Issue: Qualification/performance evaluation is arbitrary and capricious; Ruling Date: March 15, 2005; Ruling #2005-959; Agency: Virginia Community College System; Outcome: not qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Northern Virginia Community College
Ruling Number 2005-959
March 15, 2005

The grievant has requested a ruling on whether his October 27, 2004 grievance with Northern Virginia Community College (NVCC or the agency) qualifies for hearing. The grievant claims that his 2004 performance evaluation is arbitrary and capricious. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an IT Specialist I with NVCC. During the course of the 2004 performance evaluation cycle (i.e. October 25, 2003 through October 24, 2004), the grievant received five "Acknowledgment of Extraordinary Contribution" forms from NVCC. The grievant's 2004 performance evaluation reflects an overall rating of "Contributor" with an "Extraordinary Contributor" in two marked elements of the evaluation and a "Contributor" rating in the other two marked elements of the evaluation. Dissatisfied with his 2004 performance evaluation, the grievant initiated a grievance on October 27, 2004 challenging the evaluation as arbitrary and capricious.[1] The grievant alleges that he should have received an overall performance rating of "Extraordinary Contributor."

DISCUSSION

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[2] 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."[3]

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[1] It should be noted that checking the Form A box entitled "Discrimination or Retaliation by Immediate Supervisor" is a procedural mechanism which allows a grievant to bypass his immediate supervisor at the first resolution step. Checking this box does not, by itself, make out a claim of retaliation, discrimination or hostile work environment especially when, as is the case here, neither retaliation or discrimination is cited as an issue or claim on Form A nor are such claims mentioned in the management resolution step responses.
[2] Va. Code § 2.2-3004(A).
[3] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

Thus, for the grievant's October 27, 2004 grievance 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.[4] A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[5] In this case, although the grievant disagrees with portions of his 2004 performance evaluation, the overall rating and the element ratings were generally positive. Most importantly, the grievant has presented no evidence that the 2004 performance evaluation has detrimentally altered the terms or conditions of his employment. Accordingly, this grievance does not qualify for hearing.[6] We note, however, that should the 2004 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.

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.

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Claudia T. Farr
Director

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Jennifer S.C. Alger
EDR Consultant

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

[5] *See* Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 2004 U.S. App. LEXIS 11366 (10th Cir. 2004)(unpublished opinion)(citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994)). *See also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th 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.)

[6] 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 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).