Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: April 5, 2017; Ruling No. 2017-4511; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA

Department of Human Resource Management

Office of Employment Dispute Resolution[1]

QUALIFICATION RULING

In the matter of the Department of Social Services
Ruling Number 2017-4511
April 5, 2017

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") on whether her January 3, 2017 grievance with the Department of Social Services (the "agency") qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for hearing.

FACTS

On or about December 21, 2016, the grievant received her annual performance evaluation for 2015-2016, with an overall rating of "Below Contributor." The grievant initiated a grievance challenging the evaluation on or about January 3, 2017. After the grievance proceeded through the management steps, the agency head declined to qualify it for a hearing. The grievant now appeals that determination to EDR.[2]

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.[3] Accordingly, for this grievance to qualify for a hearing, there must be facts raising a sufficient question as to whether the grievant's performance rating, or an element thereof, was "arbitrary or capricious."[4]

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[1] Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. Because full updates have not yet been made to the *Grievance Procedure Manual*, this office will be referred to as "EDR" in this ruling to alleviate any confusion. EDR's role with regard to the grievance procedure remains the same post-merger.

[2] The agency appears to argue that the grievant was required to utilize the appeal process under DHRM Policy 1.40, *Performance Planning and Evaluation*, prior to using the grievance procedure. This contention is incorrect. Although a grievant may certainly elect to use the appeal process prior to grieving, there is no requirement under the grievance procedure that a grievant do so.

[3] *See* Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to qualify an arbitrary or capricious performance evaluation claim for a hearing when there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations. However, if the grievance raises a sufficient question as to whether a performance evaluation resulted merely from personal animosity or some other improper motive—rather than a reasonable basis—a further exploration of the facts by a hearing officer may be warranted.

DHRM Policy 1.40, *Performance Planning and Evaluation*, provides that "[a]n employee cannot be rated 'Below Contributor' on the annual evaluation unless he/she has received" either a Notice of Improvement Needed/Substandard Performance ("NOIN") or a Written Notice during the performance evaluation cycle.[5] In this case, the grievant received a NOIN on June 29, 2016. The grievant argues that the agency failed to follow policy because she left work on short-term disability shortly after the issuance of the NOIN and was therefore not given 30 days in which to improve her performance before the performance evaluation was issued to her. However, nothing in DHRM Policy 1.40 mandates a certain period of time between the issuance of the NOIN and the issuance of a performance evaluation: it merely requires that the NOIN be given at some point doing the performance cycle.[6] The agency complied with this requirement.

The grievant also argues that the agency lacks a basis in fact for the "Below Contributor" rating and that the rating is the result of retaliation for previous grievance activity. In particular, the grievant asserts that "management is inexplicably ignoring the real facts concerning the way that timeliness are to work and actually do work" in handling adjustment requests; that management "wholly ignores" that her monthly reports were "based on a format [from] which all of [her] control" had been removed, "leaving [her] to work off of a format that could only engender and lead to confusion and things that could be perceived as being inaccuracies"; and that management has failed to provide her with specific facts regarding her alleged poor performance.

In this case, the grievant has not raised a sufficient question as to whether the agency was acting from a retaliatory motive or was otherwise arbitrary or capricious in rating her overall performance as "Below Contributor" on her 2015-2016 annual performance evaluation. As previously noted, during the performance cycle, the grievant received a NOIN related to her failure to process adjustment requests in a timely manner, to submit accurate reports, and to follow supervisor's instructions. In addition, although the grievant is correct that she was absent for much of the period from the NOIN to her performance evaluation, to the extent she should

[5] DHRM Policy 1.40, *Performance Planning and Evaluation*.
[6] *See id.* Although her argument is somewhat unclear, the grievant appears to assert that the agency impermissibly considered "legitimate and lawful absences" as part of the alleged 30-day improvement period. As no such improvement period is mandated by policy prior to the issuance of the performance evaluation, this argument is not material.

arguably have been able to satisfy the requirements of the NOIN, the evidence suggests that she failed to do so. Specifically, as indicated in her performance evaluation, the grievant failed to develop a log of inquiries by July 8 as directed in the NOIN. While the grievant argues that she had insufficient time to perform this task,[7] it appears the task was merely to develop an Excel spreadsheet tracking receipt and completion dates.

Although the grievant clearly does not believe the agency's assessment of her performance is warranted, she has presented insufficient evidence to support her assertions that the agency's assessment of her performance was the result of a retaliatory motive, was without a basis in fact, or was otherwise arbitrary or capricious. EDR has reviewed nothing in the grievance paperwork that would support a conclusion that the evaluation resulted from anything other than management's reasoned review of the grievant's performance in relation to established performance expectations. Accordingly, the grievant's claim regarding her performance evaluation will not be qualified.

EDR's qualification rulings are final and nonappealable.[8]

Christopher M. Grab
Director
Office of Employment Dispute Resolution

[7] During the period from the issuance of the NOIN to July 8, 2016, one date was charged to medical leave, one date was spent in a grievance hearing, and the remaining periods of leave were charged to annual leave.
[8] *See* Va. Code § 2.2-1202.1(5).