

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: May 5, 2015; Ruling No. 2015-4140; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Virginia Department of Transportation  
Ruling Number 2015-4140  
May 5, 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 21, 2014 grievance with the Virginia Department of Transportation (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 Operations Manager. On or about October 24, 2014, the grievant received his annual performance evaluation for 2013-2014. He received an overall rating of “Contributor” for the year. The grievant initiated a grievance challenging the performance evaluation on or about November 21, 2014.<sup>1</sup> Although the performance evaluation was apparently revised during the management resolution steps, the grievant was not satisfied with the relief provided. The grievant asked the agency head to qualify the grievance for hearing, but his request was denied. 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.<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>

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<sup>1</sup> The grievant cites a number of other incidents in his grievance, but it appears he does so as evidence that his evaluation was arbitrary or capricious, retaliatory, or otherwise improper, rather than as an attempt to raise a claim of ongoing harassment by the agency. To the extent the grievant believes he experiences harassing or otherwise inappropriate conduct in the future, this ruling does not preclude him from raising those claims in a new grievance.

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

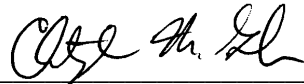
<sup>3</sup> Va. Code § 2.2-3004(B).

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

Further, 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 “Contributor” on his performance evaluation.<sup>8</sup> A satisfactory performance evaluation is not an adverse employment action.<sup>9</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. 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>10</sup>

EDR’s qualification rulings are final and nonappealable.<sup>11</sup>



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Director  
Office of Employment Dispute Resolution

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

<sup>9</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>10</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.*

<sup>11</sup> See Va. Code § 2.2-1202.1(5).