

Issue: Qualification/Performance evaluation – arbitrary/capricious; Ruling Date: May 9, 2005; Ruling #2005-1003; Agency: Department of Social Services; Outcome: not qualified



## ***COMMONWEALTH of VIRGINIA***

### ***Department of Employment Dispute Resolution***

### **QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Social Services  
Ruling Number 2005-1003  
May 9, 2005

The grievant has requested a ruling on whether his November 4, 2004 grievance with the Department of Social Services (DSS or the agency) qualifies for hearing. The grievant challenges his 2004 performance evaluation as arbitrary and capricious. For the reasons discussed below, this grievance does not qualify for a hearing.

#### **FACTS**

The grievant is employed as a Counselor 1. As initially drafted, the grievant's 2004 performance evaluation reflected an overall rating of "Below Contributor," with "Below Contributor" ratings in four individual areas. On November 4, 2004, the grievant initiated a grievance challenging this performance evaluation. The first-step respondent rejected the grievance as untimely, but this Department subsequently ruled that the grievance had been initiated within the 30-day period and that the grievant could therefore proceed.

After reviewing the grievant's claims, the second-step respondent agreed to revise the grievant's performance evaluation to reflect an overall rating of "Contributor." She also agreed to raise the grievant's rating in two of the four individual areas. The agency subsequently submitted documentation to the Department of Human Resource Management requesting that the grievant be granted a retroactive 3% raise he was previously denied in the Fall of 2004 because of his "Below Contributor" rating.

Although the grievant agrees with the decision to revise to "Contributor" his overall rating, as well as the ratings in two individual areas, he continues to object to his "Below Contributor" rating in the remaining two individual areas. On February 9, 2005, he advanced his grievance to the third resolution step. After the third-step respondent denied his request for relief, the grievant requested qualification of his grievance for hearing. The agency denied his request for qualification and the grievant has appealed this decision to this Department.

## DISCUSSION

The General Assembly has limited issues that may be qualified for a hearing to those that involve “adverse employment actions.”<sup>1</sup> An adverse employment action is defined as a “tangible employment act constituting 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>2</sup> Thus, for the grievant’s claim of arbitrary and capricious performance evaluation to qualify for hearing, the action taken against the grievant must result in an adverse effect *on the terms, conditions, or benefits* of his employment.<sup>3</sup>

Although the “Below Contributor” rating the grievant initially received, when coupled with the resulting loss of the 3% salary increase, would constitute an adverse employment action, the agency has since revised the grievant’s evaluation to reflect a “Contributor” rating and taken steps to ensure that he receives the 3% raise retroactively. A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.<sup>4</sup> In this case, although the grievant disagrees with portions of his 2004 performance evaluation and believes it to be arbitrary, the overall rating, as revised, was generally satisfactory. Most importantly, the grievant has presented no evidence that the 2004 performance evaluation, as revised, has detrimentally altered the terms or conditions of his employment.

Accordingly, the grievant’s claim of arbitrary and capricious performance evaluation does not qualify for hearing.<sup>5</sup> We note, however, that should the 2004

---

<sup>1</sup> Va. Code § 2.2-3004(A).

<sup>2</sup> Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

<sup>3</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>4</sup> See Rennard v. Woodworker’s Supply, Inc., 101 Fed. Appx. 296, 2004 U.S. App. LEXIS 11366 (10<sup>th</sup> Cir. 2004)(citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10<sup>th</sup> Cir. 1994)). See also James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4<sup>th</sup> Cir. 2004)(The court held that although the plaintiff’s performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.) Brown v. Brody, 199 F.3d 446 (D.C. Cir 1999), “[A] thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions.” Brown, 199 F.3d at 458 citing to Mattern v. Eastman Kodak Co., 104 F.3d 702, 708, 710 (5<sup>th</sup> Cir. 1997); Rabinovitz v. Pena, 89 F.3d 482, 486, 488-90 (7<sup>th</sup> Cir. 1996); Smart, 89 F.3d at 442-43; Kelecic v. Board of Regents, 1997 U.S. Dist. LEXIS 7991, No. 94 C 50381, 1997 WL 311540, at \*9 (N.D. Ill. June 6, 1997); Lucas v. Cheney, 821 F. Supp. 374, 375-76 (D. Md. 1992); Nelson v. University of Me. Sys., 923 F. Supp. 275, 280-82 (D. Me. 1996); cf. Raley v. St. Mary’s County Comm’rs, 752 F. Supp. 1272, 1278 (D. Md. 1990).

<sup>5</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

performance evaluation somehow later serve to support an adverse employment action against the grievant (e.g., demotion, termination, suspension and/or other discipline), the grievant may address the underlying merits of the evaluation through a subsequent grievance challenging any related adverse employment action.

We also note that although the grievance does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved. For more information on this Department's Workplace Mediation program, call 804-786-7994.

#### APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

---

Claudia T. Farr  
Director

---

Gretchen M. White  
EDR Consultant

---

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. Va. Code § 2.2-3806(A)(5).