

Issue: Qualification/performance evaluation; Ruling Date: March 9, 2006; Ruling #2006-1265;
Agency: Department of Corrections; Outcome: not qualified



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2006-1265
March 9, 2006

The grievant has requested a ruling on whether her November 10, 2005 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. The grievant claims that her 2005 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 a Trainer and Instructor III with DOC. The grievant's 2004 performance evaluation reflects an overall rating of "Contributor" with "Contributor" marked for three elements of the evaluation and "Below Contributor" rating in the remaining two elements. Dissatisfied with the 2005 performance evaluation, the grievant initiated a grievance on November 10, 2005 challenging the evaluation as containing erroneous, unclear and/or misleading statements. The grievant alleges that the two "Below Contributor" ratings should be changed to "Contributor."

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 November 10th grievance 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 A satisfactory performance evaluation is not an adverse employment action where

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)).

the employee presents no evidence of an adverse action relating to the evaluation.⁴ In this case, although the grievant disagrees with portions of her 2005 performance evaluation, the overall rating and the majority of element ratings were generally positive. Most importantly, the grievant has presented no evidence that the 2005 performance evaluation has detrimentally altered the terms or conditions of her employment. Accordingly, this grievance does not qualify for hearing.⁵ 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 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

William G. Anderson, Jr.
EDR Consultant, Sr.

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.)

⁵ 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).