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QUALIFICATION RULING

In the matter of the Virginia Community College System
Ruling Number 2023-5578
July 27, 2023

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management on whether her January 9, 2023 grievance with a community college in the Virginia Community College System (the "college" or "agency") qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On or about December 9, 2022, the grievant received her 2022 annual performance evaluation. The evaluation rated the grievant's performance as "Below Contributor" overall, resulting from the same rating on two core responsibilities from the grievant's Employee Work Profile (EWP). The grievant submitted a grievance on January 9, 2023, challenging the performance evaluation as retaliatory and due to alleged violations of policy, among other concerns. 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.[1] Notably, since beginning her grievance, the grievant has chosen to retire from her position, effective July 1, 2023.

[1] The grievant has also asserted a compliance challenge concerning the manner in which EDR received the grievance paperwork in this case. The college provided a large box of materials, which included the full grievance record and related correspondence. In addition, the college provided materials related to the grievant's current and past performance evaluations, documentation related to her performance, such as productivity logs, a copy of a human resources manual, a copy of an online training guide, and electronic copies of training modules created by the grievant that led to her "Below Contributor" rating. While the grievant's concerns about the college submitting voluminous information that was not part of the grievance record is understandable, nothing in the materials submitted appears unrelated to the grievant's performance or subject matter of the grievance. Further, the college states that a copy of what was provided to EDR was also submitted to the grievant. Accordingly, we have no basis to find that the college's decision to send these materials was noncompliant with the grievance procedure or otherwise improper.

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, including the establishment of performance expectations and the rating of employee performance against those expectations.[3] 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.[4] 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."[5] 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."[6] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[7] EDR has consistently recognized that unsatisfactory annual performance evaluations amount to tangible actions affecting the terms, benefits, or conditions of employment.[8] However, it is debatable whether the performance evaluation in this case has had such an adverse impact due to the apparent lack of a re-evaluation process, discussed below. Nevertheless, EDR will assume, for purposes of this ruling only, that the grievance involves an adverse employment action as there is not a basis to qualify the grievance for a hearing otherwise.

Alleged violations of policy

State policy provides that "[r]eviewers must approve and sign" a Notice of Improvement Needed (NOIN) issued to an employee during the performance cycle.[9] The grievant asserts that the reviewer did not sign the NOIN issued to her. In this case, the reviewer did not sign the NOIN because she had recused herself from the process due to past allegations against her by the grievant.

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[2] *See Grievance Procedure Manual* § 4.1.
[3] Va. Code § 2.2-3004(B).
[4] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[5] *See Grievance Procedure Manual* § 4.1(b).
[6] 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)).
[7] 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").
[8] According to state policy, receiving a "Below Contributor" overall rating on an annual performance evaluation triggers a mandatory re-evaluation process that can potentially conclude with the employee's termination if their performance does not improve within three months. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*; *see*, *e.g.*, EDR Ruling No. 2017-4413; EDR Ruling No. 2017-4389.
[9] DHRM Policy 1.40, *Performance Planning and Evaluation* ("Identifying Substandard Performance").

Instead, a representative of the agency's central office human resources staff reviewed and approved the NOIN. The agency has substantially complied with the requirements of state policy in this regard.[10] Although the reviewer did not approve and sign the NOIN, the reviewer had recused herself and the review was performed by a neutral human resources staff member. The agency did not fail to follow a mandatory policy provision such that qualification is warranted as to this issue.[11]

State policy provides that employees "must be afforded an opportunity to provide the supervisor with a self-assessment of his or her job performance for the rating period."[12] "A supervisor must review and consider the self-assessment when completing each employee's performance evaluation."[13] According to the grievant, and we find no challenge to the grievant's position in the grievance file, she was not provided an opportunity to submit and have a self-evaluation considered prior to her receipt of her evaluation. Although we are concerned that it appears the college did not adhere to policy in providing the grievant an opportunity to submit a self-evaluation, there is also no information in the grievance record submitted by the grievant that would suggest a self-evaluation would have led to a different resulting evaluation. For example, a review of the grievant's submissions does not reveal what would have been in the grievant's self-evaluation that represented any information not known or understood by the supervisor. Therefore, the failure to consider a self-evaluation does not itself render management's evaluation of the grievant's performance invalid under these facts.

State policy provides that "the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer."[14] At the end of the three-month period, an employee is to receive a re-evaluation of their performance.[15] If the employee's performance has not improved, the employer can take further action against the employee, including demotion, reassignment, or termination.[16] EDR has not reviewed any records that demonstrate that a re-evaluation plan was established by the grievant's supervisor. Similarly, the grievant was apparently not re-evaluated at the end of the three-month period. While it does not appear that the college has followed policy in this regard, the violations inured to the benefit of the grievant. Since the grievant was not provided a re-evaluation plan or re-evaluation, it would have been difficult to find support for any further action against the grievant as an outcome of the evaluation process. Therefore, the failure to follow policy in this regard does not appear to have had an adverse impact on the grievant. Further, since

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[10] While the human resources representative noted that she reviewed the NOIN, she did not actually sign it with her signature.

