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## QUALIFICATION RULING

In the matter of the Virginia Department of Health  
Ruling Number 2023-5505  
February 22, 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 November 14, 2022 grievance with the Virginia Department of Health (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

### FACTS

On or about October 4, 2022, the grievant’s manager completed their portion of the grievant’s 2022 annual performance evaluation<sup>1</sup> and discussed the evaluation with the grievant that same day. The manager gave the grievant an overall rating of “Below Contributor.” On October 5, the grievant expressed to multiple agency members, including the manager and the reviewer of the evaluation, that he would like to appeal the performance evaluation. After receiving notice that he must appeal the evaluation to his supervisor, the grievant did so on October 12, and apparently received a notification of denial on October 21. On October 28, the grievant asked how to appeal the denial, and a human resources representative responded that the next step would be to initiate a grievance.

The grievant initiated a grievance on or about November 14, 2022, alleging that he was not provided the correct written policy for appealing the performance evaluation, that none of the rules for a performance evaluation appeal were properly followed, and that the “Below Contributor” rating was inconsistent with the grievant’s “Contributor” rating for his mid-year performance evaluation. The grievant supported these issues with his own account of the specific performance issues that the manager mentioned in the evaluation. As relief, the grievant requested “[t]he removal of the overall Below Contributor rating & the restoration of the December Bonus for the evaluation.” The grievance proceeded through all three management steps with no relief being granted, and the agency head determined that the grievance did not qualify for a hearing. The grievant now appeals that determination to EDR.

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<sup>1</sup> See DHRM Policy 1.40, *Performance Planning and Evaluation* (stating that the performance evaluation cycle runs from October 25 of each year through October 24 of the following year).

## 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, including the establishment of performance expectations and the rating of employee performance against those expectations.<sup>3</sup> 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.<sup>4</sup> 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."<sup>5</sup> 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."<sup>6</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>7</sup>

### *Procedural Issues*

One of the primary arguments the grievant asserts throughout the grievance process is that the agency did not properly convey the correct appeals process for the grievant's performance evaluation. In particular, the grievant alleges that when he asked how to appeal the evaluation, the agency did not give him the necessary instructions. Instead, the grievant states that the agency told him to file a grievance. The grievant includes in the appeal the proper procedure for appealing a performance evaluation, which indicates that the grievant must submit the appeal to *the reviewer*, who then should discuss the appeal with the grievant and their supervisor.<sup>8</sup> The agency confirms that this is the correct procedure. However, the agency points out that the reviewer was the second-step respondent in the grievance process and provided ample opportunity in the second-step response to review the performance evaluation with the grievant. EDR finds the agency's

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<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

<sup>3</sup> Va. Code § 2.2-3004(B).

<sup>4</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

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

<sup>6</sup> *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)).

<sup>7</sup> *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"). For purposes of this ruling, we assume that the grievant's unsatisfactory performance review constituted an adverse employment action. See, e.g. EDR Ruling No. 2020-5101.

<sup>8</sup> See DHRM Policy 1.40, *Performance Planning and Evaluation* (the reviewer is "[t]he supervisor of an employee's immediate supervisor, or another person designated to review an employee's . . . performance rating.").

explanation sufficient to resolve any misapplication of policy in this regard. While the grievant's frustration in the agency not initially conveying the proper appeals process is understandable, he was ultimately given adequate opportunity to discuss the performance evaluation with the reviewer in the second step of the grievance process. While no physical meeting at this step occurred,<sup>9</sup> the reviewer's second-step response thoroughly and sufficiently analyzed the findings of the first-step respondent regarding the specific events and actions that led to the "Below Contributor" rating by the grievant's manager, and found no error. For these reasons, EDR does not find evidence of a misapplication or unfair application of policy regarding the appeals process sufficient to qualify this issue for a hearing.

### *Compliance Issues*

The grievant also asserts in the appeal for a hearing that the agency failed to comply with the grievance procedure during the management steps. In particular, he alleges that for both the third-step response and the qualification memo, the agency took longer than the required five workdays to issue the responses. While the grievant's concern about the agency's repeated delays is understandable, the *Grievance Procedure Manual* states that "[a]ll claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one generally forfeits the right to challenge the noncompliance at a later time."<sup>10</sup> Furthermore, if an issue of noncompliance is ultimately corrected, such as by the agency eventually issuing its response in a proper manner, EDR would typically consider the noncompliance issue to be resolved. Here, while EDR cannot confirm whether the grievant brought the noncompliance issue to the agency, what matters is that the agency ultimately issued its third-step response and qualification memo, and there has been no evidence presented of any adverse effect for this delay. For that reason, EDR finds the noncompliance issues resolved.

