

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: January 6, 2015; Ruling No. 2015-4074; Agency: Virginia Tech; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Virginia Polytechnic Institute and State University
Ruling Number 2015-4074
January 6, 2015

The grievant has requested a ruling on whether his October 14, 2015 grievance with Virginia Polytechnic Institute and State University (the “University”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 19, 2014, the grievant received his yearly performance evaluation. Although he received an overall rating of “Strong Performance,” he was rated as having “Developing Performance” in the category of “Communication Skills.” In addition, the evaluation contained several comments relating to his communication skills that the grievant found objectionable. On or about October 14, 2014, the grievant initiated a grievance to challenge the content of his evaluation. After proceeding through the management steps, the grievance was not qualified for hearing by the University president. 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.¹ Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.² 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.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).

Furthermore, 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

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.⁷ In this case, although the grievant disagrees with the University’s assessment of his communication skills, his overall performance rating was “Strong Performance.” Most importantly, the grievant has presented no evidence that the performance evaluation has detrimentally altered the terms or conditions of his employment. As a result, this grievance does not qualify for a hearing.⁸

EDR’s qualification rulings are final and nonappealable.⁹



Christopher M. Grab
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. 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 the plaintiff’s 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 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). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

⁹ See Va. Code § 2.2-1202.1(5).