

Issue: Qualification – Discipline (Counseling Memo); Ruling Date: September 1, 2011; Ruling No. 2012-3074; 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 2012-3074
September 1, 2011

The grievant has requested a ruling on whether her May 18, 2011 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

On or about April 19, 2011, the grievant received a “Substandard Performance Notice.” The grievant initiated a grievance to challenge this management action on or about May 18, 2011. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to this Department.

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.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.³

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁴ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.⁵ An adverse employment

¹ See *Grievance Procedure Manual* § 4.1 (a) and (b).

² See Va. Code § 2.2-3004(B).

³ Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

⁴ See *Grievance Procedure Manual* § 4.1(b).

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

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

The management action challenged in this grievance is a form of written counseling, a “Substandard Performance Notice.” A written 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.⁸ Further, this type of action does not constitute a “materially adverse action”⁹ required to establish a retaliation claim.¹⁰ Therefore, the grievant’s claims relating to her receipt of the “Substandard Performance Notice” do not qualify for a hearing.¹¹

Further, we note that while the “Substandard Performance 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. Therefore, should the “Substandard Performance Notice” 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.

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

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 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).

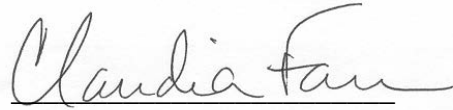
⁹ Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

¹⁰ See, e.g., EDR Ruling No. 2009-2090, at n.6.

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 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 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).

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officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

A handwritten signature in cursive script that reads "Claudia Farr". The signature is written in black ink on a light-colored background.

Claudia T. Farr
Director