

Issues: Qualification – Performance (arbitrary/capricious evaluation), and Consolidation of grievances for a single hearing; Ruling Date: January 30, 2017; Ruling No. 2017-4488; Agency: Virginia Commonwealth University; Outcome: Qualified and Consolidation Granted.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution¹

QUALIFICATION AND CONSOLIDATION RULING

In the matter of Virginia Commonwealth University
Ruling Number 2017-4488
January 30, 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 his October 18, 2016 grievance with Virginia Commonwealth University (the “University”) qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing and consolidated with the grievant’s dismissal grievance.

FACTS

On or about September 22, 2016, the grievant received his annual performance evaluation for 2015-2016, with an overall rating of “Unsatisfactory Performer.” The grievant submitted an appeal of the evaluation, which resulted in a revised evaluation he received on or about October 17, 2016. The grievant initiated this grievance on or about October 18, 2016 to challenge the performance evaluation. Although the grievant’s performance evaluation was revised based on the second step response, the performance evaluation still reflects that the grievant’s performance was unsatisfactory overall. 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.

In addition, as a result of the re-evaluation of the grievant’s performance following the October 17 performance evaluation, the grievant has again been evaluated as unsatisfactory. As such, the grievant’s employment was terminated on January 13, 2017. The grievant has filed a dismissal grievance with EDR to challenge his termination. That dismissal grievance is currently awaiting appointment of a hearing officer.

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.

DISCUSSION

Performance Evaluation

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.² 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."³

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 grievant has filed a dismissal grievance to challenge his termination for unsatisfactory performance, which will be heard by a hearing officer. As the subject of the grievant's performance will already be heard at hearing, and the issues giving rise to the October 18, 2016 grievance are intertwined with those in the dismissal grievance as they all relate to the grievant's job performance,⁴ it makes sense for the hearing officer to have the full facts at issue in addressing these matters. Further, there exist sufficiently reasonable questions about the grievant's performance evaluation to qualify for hearing.⁵ A hearing officer will be in the best position to evaluate whether the grievant's performance evaluation is supported by the facts. Accordingly, it is EDR's conclusion that the grievant's challenge to his performance evaluation raises a sufficient question as to whether it was arbitrary or capricious and should proceed to a hearing.

Whether the grievant's claims related to his performance evaluation are supported by the evidence in this case are factual determinations that a hearing officer, not EDR, should make. At the hearing, the grievant will have the burden of proof on this issue.⁶ If the hearing officer finds

² See Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

³ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁴ Indeed, an employee would not be subject to removal through a re-evaluation if that employee's performance had not first been found to be unsatisfactory in the annual performance evaluation.

⁵ For example, and while hardly determinative, a review of the grievant's performance evaluation shows that he was rated as at least a satisfactory performer for 65% of his assigned duties, and an unsatisfactory performer for 35% of his duties.

⁶ *Rules for Conducting Grievance Hearings* § VI(C).

that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure.⁷ This qualification ruling in no way determines that any of the grievant's claim are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted.

Consolidation with Dismissal Grievance

Approval by EDR in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.⁸ EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.⁹

EDR finds that consolidation of the October 18, 2016 grievance and the grievant's dismissal grievance is appropriate. These grievances involve the same grievant and could share common themes, claims, and witnesses. Further, the grievances relate to actions and occurrences that appear to have arisen from the same series of events, namely the evaluation of the grievant's performance during the last cycle and re-evaluation period. Lastly, we find that consolidation is not impracticable in this instance. Therefore, the October 18, 2016 grievance is consolidated with the grievant's dismissal grievance for a single hearing.

CONCLUSION

The grievant's October 18, 2016 grievance is qualified for a hearing and consolidated for a single hearing with the grievant's dismissal grievance. Within five workdays of receipt of this ruling, the University shall request the appointment of a hearing officer to hear those claims qualified for a hearing, using the Grievance Form B. Appointment of a hearing officer will be made in future correspondence.

EDR's qualification rulings are final and nonappealable.¹⁰



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁷ Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

⁸ *Grievance Procedure Manual* § 8.5.

⁹ *See id.*

¹⁰ *See* Va. Code § 2.2-1202.1(5).