

Issue: Qualification – Performance (interim performance evaluation); Ruling Date: September 18, 2013; Ruling No. 2014-3709; Agency: Department for Aging and Rehabilitative Services; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Department for Aging and Rehabilitative Services  
Ruling Number 2014-3709  
September 18, 2013

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 July 30, 2013 grievance with the Department for Aging and Rehabilitative Services (the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

On or about July 1, 2013, the grievant received an interim performance evaluation, rating his performance as “Below Contributor” in three of nine total measures, with overall results also categorized as “Below Contributor.” The grievant initiated a grievance to challenge his interim performance evaluation on or about July 30, 2013. During the management resolution steps of the grievance process, the agency changed the grievant’s overall rating on the interim performance evaluation to “Contributor.” After proceeding through the management steps, the agency head declined to qualify the grievance 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.<sup>2</sup> Thus, 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, or whether state policy may have been misapplied or unfairly applied.<sup>3</sup>

Further, 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

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<sup>1</sup> See *Grievance Procedure Manual* §§ 4.1 (a) and (b).

<sup>2</sup> See Va. Code § 2.2-3004(B).

<sup>3</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

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

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 instance, the grievant has not alleged discrimination, retaliation, or discipline. The management action challenged, an interim performance evaluation, is an informal supervisory action akin to a written counseling.<sup>7</sup> An interim performance evaluation does not generally constitute an adverse employment action because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.<sup>8</sup> Therefore, the grievant’s claims relating to his receipt of the Interim Performance Evaluation do not qualify for a hearing.<sup>9</sup>

We note that while the interim performance evaluation has not had an adverse impact on the grievant’s employment, it could be used later to support an adverse employment action against the grievant.<sup>10</sup> Should the interim performance evaluation grieved in this instance later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a “Below Contributor” annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

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



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<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 (4<sup>th</sup> Cir. 2007) (citation omitted).

<sup>7</sup> See *Grievance Procedure Manual* § 4.1(c).

<sup>8</sup> See Boone v. Goldin, 178 F.3d 253, 256 (4<sup>th</sup> Cir. 1999).

<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 he 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 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>10</sup> It is not entirely clear how this interim performance evaluation might end up doing so, however, as it was ultimately changed to reflect an overall “Contributor” rating.

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