

Issue: Qualification – Performance (Notice of Improvement Needed); Ruling Date: December 28, 2010; Ruling No. 2011-2857; Agency: Department of Behavioral Health and Developmental Services; Outcome: Not Qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Behavioral Health and Developmental Services  
Ruling Number 2011-2857  
December 28, 2010

The grievant has requested qualification of her September 13, 2010, grievance with the Department of Behavioral Health and Developmental Services (the agency). The grievant initially challenged her receipt of a Written Notice alleging misapplication of agency policy, retaliation, and discrimination. During the management resolution steps, the agency rescinded the Written Notice and issued a Notice of Improvement Needed. For the reasons set forth below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Registered Nurse with the agency. On August 19, 2010, the grievant received a Group II Written Notice after an internal investigation made positive findings that verbal/psychological abuse of a patient had occurred. On September 13, 2010, the grievant initiated a grievance challenging the Written Notice. The September 13<sup>th</sup> grievance proceeded through the first management resolution step without resolution. However, during the second management resolution step, the agency removed the Group II Written Notice from the grievant's file and issued a Notice of Improvement Needed. The agency upheld the improvement plan during the third management resolution step as well. On November 9, 2010, the agency denied the grievant's request for a hearing. The grievant now seeks a qualification determination from this Department.

DISCUSSION

When this grievance was initiated, the agency had issued a Group II Written Notice. During the management resolution steps, the agency rescinded the Written Notice and reduced the discipline to a Notice of Improvement Needed. Claims relating solely to the issuance of a Notice of Improvement Needed ("notice") generally do not qualify for a grievance hearing because receipt of a notice does not rise to the level of an "adverse employment action."<sup>1</sup> 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

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<sup>1</sup> See Va. Code § 2.2-3004(A).

responsibilities, or a decision causing a significant change in benefits.”<sup>2</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>3</sup>

In this case, the grievant has presented no evidence that she has suffered an adverse employment action. The notice does not constitute an adverse employment action, because such a notice, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>4</sup> Because the grievant has failed to show the existence of an adverse employment action, this grievance does not qualify for a hearing.<sup>5</sup>

We note, however, that while the notice 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 formal disciplinary action.<sup>6</sup> According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant’s employment and which would automatically qualify for a hearing under the grievance procedure.<sup>7</sup> Therefore, should the notice in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice, this ruling does not prevent the grievant from attempting to contest the merits of the notice 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, the grievant should notify the human

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<sup>2</sup> Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

<sup>3</sup> Holland v. Washington Hanes, Inc., 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>4</sup> See Boone v. Goldin, 178 F.3d 253 (4<sup>th</sup> Cir. 1999).

<sup>5</sup> While the grievant initially grieved the Written Notice as both retaliatory and discriminatory, the Written Notice was later reduced to a Notice of Improvement Needed. 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; (2) the employee suffered a materially adverse action; and (3) a causal link exists between the materially adverse action and the protected activity. The grievant has presented no evidence that a causal link exists between the grievant’s prior protected acts and the alleged adverse action at issue in this case. In addition, a Notice of Improvement Needed does not rise to the level of a materially adverse action. See Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. The grievant must present facts that raise a sufficient question as to whether she was issued the Written Notice *because of* her membership in a protected class; in this case, the grievant has not produced such evidence. See Huchinson v. INOVA Health System, Inc., Civil Action 97-293-A, 1998 U. S. Dist. LEXIS 7723, at \*3 (E.D. Va. April 8, 1998) (citing St. Mary’s Honor Center v. Hicks, 509 U. S. 502 (1993)).

<sup>6</sup> In addition, as a general rule, a supervisor may consider informal documentation of perceived performance problems when completing an employee’s performance evaluation. DHRM Policy 1.40, Performance Planning and Evaluation, “Documentation During the Performance Cycle.”

<sup>7</sup> See generally DHRM Policy 1.60, Standards of Conduct; see also *Grievance Procedure Manual* § 4.1(a).

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resources office, in writing, within five workdays of receipt of this ruling. 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.

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Claudia T. Farr  
Director