

Issues: Qualification – Performance (arbitrary/capricious evaluation), and Consolidation of Grievances for a Single Hearing; Ruling Date: February 27, 2017; Ruling No. 2017-4492; Agency: Department of Veterans Affairs; 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 the Department of Veterans Services
Ruling Number 2017-4492
February 27, 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 November 23, 2016 grievance with the Department of Veterans Services (the “agency”) 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 November 3, 2016, the grievant received her annual performance evaluation for 2015-16, with an overall rating of “Below Contributor.” The grievant initiated a grievance challenging the evaluation on or about November 23, 2016. 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 November 3 performance evaluation, the grievant has again been evaluated as “Below Contributor.” As such, the grievant’s employment was terminated on February 1, 2017. The grievant has filed a dismissal grievance with EDR to challenge her termination. That dismissal grievance is currently awaiting appointment of a hearing officer.

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

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.

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 or the result of discrimination or retaliation.

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.

In this case, the grievant appears to assert that her "Below Contributor" rating was the result of personal animosity by Ms. S, the supervisor conducting the evaluation.⁴ In addition, the grievant asserts that the "Below Contributor" rating was in retaliation for her previous grievance activity and related challenges to management. The grievant has filed a dismissal grievance to challenge her 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 November 23, 2016 grievance are intertwined with those in the dismissal grievance as they all relate to the grievant's job performance,⁵ 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.⁶ 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 her performance evaluation raises a sufficient question as to whether it was arbitrary, capricious and/or retaliatory and should proceed to a hearing.

Whether the grievant's claims related to her performance evaluation are supported by the evidence in this case are factual determinations that a hearing officer, not EDR, should make. At

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 The grievant alleges that she had three supervisors during the performance cycle, each of whom supervised her for an approximately equal period of time. The grievant further asserts that Ms. S worked in an office 5 ½ hours away and rarely observed the grievant's work.

⁵ 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.

⁶ For example, although hardly determinative, the close proximity in time between the grievant's earlier grievance activity, which began on or about August 21, 2016 and has continued to the present, and her November 3, 2016 "Below Contributor" evaluation arguably raises questions that warrant further exploration by a hearing officer. See, e.g., *Taylor v. Republic Servs., Inc.*, 968 F.Supp.2d 768, 797-98 (E.D. Va. 2013)

the hearing, the grievant will have the burden of proof on this issue.⁷ If the hearing officer finds that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure.⁸ 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

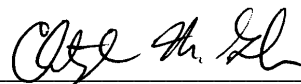
Approval by EDR in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.⁹ EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.¹⁰

EDR finds that consolidation of the November 23, 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 November 23, 2016 grievance is consolidated with the grievant's dismissal grievance for a single hearing.

CONCLUSION

The grievant's November 23, 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 agency 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.¹¹



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⁷ *Rules for Conducting Grievance Hearings* § VI(C).

⁸ Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

⁹ *Grievance Procedure Manual* § 8.5.

¹⁰ *See id.*

¹¹ *See* Va. Code § 2.2-1202.1(5).