

Issue: Qualification – Performance (arbitrary/capricious performance evaluation);
Ruling Date: March 27, 2015; Ruling No. 2015-4123; 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 2015-4123
March 27, 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 her December 19, 2014 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

The grievant is employed by the agency as an Education Administrator II. On or about September 27, 2014, the grievant received her annual performance evaluation for 2013-2014.¹ She received an overall rating of “Contributor” for the year. The grievant appealed her evaluation using the agency’s internal performance evaluation appeal procedure. The grievant received the agency’s response to her appeal on November 21 and her issues with the performance evaluation were not resolved. The grievant initiated a grievance on or about December 19, 2014, in which she argues that her overall performance rating “is not fair based on the duties and responsibilities [she] assumed” during the evaluation cycle and effectively asserts that her overall rating should be increased. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head. 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.² Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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 It appears that the grievant refused to sign her performance evaluation when it was presented to her, and there is no date on the evaluation that affirmatively indicates the date she received it. The evaluation is dated September 25, 2014, and was signed by her supervisor on September 27. Ultimately, the date on which the grievant actually received her evaluation is immaterial, as she appealed her overall rating and timely filed a grievance after receiving the results of the appeal.

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

Further, 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

In this case, the grievant received an overall rating of “Contributor” on her performance evaluation.⁸ A satisfactory performance evaluation is not an adverse employment action.⁹ 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 her performance evaluation, she received ratings of “Contributor” on most of the individual factor ratings and her overall performance rating was “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 have detrimentally altered the terms or conditions of her employment. As a result, the grievance does not qualify for a hearing on this basis.¹⁰

EDR’s qualification rulings are final and nonappealable.¹¹



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⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

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

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

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

⁸ *See* DHRM Policy 1.40, *Performance Planning and Evaluation*, for additional discussion of performance evaluation procedures for state employees.

⁹ *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).

¹⁰ 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.*

¹¹ *See* Va. Code § 2.2-1202.1(5).