Issue: Qualification – Performance Evaluation (Arbitrary/Capricious); Ruling Date: July 13, 2009; Ruling #2010-2358; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling No. 2010-2358
July 13, 2009

The grievant has requested a ruling on whether his March 6, 2009 grievance with the Department of Social Services (DSS or the agency) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as an Information Technology Specialist. In his March 6, 2009 grievance, the grievant challenges as unwarranted the "Below Contributor" ratings he received for certain areas of his 2008 performance evaluation, for which he received an overall rating of "Contributor."

After the parties failed to resolve the grievance during the management resolution steps, the grievant asked the agency head to qualify the grievance for hearing. The agency head denied the grievant's request, and he has appealed to this Department.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] Thus, claims relating to issues such as the method, 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 influenced management's decision, or whether state policy may have been misapplied or unfairly applied. In this case, the grievant has challenged his 2008 performance evaluation as being unsubstantiated.

The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[2] Thus, typically, a 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

[1] Va. Code § 2.2-3004(B).
[2] *See Grievance Procedure Manual* § 4.1(b).

decision causing a significant change in benefits."[3] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's 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 some of the individual factor ratings, the overall rating was "Contributor" and generally satisfactory. Most importantly, the grievant has presented no evidence that the 2008 performance evaluation has detrimentally altered the terms or conditions of his employment. Accordingly, the claim related to the performance evaluation does not qualify for hearing.[6] We note, however, that should the 2008 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 and file a notice of appeal with the circuit court pursuant to Va. Code § 2.2-3004(E). 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

[3] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[4] *See, e.g.*, Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[5] Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 307 (10th Cir. 2004) (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, 377-378 (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.). EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612.
[6] Although this claim 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).