Hutchinson v. INOVA Health System, Inc., No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *3-4 (E.D. Va. April 8, 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

employee's phrase of "could not" as a refusal to work rather than an employee who expresses a mere preference not to work. The differences in language can explain the arguably disparate results here, rather than discriminatory intent.[14]

Similarly, the other Caucasian employee the grievant alleges refused to work the ferry and was not disciplined, Employee S, is a different case altogether. Employee S was not originally included on the ferry coverage schedule. Indeed, it is unclear whether Employee S refused to work the ferry in a similar fashion to the grievant. Employee S has not been requested by the agency to operate the ferry. As such, there is no inference of disparate treatment in this example either. Because the grievant has not presented evidence that raises a sufficient question that he was singled out for disciplinary action based on his race, this claim does 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

[14] This ruling does not mean that EDR deems the originally issued disciplinary action to be appropriate, only that the claim of discrimination on the basis of race does not qualify for a hearing.