Issue: Qualification – Discipline (Counseling Memo); Ruling Date: October 12, 2011; Ruling No. 2012-3111; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling Number 2012-3111
October 12, 2011

The grievant has requested a ruling on whether her July 8, 2011 grievance with the Department of Social Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about July 7, 2011, the grievant received a memorandum regarding "Unauthorized Leave/Agency Visits/Work Hours." The grievant initiated a grievance to challenge this memorandum on or about July 8, 2011. The July 8, 2011 grievance also appears to request, as a reasonable accommodation, the ability to telework on days the grievant takes leave for physical therapy. Due to the distance between her treatment location, which was closer to her home, and her work location, the grievant would choose not to proceed to work following her therapy given the amount of travel time involved. Consequently, she would take a full day of leave on her therapy days after having her telework privileges revoked on June 3, 2011. Before that time, the grievant was able to telework for the remaining portion of her therapy days. 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

[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).

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]

July 7, 2011 Memorandum

A written memorandum, which appears to be akin to a counseling memorandum in this case, 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, although the grievant has identified other issues of concern stemming from this memorandum and requests various forms of relief regarding those issues, it does not appear that the agency has taken any action that has adversely affected the terms, conditions, or benefits of the grievant's employment. Therefore, the grievance does not qualify for a hearing.[9]

We also note that while the 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. Therefore, should the memorandum 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.

Telework

Separate from any dispute the grievant has about the removal of her teleworking privileges, which is not an issue before this Department in this ruling,[10] the grievant appears to have sought, as a reasonable accommodation under the Americans with Disabilities Act (ADA), the ability to telework on days she had physical therapy. However, even assuming the grievant

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[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] 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).

[10] The agency determined that a challenge to the removal of the grievant's telework duties was untimely. The grievant has not raised that determination through the compliance process with this Department.

would be considered a qualified individual with a disability,[11] we cannot find support for an argument that the agency would have been under a duty to provide that accommodation. Indeed, it would appear that the grievant sought telework on her physical therapy days due to the distance she lived and was treated from her work location. Consequently, the grievant's telework request addresses her own convenience and leave use, rather than an accommodation to overcome any impairment or limitations affecting her ability to perform the essential functions of her job.

Further, and more importantly, the grievant's situation has changed since the initiation of her grievance. This Department has recognized that even if a grievant's allegations are true there are still some cases when qualification is inappropriate even if law and/or policy may have been violated or misapplied. For example, during the resolution steps, an issue may have become moot, either because the agency granted the specific relief requested by the grievant or an interim event prevents a hearing officer from being able to grant any meaningful relief. Additionally, qualification may be inappropriate when the hearing officer does not have the authority to grant the relief requested by the grievant and no other effectual relief is available.

The grievant has recently undergone surgery and her recovery time and future treatment are unclear at this time. What is clear, however, is that her physical condition and therapy schedule at the time this grievance was initiated are no longer the same. As such, we view the grievant's request for telework on her physical therapy days to be moot because that schedule no longer exists. Accordingly, there is no basis to qualify the grievance for a hearing.

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

[11] *See, e.g.*, EDR Ruling No. 2011-2691.