

Issue: Qualification – Performance Evaluation (arbitrary/capricious); Ruling Date: April 22, 2013; Ruling No. 2013-3580; Agency: Department of Juvenile Justice; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Department of Juvenile Justice
Ruling Number 2013-3580
April 22, 2013

The grievant has requested a ruling on whether her November 13, 2012 grievance with the Department of Juvenile Justice (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about November 9, 2011, the agency completed the grievant’s annual evaluation for 2010-2011. On her evaluation, the grievant received an overall rating of “Contributor.” When her evaluation was completed, the grievant was absent from work on approved family leave for several months and, in her absence, the agency filed her evaluation with its human resources department. The grievant became aware that the evaluation had been filed, and that she had not received a copy of it, on or about October 15, 2012. She initiated a grievance to challenge the content of her evaluation, the agency’s apparent failure to deliver it to her, and its failure to obtain her signature acknowledging receipt of the evaluation, on November 13, 2012.¹ After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management.

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

¹ The grievant also appears to allege that she has experienced retaliation because she transferred to a different office in July 2011. She has not presented any facts in support of that argument, however, and as a result EDR will not address that claim in this ruling. If the grievant wishes to file a grievance alleging retaliation for participating in the grievance process, she may do so according to the rules set forth in the *Grievance Procedure Manual*.

² See *Grievance Procedure Manual* § 4.1.

³ Va. Code § 2.2-3004(B).

decision, whether state policy may have been misapplied or unfairly applied or whether a performance evaluation was arbitrary and/or capricious.⁴

Adverse Employment Action

The grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ 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.”⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁷

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.⁸ In this case, although the grievant disagrees with some of the facts contained in the evaluation, she received a “Contributor” rating on each individual factor rating and her overall performance rating was also “Contributor.” Most importantly, 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 has detrimentally altered the terms or conditions of her employment. Consequently, the grievance does not qualify for a hearing.⁹

EDR’s qualification rulings are final and nonappealable.¹⁰



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⁴ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁵ *See Grievance Procedure Manual* § 4.1(b).

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) (citation omitted).

⁸ *E.g.*, EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612; *see also James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although the plaintiff’s performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year).

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. *Id.*

¹⁰ *See* Va. Code § 2.2-1202.1(5).