

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: December 6, 2016; Ruling No. 2017-4437; Agency: University of Virginia; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the University of Virginia
Ruling Number 2017-4437
December 6, 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 July 18, 2016 grievance with the University of Virginia (the “University”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

FACTS

The grievant is employed by the University as Faculty and Student Support. On or about April 18, 2016, she received an evaluation rating her performance as “Inconsistent.” On or about July 18, 2016, she initiated a grievance alleging that the evaluation rating was in retaliation for reporting a security concern and “defending [herself]” in response to a due process memorandum. After proceeding through the management steps, the grievance was not qualified for a hearing by the agency head.¹ The grievant now appeals that determination to EDR.²

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.³ Additionally, the grievance statutes and procedure reserve to management the exclusive right to

¹ The grievant raises several additional “issues of concern,” which appear to have arisen since the initiation of her July 18 grievance. As these issues were not raised in the grievance, they will not be addressed here. *See Grievance Procedure Manual* §2.4 (“Once the grievance is initiated, challenges to additional management actions or omissions cannot be added.”) The grievant may raise these concerns through another grievance, provided the grievance is otherwise timely. *See id.*

² The grievant also asserts that the University has failed to comply with the grievance procedure, including allegedly having removed documents from the grievance record. Noncompliance challenges must be raised through the process set forth in Section 6.3 of the *Grievance Procedure Manual*. As the grievance has now reached the qualification stage, however, any challenges to possible noncompliance are deemed waived. *See Grievance Procedure Manual* § 6.3. Furthermore, regardless of whether there were documents removed from the grievance record during the course of the management steps, EDR has reviewed all documents submitted and the decision herein is based on the entirety of the record including any additional information submitted during the pendency of this ruling.

³ *See Grievance Procedure Manual* § 4.1.

manage the affairs and operations of state government.⁴ 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.⁵

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁶ 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."⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁸

The grievant asserts that her rating of "inconsistent" for the 2015-2016 performance cycle was given in retaliation for having raised safety and/or security concerns and successfully defended herself after receiving a due process notice. However, as the grievant herself acknowledges, an "Inconsistent" performance evaluation is not an adverse employment action.⁹ Further, as a result of the "Inconsistent" rating, the grievant did not receive a pay cut, she was not demoted, and her job was not affected.

Where, as here, 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, her overall performance rating was equivalent to the "Contributor" level used under DHRM Policy 1.40, *Performance Planning and Management*. 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

⁴ Va. Code § 2.2-3004(B).

⁵ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ *See Grievance Procedure Manual* § 4.1(b).


⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁸ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁹ *See* Performance Management Resource Guide, available at <http://www.hr.virginia.edu/uploads/documents/media/PerformanceManagementResourceGuide.pdf>, at 26, 35-36, 38; DHRM Policy 1.40, *Performance Planning and Evaluation*. *see also, e.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *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). A rating of "inconsistent" under the University's five point evaluation system is equivalent to a "contributor" rating under DHRM Policy 1.40, *Performance Planning and Evaluation*.

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

EDR's qualification rulings are final and nonappealable.¹¹



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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). To the extent this ruling does not address any issue raised by the grievant in her grievance, EDR has thoroughly reviewed the record and has determined that qualification is not warranted on any basis.