[11] As we have determined that the NOIN was properly issued, the grievant's argument that she did not receive a valid NOIN to support the "Below Contributor" rating on her evaluation is not a basis to find that the college failed to follow policy. Similarly, the grievant's argument that the NOIN was not attached to her evaluation when issued does not support a claim that the agency failed to follow policy. The provision of DHRM Policy 1.40 referred to by the grievant concerns where to retain the NOIN, either in a supervisor's file or the employee's personnel file. DHRM Policy 1.40, *Performance Planning and Evaluation* ("Identifying Substandard Performance"). We cannot find that the agency's alleged failure in not attaching the NOIN to the grievant's evaluation when it was issued as a basis to invalidate the evaluation itself.

[12] DHRM Policy 1.40, *Performance Planning and Evaluation* ("Self-Evaluation").

[13] *Id.*

[14] DHRM Policy 1.40, *Performance Planning and Evaluation* ("Re-Evaluation Plan").

[15] *Id.*

[16] *Id.*

the lack of a re-evaluation plan only impacts the viability of any future re-evaluation, which did not occur, we cannot find that this violation would invalidate the original evaluation itself.

Arbitrary or Capricious Performance Evaluation

The grievance also includes challenges to how the grievant was evaluated on the factors that were rated "Below Contributor." For such claims 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."[17]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.

The primary purpose of the grievant's position was to "support the HR Training and development unit … with the development, design and delivery of innovative and quality, HR faculty, staff and student training." To that end, the largest core responsibility (50%)[18] on the grievant's EWP was listed as "Training & Development Faculty, Staff and student curriculum and training modules design & delivery, reporting, communication, and development." Over the course of the performance cycle, the grievant had been assigned to create and oversee numerous virtual training modules. These tasks were first assigned to the grievant in the prior performance period, but as they were not completed, they were carried over to the 2021-22 performance period. The grievant was unable to produce these modules in a useable form. This deficiency in her performance was the primary reason for the grievant's "Below Contributor" evaluation. Given that this portion of the grievant's tasks was such a substantial part of her EWP, it is understandable that the deficiency led to the overall "Below Contributor" rating, even without consideration of other deficiencies noted.[19]

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

[18] The grievant has correctly pointed out that there are some discrepancies between the relative percentages of her core responsibilities listed in her EWP and the evaluation. However, the discrepancies do not appear to have a material impact on the evaluation. Indeed, the evaluation lists the Training & Development core responsibility at 40%, but the correct percentage is 50%. Thus, the grievant's deficiency on this core responsibility should be considered even more significant.

[19] The other factor on which the grievant was rated as "Below Contributor" was "Employee and Stakeholder Constituent Services." The evaluation of this criteria is admittedly confusing as it refers to time management concerns and tardiness by the grievant. However, the tasks the grievant is to perform under this core responsibility relate to completion of verification of employment and public service loan forgiveness forms. It does not appear that the grievant is alleged to have been deficient in her performance in relation to these forms. Rather, it appears that the supervisor was attempting to refer to the grievant's time management in completing other training and development tasks. As such, we have reviewed this evaluation without consideration of this factor. Even if we assume that this factor was rated as "Contributor," there would be a sufficient basis to support a "Below Contributor" rating overall based on the grievant's performance under the Training & Development core responsibility.

Having reviewed the information provided by the parties, EDR finds that, although the grievant challenges the conclusions stated in the evaluation, she has not provided evidence to contradict the primary basis supporting her "Below Contributor" rating during the evaluation cycle. Although there may be some reasonable dispute about comments and ratings on individual core responsibilities and competencies, EDR cannot find that this performance evaluation as a whole is without a basis in fact or otherwise arbitrary or capricious. While it is understandable that the grievant is frustrated by what she believes to be a failure to consider her performance as a whole, it was entirely within management's discretion to determine that the instances of deficient performance described above were of sufficient significance that a "Below Contributor" rating was warranted. Accordingly, EDR finds that there is insufficient evidence to support the grievant's assertion that her performance evaluation was without a basis in fact or resulted from anything other than management's reasoned evaluation of her performance in relation to established performance expectations. As a result, the grievance does not qualify for a hearing on this basis.

Retaliation

The grievant also argues the performance evaluation was the result of retaliation because of a complaint she submitted to the Equal Employment Opportunity Commission (EEOC). 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.[20] If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[21] Ultimately, a successful retaliation claim must demonstrate that, but for the protected activity, the adverse action would not have occurred.[22]

Here, the grievant states she has engaged in protected activity by filing a complaint with the EEOC.[23] Even inferring a causal connection between the grievant's exercise of protected activity and the "Below Contributor" rating on her performance evaluation, EDR finds that the agency has provided legitimate, nonretaliatory business reasons for its assessment of her work performance. As discussed above, the information provided shows that the grievant's performance evaluation was based on management's reasoned evaluation of her performance in relation to established performance expectations. Furthermore, there are no facts that would indicate the grievant's protected activity was a but-for cause of her allegedly retaliatory performance evaluation. Accordingly, EDR concludes that the grievant has not raised a sufficient question as to whether retaliation has occurred, and the grievance does not qualify for a hearing on this basis.

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[20] *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).
[21] *See*, *e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[22] *Id.*
[23] *See* Va. Code § 2.2-3004(A).

CONCLUSION

The facts presented by the grievant do not constitute a claim that qualifies for a hearing under the grievance procedure.[24] EDR's qualification rulings are final and nonappealable.[25]

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