Issue: Qualification – Discipline (other); Ruling Date: May 18, 2012; Ruling No. 2012-3335; 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 Virginia Department of Transportation
Ruling Number 2012-3335
May 18, 2012

The grievant has requested a ruling on whether his November 8, 2011 grievance with the Virginia Department of Transportation (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about December 17, 2010, the grievant was involved in a minor accident (single vehicle) with the snow plow he was driving for the agency. The incident was reported and reviewed by management within the grievant's district and determined to be a non-preventable accident, meaning the grievant was not at fault. However, the Central Review Committee reviewed the matter thereafter and determined that the accident was preventable due to negligence on the grievant's part. The grievant was notified of this finding and given an opportunity to appeal to the Virginia State Police Accident Review Committee ("VSP Committee"). The VSP Committee upheld the Central Review Committee's determination. The grievant initiated his November 8, 2011 grievance to challenge the "preventable" finding and indicates he was not given an opportunity to present his side of the story. 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

The first issue that must be addressed is the agency's apparent assertion that this matter does not qualify because the determination of the VSP Committee is deemed "final" by the agency's policy. While the agency policy would appear to indicate that the VSP Committee's finding is "final" for purposes of the agency's appeal process involving accidents,[1] that policy language does not override the statutorily created grievance procedure. This Department is unaware of any provision of the Virginia Code that makes the VSP Committee's findings final such that a grievance could not be filed or qualified on this type of matter, which is directly and personally related to the grievant's employment. The Virginia Code provides the grievant with a statutory right to file a grievance on such a matter.[2] As such, we will proceed to determine whether this grievance qualifies for a hearing.

[1] VDOT Motor Vehicle Crashes and Convictions of Moving Traffic Violations Policy, SP #1-006 ("VDOT Policy") § 6.2.3.
[2] In addition, the agency policy specifically provides that if an employee receives disciplinary action for an accident, the disciplinary action may be grieved. *Id.*

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[3] Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[4] 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.[5]

Further, 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 management action challenged in this grievance is the finding by the agency that the grievant has engaged in a preventable accident. Such a finding carries no immediate disciplinary sanction, although it could depending on the severity of the incident.[10] In this case, the grievant has not yet received any disciplinary action for the December 17, 2010 accident. Consequently, the grievant has essentially received the equivalent of a counseling memo: a management action that carries no automatic sanction but notes some level of unsatisfactory performance. 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.[11] Therefore, the grievance does not qualify for a hearing.[12]

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[3] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[4] *See* Va. Code § 2.2-3004(B).
[5] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).
[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).
[10] VDOT Policy § 6.2.5.
[11] *See* Boone v. Goldin, 178 F.3d 253, 256 (4th Cir. 1999).
[12] 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. *Id.*

One of the issues raised by the grievant was that he was not given an opportunity to present his side of the story to the Central Review Committee or the VSP Committee. The agency policy does indicate that in sending the materials to the VSP Committee for consideration of an appeal, "any additional information the employee submits" should be included as well.[13] It appears that the grievant was under the assumption that he would be called or given an opportunity to meet with someone to provide his information. However, the documentation he was given with the Central Review Committee's determination clearly states, "If you elect to appeal this decision, additional information or evidence that you desire to submit should be attached to this form and it will be made part of the record." The grievant appears not to have submitted anything additional in requesting the appeal to the VSP Committee and only checked a box indicating his desire to appeal. While it could be a good practice to provide an opportunity to provide verbal input on such a matter, no such guarantee is provided by policy. Further, the grievant was notified of his opportunity to provide additional information and did not do so. Consequently, the grievant's assertion that he was not given an opportunity to provide input appears inaccurate and does not impact the result in this case.

We also note that while the preventable accident finding 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. Indeed, based on the agency's policy, whether an employee has had other preventable accidents before is taken into account in determining whether to issue disciplinary action.[14] Therefore, should the incident 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 officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

Claudia T. Farr
Director

[13] VDOT Policy § 6.2.3.
[14] VDOT Policy § 6.2.5.