

Issue: Qualification – Performance Evaluation (Arbitrary/Capricious); Ruling Date: April 17, 2012; Ruling No. 2012-3315; 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 2012-3315  
April 17, 2012

The grievant has requested a ruling on whether his November 18, 2011 grievance with Old Dominion University (the University) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant's annual performance evaluation rated him with an overall rating of "Contributor." Though overall satisfactory, the evaluation also listed the grievant's performance as "Below Contributor" in one area.<sup>1</sup> The grievant initiated a grievance to challenge his performance evaluation on or about November 18, 2011. After proceeding through the management steps, the agency head declined to qualify the grievance for a hearing. The grievant now appeals that determination to this Department.

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.<sup>2</sup> Additionally, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.<sup>3</sup> Thus, claims relating to issues such as the methods, 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 improperly influenced management's decision, or whether state policy may have been misapplied or unfairly applied, or whether a performance evaluation was arbitrary or capricious.<sup>4</sup>

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>5</sup> Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.<sup>6</sup> An adverse employment

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<sup>1</sup> The original evaluation rated the grievant "Below Contributor" on two factors, but one has since been amended to "Contributor" during the management resolution steps of the grievance process.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1 (a) and (b).

<sup>3</sup> See Va. Code § 2.2-3004(B).

<sup>4</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(c).

<sup>5</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>6</sup> 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

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.”<sup>7</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>8</sup>

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.<sup>9</sup> In this case, although the grievant disagrees with one of the individual factor ratings and some of the facts contained within the evaluation, the overall rating was “Contributor” and generally satisfactory. Most importantly, the grievant has presented no evidence that the performance evaluation has detrimentally altered the terms or conditions of his employment.<sup>10</sup> Consequently, this grievance does not qualify for a hearing.<sup>11</sup>

#### 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

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substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. *See* EDR Ruling No. 2007-1538.

<sup>7</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>8</sup> *Holland v. Washington Homes, Inc.*, 487 F.3d 208, 219 (4<sup>th</sup> Cir. 2007).

<sup>9</sup> *E.g.*, EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612; *see also* *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377-378 (4<sup>th</sup> Cir. 2004) (holding 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.).

<sup>10</sup> The grievant’s assertion that the evaluation constitutes an adverse employment action because it may impact his prospects for other jobs is speculative.

<sup>11</sup> 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 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).