

Issue: Qualification – Performance (Interim Evaluation); Ruling Date: August 10, 2012; Ruling No. 2013-3393; Agency: Virginia Employment Commission; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the Virginia Employment Commission
Ruling Number 2013-3393
August 10, 2012

The grievant has requested a ruling on whether her June 6, 2012 grievance with the Virginia Employment Commission (“agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

In her June 6, 2012, grievance, the grievant is challenging her interim performance evaluation. On each of five “Core Responsibilities,” the grievant received a rating of “Contributor,” and in the area of “Special Assignments,” the grievant received a rating of “Below Contributor.”¹ In her comments, the grievant’s supervisor indicated that the grievant needs to emphasize staff development, and provide more monitoring of and documentation regarding her subordinates’ performance issues. The grievant alleges that these ratings are not reflective of her performance. The grievant also appears to assert that discrimination or retaliation by her immediate supervisor may have affected her interim evaluation.

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, the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.³ 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.⁴

¹ See DHRM Policy 1.40, *Performance Planning and Evaluation*.

² See *Grievance Procedure Manual* § 4.1 (a) and (b).

³ See Va. Code § 2.2-3004(B).

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

Adverse Employment Action

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”⁵ Thus, typically, the threshold question is whether the grievant has suffered an adverse employment action.⁶ 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.”⁷ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.⁸

An interim performance evaluation 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.⁹ Further, this type of action does not constitute a “materially adverse action”¹⁰ required to establish a retaliation claim.¹¹ Therefore, the grievant’s challenge to her interim evaluation does not qualify for a hearing on this basis.¹²

Discrimination/Retaliation

Grievances that may be qualified for a hearing also include actions that occurred due to retaliation or discrimination on the grounds of race, color, religion, political affiliation, age, disability, national origin or sex.¹³ As noted above, we do not find that the interim performance evaluation received by the grievant constitutes an adverse employment action or materially adverse action. However, to the extent that the grievant alleges discrimination and/or retaliation, she has presented no facts that indicate discrimination on any of these bases, nor does she allege specific grounds upon which she may have experienced retaliation. Consequently, the grievant

⁵ See *Grievance Procedure Manual* § 4.1(b).

⁶ 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, EDR substitutes a lessened “materially adverse” standard for the “adverse employment action” standard in retaliation grievances. See EDR Ruling No. 2007-1538.

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

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

⁹ See *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999).

¹⁰ *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); see, e.g., EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

¹¹ See, e.g., EDR Ruling No. 2009-2090, at n.6.

¹² We also note that while the interim performance evaluation has not had an adverse impact on the grievant’s employment, it could be used later to support an adverse employment action against the grievant. Therefore, should the interim evaluation grieved in this case later serve to support an adverse employment action against the grievant, such as a formal Written Notice or a “Below Contributor” annual performance rating, this ruling does not prevent the grievant from attempting to contest the merits of these allegations through a subsequent grievance challenging the related adverse employment action.

¹³ See *Grievance Procedure Manual* § 4.1(b). Although the grievant does not specifically state in her grievance that actual discrimination or retaliation has occurred, she placed a mark on the Grievance Form A indicating that she decided not to present the grievance to her immediate supervisor due to these factors.

has not shown evidence sufficient to raise a question as to whether discrimination and/or retaliation have occurred. Therefore, the grievance does not qualify for hearing on that basis.

APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.¹⁴ The nonappealability of such rulings became effective on July 1, 2012. Because the instant grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt 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 former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. 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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¹⁴ Va. Code § 2.2-1202.1(5).