

Issues: Qualification – Performance (arbitrary/capricious evaluation and re-evaluation);
Ruling Date: May 8, 2018; Ruling No. 2018-4701; Agency: Department of
Corrections; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution

QUALIFICATION RULING

In the matter of the Department of Corrections
Ruling Number 2018-4701
May 8, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether her January 19, 2018 grievance with the Department of Corrections (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about October 19, 2017, the grievant received her annual performance evaluation for 2016-2017, with an overall rating of “Below Contributor.” The grievant was placed on a re-evaluation plan, which established performance standards for a three-month re-evaluation period, on or about October 25, 2017. On or about January 11, 2018, the grievant received a re-evaluation of her performance during the re-evaluation period, again with an overall rating of “Below Contributor.” As a result of the grievant’s alleged failure to improve her work performance during the re-evaluation period, the agency demoted her to a different position and reduced her salary by five percent.

The grievant filed a grievance on January 19, 2018, alleging that both the annual evaluation and the re-evaluation were arbitrary, capricious, and did not accurately reflect her work performance during the 2016-2017 evaluation cycle and the three-month re-evaluation period, respectively. After proceeding through the management resolution steps, the grievance was not qualified for a hearing by the agency head. The grievant now appeals that determination to EEDR.

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 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

¹ See *Grievance Procedure Manual* § 4.1.

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

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.

DHRM Policy 1.40, *Performance Planning and Evaluation*, states that, to receive a "Below Contributor" rating on her annual evaluation, an employee must have received "[a]t least one documented Notice of Improvement Needed/Substandard Performance form" during the evaluation cycle.⁴ In addition, "[a]n employee who receives a rating of 'Below Contributor' [on her annual evaluation] must be re-evaluated and have a performance re-evaluation plan developed"⁵ 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 her annual evaluation.⁶ If the employee's performance does not improve during the three-month re-evaluation period and she "receives a re-evaluation rating of 'Below Contributor,'" the agency must "demote, reassign, or terminate the employee by the end of the . . . re-evaluation period."⁷

On or about September 15, 2017, the grievant received a Notice of Improvement Needed/Substandard Performance ("NOIN") identifying specific deficiencies in her work performance and directing the actions necessary for improvement. The NOIN described issues with the grievant's "[f]ailure to respond to supervisor's and end users' inquiries, whether by email or phone, in a timely manner, or not at all," her "[f]ailure to meet deadlines, including those set directly by her supervisor," and her "failure to follow supervisor's instructions/failure to communicate." More specifically, the NOIN states that the grievant's supervisor received complaints from customers "indicating that they [were] not getting responses back" from the grievant; that the grievant did "not respond at all, or respond[ed] in an extremely untimely manner . . . to a number of her supervisor's emails"; that the grievant did not meet deadlines for completing audits on schedule; that the grievant failed to respond to a project deadline on at least one other assigned project; and that the grievant did not comply with other instructions given by her supervisor. The incidents of unsatisfactory performance that were addressed in the NOIN are cited in the grievant's annual evaluation as support for the overall "Below Contributor" rating.⁸

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

⁴ DHRM Policy 1.40, *Performance Planning and Evaluation*.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ The grievant appears to have received a second NOIN at approximately the same time as her annual evaluation, which noted that she had "shown considerable effort" in making improvements but remained "unable to meet her deadlines for completion of" certain projects.

In her three-month re-evaluation, the agency noted that the grievant's communications with her supervisor "did show general improvement." While the grievant also completed several audits during the re-evaluation period, the agency stated that she "did not follow instructions" from her supervisor about how to complete the audits and that she failed "to follow the schedule" given to her for finishing the audits. The agency determined that the grievant's continued deficiencies with audit completion "did not result in the expected outcome" of the projects because she "failed to complete [tasks] in the manner required of her" Based on these issues, the agency determined that the grievant's performance during the re-evaluation period warranted a re-evaluation rating of "Below Contributor."

In support of her position that the agency did not properly evaluate her work performance on her annual evaluation and three-month re-evaluation, the grievant argues that there are extenuating circumstances or other justifications for her alleged performance deficiencies. Among other things, the grievant contends that she had "computer issues" and received "massive emails," that her "supervisor [was] unclear and unable to recall conversations," and that she "[r]equested to be removed from [her] supervisor"

Having reviewed the information provided by the parties,⁹ EEDR finds that, although the grievant challenges the conclusions stated in the evaluation and re-evaluation, she has not provided evidence to contradict many of the basic facts relating to her performance during the evaluation cycle. Although there may be some reasonable dispute about comments and ratings on individual core responsibilities and competencies, EEDR cannot find that the grievant's annual evaluation or re-evaluation, as a whole, are 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, particularly those that were addressed through the NOIN and did not improve during the re-evaluation period, were of sufficient significance that a "Below Contributor" rating was warranted on her annual evaluation and three-month re-evaluation. Accordingly, EEDR finds that there is insufficient evidence to support the grievant's assertion that her annual evaluation and three-month re-evaluation were 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.

EEDR's qualification rulings are final and nonappealable.¹⁰



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⁹ While this ruling was pending, the grievant informed EEDR that she wished to include additional information for consideration with her grievance. She did not, however, submit such documentation by the provided deadline. EEDR received no further information from the grievant prior to the issuance of this ruling.

¹⁰ Va. Code § 2.2-1202.1(5).