

Issue: Qualification – Work Conditions (employee/supervisor conflict); Ruling Date: January 29, 2016; Ruling No. 2016-4295; 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 2016-4295
January 29, 2016

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 October 30, 2015 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 a Lead Carpenter. On or about October 5, 2015, the grievant received his annual performance evaluation for 2014-2015. On the evaluation, the grievant received an overall performance rating of “Achiever.” He initiated a grievance challenging the performance evaluation on or about October 30, 2015. In the grievance, the grievant argues that he should have received a rating of “High Achiever,” disputes comments made with respect to certain areas of his performance, and asserts that the “comments lowered [his] overall evaluation.” The grievant further claims that the content of the evaluation and his overall performance evaluation rating were “direct retaliation by [his] supervisor” because the grievant has “taken a stance against” the supervisor’s allegedly improper behavior and “raised questions” about the application of certain University policies and procedures. 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.¹ 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.² 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

¹ See *Grievance Procedure Manual* § 4.1.

² Va. Code § 2.2-3004(B).

misapplied or unfairly applied, or whether the performance evaluation was arbitrary and/or capricious.³

While grievances that allege retaliation may qualify for a hearing, 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

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.”⁷ 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.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 his performance evaluation and received a rating of “Fair Performer” on one of the individual factor ratings, he received ratings of “Achiever” and “High Achiever” on all of the remaining 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.¹⁰

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

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).

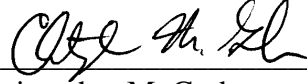
⁷ For information about the University’s performance evaluation process, see <http://www.hr.vcu.edu/employee-relations-and-performance-management/guides-for-managers/annual-performance-cycle/>.

⁸ DHRM Policy 1.40, *Performance Planning and Evaluation*, uses a system with three evaluation ratings: “Below Contributor,” “Contributor,” and “Extraordinary Contributor.”

⁹ *E.g.*, EDR Ruling No. 2015-4119; 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 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

EDR's qualification rulings are final and nonappealable.¹¹



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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.*

¹¹ See Va. Code § 2.2-1202.1(5).