

Issue: Qualification – Performance (arbitrary/capricious performance evaluation);  
Ruling Date: March 26, 2015; Ruling No. 2015-4119; Agency: Virginia  
Commonwealth University; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of Virginia Commonwealth University  
Ruling Number 2015-4119  
March 26, 2015

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his November 24, 2014 grievance with Virginia Commonwealth University (the “University”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the University as an Information Technology Manager. On or about October 27, 2014, the grievant received his annual performance evaluation for 2013-2014. On the evaluation, the grievant received an overall performance rating of “Achiever.” The grievant appealed his evaluation using the University’s performance evaluation appeals process.<sup>1</sup> When the internal appeals process did not resolve the grievant’s issues with his evaluation, he initiated a grievance on or about November 24, 2014. In the grievance, the grievant alleges that his supervisor failed to follow University policy because she “did not read [his] self-evaluation” prior to writing his performance evaluation and argues that certain statements in the evaluation about his performance are not accurate. He further claims that the evaluation “was written in retaliation for recent events.” Specifically, the grievant alleges that the evaluation was retaliatory because he reported a concern to the University in August 2014 that his supervisor had failed to follow University purchasing policies. After proceeding through the management steps, the grievance was not qualified for a hearing by the University president. The grievant now appeals that determination 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.<sup>2</sup> 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.<sup>3</sup>

---

<sup>1</sup> Additional information about the University’s internal performance evaluation appeals process is available at <http://www.hr.vcu.edu/employee-relations-and-performance-management/guides-for-managers/annual-performance-cycle/performance-evaluation-appeals/>.

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

<sup>3</sup> Va. Code § 2.2-3004(B).

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.<sup>4</sup>

Furthermore, 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>

In this case, the grievant received an overall rating of "Achiever" on the University's evaluation scale. The University evaluates its employees using a scale that consists of five ratings: "Unsatisfactory Performer," "Fair Performer," "Achiever," "High Achiever," and "Extraordinary Achiever."<sup>8</sup> Based on information provided by the University, ratings of "Fair Performer," "Achiever," and "High Achiever" are equivalent to a rating of "Contributor" on the DHRM evaluation scale.<sup>9</sup> A satisfactory performance evaluation is not an adverse employment action.<sup>10</sup> Thus, where the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. In this case, although the grievant disagrees with some of the information contained in his performance evaluation, he received ratings of "Achiever" and "High Achiever" on each of the individual factor ratings and his overall performance rating was "Achiever." 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 have detrimentally altered the terms or conditions of his employment. As a result, the grievance does not qualify for a hearing on this basis.<sup>11</sup>

---

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

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

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

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

<sup>8</sup> For information about the University's performance evaluation process, see <http://www.hr.vcu.edu/employee-relations-and-performance-management/guides-for-managers/annual-performance-cycle/>.

<sup>9</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*, uses a system with three evaluation ratings: "Below Contributor," "Contributor," and "Extraordinary Contributor."

<sup>10</sup> *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 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).

<sup>11</sup> 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.*

EDR's qualification rulings are final and nonappealable.<sup>12</sup>



---

Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

---

<sup>12</sup> See Va. Code § 2.2-1202.1(5).