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QUALIFICATION RULING

In the matter of George Mason University
Ruling Number 2023-5533
April 12, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether his January 13, 2023 grievance with George Mason University (the "university" or "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On or about November 29, 2022, the grievant's 2022 annual performance evaluation was completed by his supervisor, the Lieutenant, and reviewed by the Deputy Chief. The grievant received an overall rating of "Developing/Fair," a university-specific rating that the agency provides evidence of being equivalent to a "Contributor" rating. The grievant initiated a grievance on or about January 13, 2023, alleging that the performance evaluation findings were arbitrary and capricious, retaliatory, and that he suffered an adverse employment action as a result of the performance rating due to allegedly being ineligible for promotion. The basis for retaliation rests primarily on the fact that the grievant currently has an ongoing grievance pending a hearing, and that despite this, those responsible for the evaluation are also involved in the ongoing grievance. Additionally, the performance evaluation mentioned the Internal Affairs investigation challenged in the ongoing grievance. As relief, the grievant's requests include that (1) the university "provide a work environment that is free from retaliation and arbitrary and capricious performance evaluations," (2) the university "repeat the evaluation process and provide a rating with a reasoned basis related to established expectations," and (3) the university "provide training in the areas that they stated they would provide related to [his] job duties." The grievance proceeded through the management steps, and the agency head determined that the grievance did not qualify for a hearing. The grievant now appeals that determination to EDR.

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.[1] Additionally,

[1] *See Grievance Procedure Manual* § 4.1.

the grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, including the establishment of performance expectations and the rating of employee performance against those expectations.[2] Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management's decision, whether state policy may have been misapplied or unfairly applied, or whether the performance evaluation was arbitrary and/or capricious.[3] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent.

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

Adverse Employment Action

EDR has held that in general, a satisfactory performance evaluation is not an adverse employment action[7] and that "a poor performance evaluation is actionable only where the employer subsequently uses the evaluation as a basis to detrimentally alter the terms or conditions of the recipient's employment."[8] Here, the grievant received a "Developing/Fair" overall performance rating. While the grievant argues that this rating is unsatisfactory and thus an adverse employment action, the university provides credible evidence showing that the university's "Developing/Fair" rating is equal to DHRM's "Contributor" rating. The university follows DHRM policy regarding performance evaluations, with the names of the ratings being the only aspect unique to the university; consistent with DHRM policy, nothing in the university's resources

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[2] Va. Code § 2.2-3004(B).
[3] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[4] *See Grievance Procedure Manual* § 4.1(b).
[5] Ray v. Int'l Paper Co., 909 F.3d 661, 667 (4th Cir. 2018) (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
[6] Laird v. Fairfax County, 978 F.3d 887, 893 (4th Cir. 2020) (citing Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007)) (an adverse employment action requires more than a change that the employee finds "less appealing").
[7] *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that, while an employee's performance rating was lower than on his previous evaluation, there was no adverse employment action where he failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).
[8] EDR Ruling No. 2022-5312 (quoting *James*, 368 F.3d at 377 (citation and internal quotation marks omitted)). Although DHRM Policy 1.40, *Performance Planning and Evaluation*, establishes remedial procedures for substandard performance, these procedures do not apply unless an employee's *overall* performance rating is "Below Contributor." Policy 1.40 does not mandate any adverse results for a "Below Contributor" sub-rating where the overall rating is satisfactory.

indicate that a "Developing/Fair" overall performance rating triggers any further action.[9] The grievant also argues that a "Developing/Fair" rating would make him ineligible for promotion per former General Order 34 and University Policy 1002. However, General Order 34[10] has since been rescinded in favor of Policy 1002, and Policy 1002 does not explicitly state that "Developing/Fair" ratings prohibit promotion. The Policy merely states that performance ratings are considered as one of many factors when determining promotion eligibility.[11] While this technically allows for a "Developing/Fair" rating to affect promotional eligibility, it is not the same as being deemed automatically ineligible for promotion. EDR has held that "Contributor" ratings (or agency-equivalent ratings), absent any explicit policy that prohibits promotions based on such ratings, are not adverse employment actions. For these reasons, the grievance does not rise to the level of an adverse employment action and does not qualify for a hearing.

Retaliation

The grievant also argues that there was retaliation in the performance evaluation because those who were involved in the evaluation were also involved in the ongoing grievance related to an Internal Affairs investigation and mentioned such investigation in the evaluation. A claim of retaliation may qualify for a hearing if the grievant presents evidence raising a sufficient question whether (1) they engaged in a protected activity; (2) they suffered an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.[12] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[13] While the grievant engaged in protected activity through a prior grievance, the grievance record does not reflect that he has suffered an adverse employment action as described above. It should also be noted that a Deputy Chief who was involved in a pending grievance and Internal Affairs investigation is not prohibited from being involved in an annual performance evaluation; the involvement of the same individual(s) does not automatically raise a sufficient question of a causal link between the protected activity and the challenged employment action. Finally, mentioning the investigation in the evaluation cannot be considered retaliatory when it was only mentioned to provide context for the grievant's history regarding a specific job duty that was being evaluated. Further, the grievant was ultimately rated positively ("Proficient") for the job function on which the investigation was mentioned. For these reasons, EDR finds no sufficient question as to a retaliation claim.

CONCLUSION

[9] *See* DHRM Policy 1.40, *Performance Planning and Evaluation*.
[10] The University additionally points out that even under former General Order 34, a "Developing/Fair" overall performance rating did not make the grievant ineligible for promotion. Only employees receiving an evaluation below a contributor rating (and the grievant's overall rating was deemed the equivalent of a contributor), were ineligible for promotion under the former Order.
[11] George Mason University Police Dep't, Policy 1002, *Special Duties and Promotions*, at 4 ("Overall performance will be considered in evaluating the candidate's suitability for the position.").
[12] *See* Netter v. Barnes, 908 F.3d 932, 938 (4th Cir. 2018) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)); Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 900-901 (4th Cir. 2017).
[13] *Id.*

The facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[14] EDR's qualification rulings are final and nonappealable.[15]

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[14] *See Grievance Procedure Manual* § 4.1.
[15] Va. Code § 2.2-1202.1(5).