Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: June 28, 2011; Ruling No. 2011-3018; Agency: University of Virginia; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the University of Virginia
Ruling Number 2011-3018
June 28, 2011

The grievant has requested a ruling on whether her January 14, 2010 grievance with the University of Virginia (the University) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In her January 14, 2010 grievance, the grievant is challenging her 2009 performance evaluation. The overall rating she received was "Inconsistent," which, according to the University, is the equivalent of a "Contributor" rating under Department of Human Resource Management (DHRM) policy.[1] An "Inconsistent" rating does not trigger a re-evaluation of the employee's work performance, which could, if still found deficient, lead to termination.

DISCUSSION

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.[2] Additionally, by statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[3] 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, whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary or capricious.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically, the threshold question is

[1] *See* DHRM Policy 1.40, *Performance Planning and Evaluation*.
[2] *See Grievance Procedure Manual* § 4.1 (a) and (b).
[3] Va. Code § 2.2-3004(B).
[4] *See Grievance Procedure Manual* § 4.1(b).

whether the grievant has suffered an adverse employment action.[5] 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 decision causing a significant change in benefits."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7]

The performance evaluation received by the grievant is not an adverse employment action because the overall rating was essentially at a "Contributor" level. Although the "Inconsistent" rating under the University's scale identifies some deficiencies in performance, such a document, because it carries no other sanction, is the equivalent of a counseling memo. A counseling memo does not generally constitute an adverse employment action, because such an action, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[8] Consequently, this grievance does not qualify for a hearing.

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.

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Claudia T. Farr
Director

[5] While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.
[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[7] Holland v. Washington Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007).
[8] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).