

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: December 12, 2017; Ruling No. 2018-4651; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2018-4651
December 12, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether his October 20, 2017 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

The grievant is employed by the agency as an area construction engineer. On or about October 6, 2017, the grievant received his annual performance evaluation for 2016-2017. On the evaluation, the grievant received an overall performance rating of “Contributor,” however, in one category he was rated “Below Contributor.” On or about October 20, 2017, the grievant initiated a grievance challenging the “Below Contributor” rating in the one category. After proceeding through the management steps, the grievance was not qualified for a hearing. The grievant now appeals that determination to EEDR.

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, including the establishment of performance expectations and the rating of employee performance against those expectations.² Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts 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 the performance evaluation was arbitrary and/or capricious.³

¹ See *Grievance Procedure Manual* § 4.1.

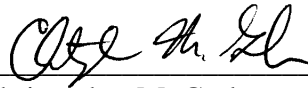
² Va. Code § 2.2-3004(B).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

In addition, 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. 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.”⁵ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁶

In this case, the grievant received an overall rating of “Contributor.” A satisfactory performance evaluation is not an adverse employment action.⁷ Further, the grievant has presented no evidence that the performance evaluation itself or any procedural abnormalities in the creation and/or filing of the performance evaluation have detrimentally altered the terms or conditions of his employment.⁸ As a result, the grievance does not qualify for a hearing.⁹

EEDR’s qualification rulings are final and nonappealable.¹⁰



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Director
Office of Employment Dispute Resolution

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

⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁶ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁷ E.g., EDR Ruling No. 2015-4119; 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, 377-378 (4th Cir. 2004) (holding that, although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

⁸ To the extent that the grievant appears to have raised the issue of whether retaliation for his initiating a complaint with the agency’s Civil Rights Office improperly influenced his evaluation, EEDR has carefully reviewed the information presented by the grievant and is unable to conclude that sufficient evidence was presented to indicate that the agency’s stated explanation for the “Below Contributor” rating may have been pretext for an improper motive.

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 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.*

¹⁰ See Va. Code § 2.2-1202.1(5).