

Issues: Qualification – Performance (arbitrary/capricious performance evaluation) and Retaliation (grievance activity); Ruling Date: March 22, 2016; Ruling No. 2016-4317; Agency: Virginia Community College System; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Virginia Community College System  
Ruling Number 2016-4317  
March 22, 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 her December 7, 2015 grievance with the Virginia Community College System (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 a human resource analyst. On or about November 5, 2015, the grievant received her annual performance evaluation for 2014-2015. On the evaluation, the grievant received an overall performance rating of “Contributor.” She appealed her rating, as provided for in DHRM Policy 1.40, *Performance Planning and Evaluation*. By letter dated November 25, 2015, the reviewer indicated that he agreed with her performance evaluation and did not recommend any changes. On or about December 7, 2015, the grievant initiated a grievance challenging the performance evaluation and the agency’s alleged failure to comply with Policy 1.40. After proceeding through the management steps, the grievance was not qualified for a hearing. 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>1</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>2</sup> 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

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

<sup>2</sup> Va. Code § 2.2-3004(B).

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

In addition, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>4</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>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup>

In this case, the grievant received an overall rating of “Contributor.” A satisfactory performance evaluation is not an adverse employment action.<sup>7</sup> Further, 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.<sup>8</sup> As a result, the grievance does not qualify for a hearing on this basis.<sup>9</sup>

EDR’s qualification rulings are final and nonappealable.<sup>10</sup>



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

<sup>4</sup> *See Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> *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).

<sup>8</sup> As the grievant has previously alleged, *see* EDR Ruling Number 2016-4299, she also asserts in attachments to the grievance that her supervisor has created a hostile work environment. Although the claims raised by the grievant in this grievance do not rise to the severe or pervasive level necessary for qualification, this ruling in no way limits the grievant’s ability to challenge future conduct through the grievance procedure.

<sup>9</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 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.*

<sup>10</sup> *See* Va. Code § 2.2-1202.1(5).