### *Performance Evaluation*

The grievant's annual evaluation for the 2021-2022 performance cycle, on which he received an overall rating of "Below Contributor," appears to be the primary management action challenged in the grievance. The grievant argues that he should have received an overall rating of "Contributor," the rating that he gave himself for his self-review, and questions the accuracy of the "Below Contributor" rating when he was recently given a "Contributor" rating for his mid-year performance evaluation. In essence, the grievant is arguing that the performance rating was arbitrary or capricious. 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

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<sup>9</sup> The record indicates that the second-step respondent reached out to the grievant to schedule the fact-finding meeting, but he did not respond; conversely, the grievant states in his appeal for a hearing that he never received an email about this.

<sup>10</sup> *Grievance Procedure Manual* § 6.3; see also, e.g., EDR Ruling No. 2004-752; EDR Ruling No. 2003-042; EDR Ruling No. 2002-036.

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*, states that, to receive a “Below Contributor” rating on their annual evaluation, an employee must have received “[a]t least one documented Notice of Improvement Needed/Substandard Performance form” during the evaluation cycle.<sup>11</sup> A Written Notice issued during the performance cycle may also support an overall rating of “Below Contributor.”<sup>12</sup> In addition, “[a]n employee who receives a rating of ‘Below Contributor’ [on their annual evaluation] must be re-evaluated and have a performance re-evaluation plan developed . . . .”<sup>13</sup> A re-evaluation plan “that sets forth performance measures for the following three (3) months” must be developed within ten workdays of the employee’s receipt of their annual evaluation.<sup>14</sup> Here, however, the grievant’s employment was terminated on November 22, 2022 (for other disciplinary reasons). Although the agency did not develop a performance plan prior to that termination, it does not appear that the lack of a re-evaluation plan has had any adverse effect on the grievant as he is no longer employed by the agency.<sup>15</sup> For that reason, the discussion here will be limited to whether the performance evaluation was arbitrary or capricious.

In support of the grievant’s position that the agency did not properly evaluate his work performance, the grievant strenuously argues that management’s assessment of his performance was inconsistent with his mid-year performance evaluation where he was given a “Contributor” rating. In particular, the grievant questions the lack of any negative incidents that have occurred between the mid-year evaluation and the end-of-year evaluation. The grievant emphasizes that his manager was wrong to evaluate him poorly regarding the timeliness of certain site visit reports. The grievant argues that he was given inconsistent instructions on how to report the site visits, and it was because of this miscommunication by the agency that the grievant did not accurately adhere to the deadlines given. In response, the agency has provided a thorough account of information given to the grievant prior to the site visit reports, all of which was given around or before the time of the mid-year performance evaluation. In addition, the agency explained that the “Below Contributor” rating was based on a Written Notice that the grievant received on July 8, 2022 for repeated violations of DHRM Policy 1.60, *Standards of Conduct*, from October 2021 through June 2022. EDR finds these rationales, taken together, to provide sufficient reasoning for the agency’s overall rating.

Although the grievant challenges the conclusions stated in the evaluation, he has not provided evidence to contradict many of the basic facts relating to his performance during the evaluation cycle, other than his personal accounts of the communication inconsistencies regarding

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<sup>11</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> The grievant has challenged the termination of his employment via a separate dismissal grievance, which is currently pending with EDR for an administrative hearing. If the grievant were to be reinstated to his position following such a hearing, the agency should reassess at that time whether further action is required under Policy 1.40 as to his most recent performance evaluation. In that case, the grievant could also ask EDR to reconsider whether the performance evaluation under review here is still viable and/or whether there is a basis to re-evaluate other determinations made in this ruling.

the site visit reports and of why he believes the Policy 1.60 violations were unwarranted.<sup>16</sup> As noted above, for a grievance to qualify for a hearing, the grievant must present evidence raising a sufficient question whether a challenged management action violated a mandatory policy requirement or effectively disregarded an applicable policy's intent.<sup>17</sup> In this case, there may be some reasonable dispute about how clear and concise the agency was when communicating with the grievant regarding the site reports, but the record also reflects ample opportunity for the grievant to seek clarity about expectations in this area. Under these circumstances, it was within management's discretion to determine that the grievant's work performance warranted an overall rating of "Below Contributor" rather than a rating of "Contributor," and nothing in the record indicates that the agency was arbitrary or capricious in doing so. Accordingly, EDR finds that the grievance does not raise a sufficient question whether the grievant's performance evaluation lacked a basis in fact or resulted from anything other than management's reasoned evaluation of his performance in relation to established performance expectations. As a result, the November 14 grievance does not qualify for a hearing on these grounds.

#### CONCLUSION

The facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.<sup>18</sup> EDR's qualification rulings are final and nonappealable.<sup>19</sup>

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<sup>16</sup> The grievant will have the opportunity to present his arguments in opposition to the Written Notice at the grievance hearing referenced above. If the Written notice is rescinded by the hearing officer, the grievant could ask EDR to reconsider whether the performance evaluation under review here is still viable and/or whether there is a basis to re-evaluate other determinations made in this ruling. *See* n. 15, *supra*.

<sup>17</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

<sup>18</sup> *See Grievance Procedure Manual* § 4.1.

<sup>19</sup> Va. Code § 2.2-1202.1(5).