Issues: Qualification – Performance (arbitrary/capricious evaluation), Discrimination (other), Retaliation (grievance activity participation); Ruling Date: November 28, 2018; Ruling No. 2018-4638; Agency: Virginia Employment Commission; 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 Virginia Employment Commission
Ruling Number 2018-4638
November 28, 2017

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management on whether her September 18, 2017 grievance with the Virginia Employment Commission (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 8, 2017, the grievant received her annual performance evaluation for 2016-2017, with an overall rating of "Below Contributor." The grievant filed a grievance on September 18, 2017, alleging that her performance evaluation was arbitrary, capricious, and did not accurately reflect her work performance during the evaluation cycle. 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

Performance Evaluation

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 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.

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

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.

During the 2016-2017 evaluation cycle, the grievant received several corrective actions and Interim Evaluations noting deficiencies in her work performance. For example, the grievant was issued a Group II Written Notice on March 6, 2017, for failing to follow her supervisor's instructions in relation to the completion of a work assignment. The grievant also received three Interim Evaluations (on April 14, June 12, and August 3, 2017), all of which rated her performance at the "Below Contributor" level due to issues with her work performance. The Interim Evaluations specifically noted that the grievant "pushed back" on work assignments, refused to complete or was unable to complete certain tasks, missed deadlines, and did not display effective communication skills. On August 3, 2017, the grievant was given an Improvement Needed/Substandard Performance Notification Form stating that she "pushe[d] back and argue[d] about every assignment," was "confrontational," and was unable to satisfactorily complete work assignments without assistance. The incidents that were addressed with these performance management interventions during the evaluation cycle are cited in the grievant's evaluation as support for the overall "Below Contributor" rating.

Having reviewed the information provided by the parties, EEDR finds that, although the grievant challenges the conclusions stated in the 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 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, particularly those that were addressed with three Interim Evaluations, an Improvement Needed/Substandard Performance Notification Form, and the issuance of a Group II Written Notice, were of sufficient significance that a "Below Contributor" rating was warranted. Accordingly, EEDR 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.

Discrimination

In addition, the grievant argues that the agency's decision to rate her as a "Below Contributor" on her performance evaluation was discriminatory in nature. Grievances that may

be qualified for a hearing include actions that occurred due to discrimination on the grounds of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, genetics, disability, or veteran status.[4] For a claim of discrimination to qualify for a hearing, there must be more than a mere allegation that discrimination has occurred. Rather, there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance will not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.[5]

In this case, the grievant does not appear to have identified a protected status in her submission on which the alleged discrimination was based. Moreover, even assuming the grievant had specified a protected status, EEDR has reviewed the grievance record as well as information submitted for this ruling and found no basis to support a conclusion that the grievant's performance evaluation was arbitrary, capricious, or otherwise improper, as discussed more fully above. While the grievant may disagree with the agency's assessment of her work performance, such disagreement alone does not establish that the "Below Contributor" rating on her performance evaluation was motivated by discrimination, and there is otherwise insufficient evidence to show that the agency's stated business reasons were pretextual. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on a protected status. There are no such facts here, and, accordingly, the grievance does not qualify for a hearing on this basis.

Retaliation

Finally, the grievant alleges that the agency gave her a rating of "Below Contributor" on her evaluation as a form a retaliation, apparently because she used the grievance procedure to dispute past corrective actions with which she disagreed. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity[6]; (2) the employee suffered an adverse employment action[7]; and (3) a causal link exists between the adverse employment action and the protected activity; in

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[4] *See, e.g.*, Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

[5] *See* Hutchinson v. INOVA Health Sys., Inc., Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

[6] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

[7] 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." Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998). Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment. *See, e.g.*, Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted). For purposes of this ruling only, EEDR will assume the grievant's rating of "Below Contributor" on her performance evaluation constituted an adverse employment action.

other words, whether management took an adverse action because the employee had engaged in the protected activity. 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.[8] Ultimately, to support a finding of retaliation, EEDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[9]

Here, the grievant engaged in protected activity using the grievance procedure to challenge work-related issues.[10] Even inferring a causal connection between the grievant's exercise of protected activity and the "Below Contributor" rating on her performance evaluation, EEDR finds that the agency has provided legitimate, nonretaliatory business reasons for its assessment of her work performance. As discussed above, the information provided by the parties 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, EEDR conclude 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.

EEDR's qualification rulings are final and nonappealable.[11]

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[8] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[9] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[10] *See* Va. Code § 2.2-3004(A).
[11] *Id.* § 2.2-1202.1(5).