Issue: Qualification/performance evaluation/arbitrary and capricious; Ruling Date: January 30, 2006; Ruling #2006-1254; Agency: Old Dominion University; Outcome: not qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Old Dominion University
Ruling Number 2006-1254
January 30, 2006

The grievant has requested a ruling on whether her November 4, 2005 grievance with Old Dominion University (ODU or the agency) qualifies for hearing. She challenges her 2005 performance evaluation as being unwarranted and unfair. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed with the agency as an Office Manager. On or about October 5, 2005, the grievant received her 2005 performance evaluation. This evaluation reflects an overall rating of "Contributor," with an "Extraordinary Contributor" rating in two elements of the evaluation, a "Contributor" rating in four elements, and a "Below Contributor" in the remaining element. Dissatisfied, the grievant initiated a grievance on November 4, 2005 challenging the performance evaluation.

DISCUSSION

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[1] 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."[2] Thus, for the grievant's claim of arbitrary and capricious performance evaluation and/or misapplication of policy to qualify for hearing, the action taken against the grievant must result in an adverse effect *on the terms, conditions, or benefits* of her employment.[3]

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[1] Va. Code § 2.2-3004(A).
[2] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[3] 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)).

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[4] In this case, although the grievant disagrees with several aspects of her 2005 performance evaluation, the overall rating was "Contributor" and generally satisfactory. Most importantly, the grievant has presented no evidence that the 2005 performance evaluation has detrimentally altered the terms or conditions of her employment. She admits that she has not experienced a loss of pay, been demoted, or experienced a significant change in job responsibilities.[5] Accordingly, this grievance does not qualify for hearing.[6] We note, however, that should the 2005 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

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[4] *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.) 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 (5th Cir. 1997); Rabinovitz v. Pena, 89 F.3d 482, 486, 488-90 (7th 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).

[5] The grievant alleges that in conjunction with her evaluation, her supervisor advised her that she would have additional responsibility for the budget. The grievant states that the alleged additional responsibility is not a punitive action by her supervisor, but rather is simply an attempt to see how the grievant would perform with additional budget responsibility. She also admits that her supervisor agreed to help and train her throughout the year. The grievant's 2005 performance evaluation notes that the grievant required "significant assistance from the director in preparing the annual new budget request, after three years of being in her position, and should work towards becoming more independent and accurate in this process." Under these circumstances, we find that the grievant has not shown that the alleged additional budget responsibility is so significant a change in employment status as to constitute an adverse employment action.

[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 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. Va. Code § 2.2-3806(A)(5).

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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Gretchen M. White
EDR Consultant