

Issue: Qualification – Performance Evaluation (Other); Ruling Date: June 3, 2013;  
Ruling No. 2013-3614; Agency: Department of Taxation; 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 Taxation  
Ruling Number 2013-3614  
June 3, 2013

The grievant has requested a ruling on whether her January 3, 2013 grievance with the Department of Taxation (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about October 25, 2012, the agency completed the grievant’s annual performance evaluation for 2011-2012. The “Reviewer’s Comments” section on the evaluation was completed by a supervisor within the grievant’s agency. This supervisor did not have any contact with the grievant regarding the content of her evaluation. After the grievant received her evaluation, the agency determined that a different supervisor should have signed the “Reviewer’s Comments” section. This second supervisor crossed out the original reviewer’s signature and signed the evaluation on or about November 8, 2012, but did not date her signature. Other than the changed signature, none of the content of the evaluation was modified. The agency apparently did not notify the grievant that it had made this change to her evaluation. On or about December 4, 2012 the grievant became aware of the revised signature on her evaluation and filed a grievance challenging this management action on January 3, 2013.<sup>1</sup> 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”).

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.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to

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<sup>1</sup> The grievant did not file a grievance challenging the content of her evaluation. This grievance is not timely to challenge the content of the initial evaluation because it was not filed within 30 calendar days of the date on which the grievant received the evaluation, and, to the extent that this grievance challenges the evaluation’s content, those claims will not be addressed in this ruling.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.<sup>3</sup> 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, whether state policy may have been misapplied or unfairly applied or whether a performance evaluation was arbitrary and/or capricious.<sup>4</sup>

*Adverse Employment Action*

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

A procedural error of this nature in a performance evaluation is not an adverse employment action when there is no evidence of an adverse action relating to the error. In this case, although the agency acknowledges that the revision of the reviewer's signature on the evaluation was a technical mistake, it had no demonstrable effect on the evaluation's content. Indeed, the agency has emphasized that the second supervisor who signed the evaluation assisted in preparing the evaluation, was familiar with its content, and agreed with the grievant's overall rating. Most importantly, the grievant has presented no evidence that any procedural abnormalities in the creation and/or filing of the performance evaluation have detrimentally altered the terms or conditions of her employment. As a result, this grievance does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.<sup>8</sup>



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<sup>3</sup> Va. Code § 2.2-3004(B).

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

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>7</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>8</sup> See Va. Code § 2.2-1202.1(5).