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QUALIFICATION RULING

In the matter of the Virginia Department of Health
Ruling Numbers 2019-4895, 2019-4916
May 31, 2019

The grievant has requested rulings from the Office of Employment Dispute Resolution (“EDR”)¹ at the Virginia Department of Human Resource Management (“DHRM”) on whether his grievances filed with the Virginia Department of Health (the “agency”) on November 21, 2018 and December 28, 2018, respectively, qualify for hearing. For the reasons discussed below, neither grievance is qualified for a hearing.

FACTS

On or about October 24, 2018, the grievant received from his supervisor both his most recent Performance Rating form and a notice of the agency’s anticipated disciplinary action against him.² The grievant’s performance review listed his overall rating as “Contributor,” with five sub-fields rated with “Contributor” and four rated with “Extraordinary Contributor.” The grievant received one “Below Contributor” rating in the sub-field of Performance Management (Supervision), which the explanatory comments attributed to “perceived inequitable treatment of staff” by the grievant. For the same reason, the agency alleged that the grievant faced disciplinary action based on investigative findings that he had violated DHRM and agency policies regarding gender discrimination, workplace harassment, ethics, and standards of conduct. After the grievant offered a detailed rebuttal to these allegations, the agency issued him a Group I Written Notice and Performance Improvement Plan on November 29, 2018.

In separate grievances, the grievant challenged both his Performance Rating form and the Written Notice, on grounds that the underlying investigation was flawed. He sought “Extraordinary Contributor” ratings in all evaluation fields, including his overall rating and “full annulment” of the Written Notice. In response, the agency removed any reference to formal

¹ The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as “EDR” in this ruling. EDR’s role with regard to the grievance procedure remains the same.

² The Performance Rating form is dated September 14, 2018, but was signed by the grievant’s supervisor on October 21, 2018. The grievant’s correspondence indicates he received the form in person on October 24, 2018.

disciplinary action from the Performance Rating form and mitigated the Written Notice to a Written Counseling. Otherwise, it denied the grievant's requested relief.³

The agency head declined to qualify either grievance for a hearing. The grievant now appeals those determinations to EDR.

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.⁴ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁵ Thus, claims relating to issues such as the means, methods, 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, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary and/or capricious.⁶

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁷ Typically, then, the threshold question is whether the grievant has suffered an adverse employment action. 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 agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁹

Performance Evaluation

In this case, the grievant received an overall rating of "Contributor" on his performance evaluation.¹⁰ A satisfactory performance evaluation¹⁰ is not an adverse employment action.¹¹ Even if a single "Below Contributor" sub-rating on an overall satisfactory evaluation could be an adverse employment action, "a poor performance evaluation is actionable only where the

³ In his due process memo and other grievance documents, the grievant requested additional relief including dismissal of all allegations against him; reconsideration and reversal of his 2018 performance evaluation; further discussion about broader agency dysfunction; investigation of certain other employees the grievant claims made false accusations against him; and investigation of the initial investigators, who he claims conducted a biased and unethical investigation of those accusations.

⁴ See *Grievance Procedure Manual* § 4.1.

⁵ Va. Code § 2.2-3004(B).

⁶ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁷ See *Grievance Procedure Manual* § 4.1(b).

⁸ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁹ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

¹⁰ See DHRM Policy 1.40, *Performance Planning and Evaluation*, for additional discussion of performance evaluation procedures for state employees.

¹¹ *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377-78 (4th Cir. 2004) (although the plaintiff's performance rating was lower than his previous yearly evaluation, there was no adverse employment action where he did not show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment."¹² Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, the associated grievance does not qualify for a hearing.

Here, the grievant received at least satisfactory ratings on nine out of ten specific performance fields. Thus, his overall rating was "Contributor," as it was on his most recent interim evaluation. Although the grievant believes his self-ratings of "Extraordinary Contributor" are the most accurate assessment of his performance, the grievant has presented no evidence that the performance evaluation completed by his supervisor or any procedural abnormalities in the creation and/or filing of the performance evaluation have detrimentally altered the terms or conditions of his employment. As a result, his grievance does not qualify for a hearing on this basis.¹³

Written Counseling

The grievant also asks the agency to rescind its Written Counseling on grounds that it is premised on misconduct that the grievant denies.¹⁴ Such written counseling is an example of informal supervisory action. It is not equivalent to a Written Notice of formal discipline, which the agency initially issued to the grievant but later rescinded. 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.¹⁵ Therefore, the grievant's claims relating to the Written Counseling in this case do not qualify for a hearing.¹⁶

Although it is not apparent that the Written Counseling in itself has adversely affected the terms, conditions, or benefits of the grievant's employment, it could be used to support an adverse employment action against him in the future. Should the informal supervisory actions grieved in this instance later serve to support an adverse employment action, such as a formal Written Notice or a "Below Contributor" overall annual performance rating, this ruling does not prevent the grievant from contesting the merits of these allegations through a subsequent grievance challenging a related adverse employment action.

¹² *Booz-Allen & Hamilton*, 368 F.3d at 377 (internal quotation omitted). Although DHRM Policy 1.40 establishes remedial procedures for substandard performance, these procedures do not apply unless an employee's *overall* performance rating is "Below Contributor." DHRM Policy 1.40 does not mandate any adverse results for a "Below Contributor" sub-rating where the overall rating is satisfactory. *See* DHRM Policy 1.40.

¹³ 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.*

¹⁴ This ruling does not address the merits of the underlying allegations against the grievant, *i.e.* whether he violated policies related to discrimination, harassment, ethics, or standards of conduct. Further, nothing in this ruling should be interpreted to affirm or approve the investigation the agency relied upon to support those allegations, in either its procedure or conclusions.

¹⁵ *See* *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999).

¹⁶ As stated above, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act. *See* Va. Code § 2.2-3806(A)(5); n. 13, *supra*.

EDR's qualification rulings are final and nonappealable.¹⁷



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¹⁷ See Va. Code § 2.2-1202.1(5).