

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: July 18, 2017; Ruling No. 2017-4571; Agency: Virginia Department of Emergency Management; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the Virginia Department of Emergency Management
Ruling Number 2017-4571
July 18, 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 his April 8, 2017 grievance with the Virginia Department of Emergency Management (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about January 12, 2017, the grievant received his annual performance evaluation for 2015-2016, with an overall rating of “Below Contributor.” The grievant internally appealed the evaluation to agency management and was notified on March 10, 2017 that his overall rating for the performance cycle would not be changed. The grievant filed a grievance on April 8, 2017, alleging that the performance evaluation was arbitrary, capricious, and did not “accurately reflect or account for the work activities encompassed within the performance 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

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

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. The *Grievance Procedure Manual* has now been updated to reflect this Office’s name post-merger as the Office of Equal Employment and Dispute Resolution.

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).

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.

EEDR's review of the information in the grievance record indicates that, during the performance cycle, the grievant received (1) a Notice of Improvement Needed/Substandard Performance for such as issues as failing to properly engage in "planning, program evaluation, modification or training, as required by [his] senior-level role" with regard to managing emergency operations, (2) a formal written counseling for inappropriate social media postings about agency operations, (3) verbal counseling for failing to properly handle a directive from his supervisor to request staffing support from another state agency, and (4) verbal counseling for an incident in which he directed visitors to the agency's location to an on-site cafeteria without addressing potential security concerns. The agency had further concerns with the grievant's lack of supervision of a wage employee. In addition, according to the agency, an audit of the contract assigned to the grievant identified issues with his administration of the contract, including an overpayment and contractual terms that either were not performed or were performed incorrectly. The incidents that were addressed with performance management interventions, as well as the grievant's work performance relating to supervision of the wage employee and contract administration, are all cited in his performance evaluation as support for the overall "Below Contributor" rating, as well as additional general concerns. The evaluation further notes that the grievant agreed to participate in a recorded interview with representatives from a federal agency without first seeking "guidance and/or permission from his supervisor" as an example of unsatisfactory performance to justify the grievant's "Below Contributor" rating.

In support of his position, the grievant has provided a detailed refutation of the allegedly unsatisfactory aspects of his performance described in his evaluation. Having reviewed the information provided by the parties, EEDR finds that, although the grievant challenges the conclusions stated in the evaluation, his evidence does not contradict many of the basic facts relating to his performance as stated in the evaluation. 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 he believes to be a failure to consider his performance as a whole, it was entirely within management's discretion to determine that the specific instances of deficient performance described above, particularly those that were addressed through counseling or other performance management, were of sufficient significance that a "Below Contributor" rating was warranted. Having reviewed the information provided by the parties, EEDR finds that there is insufficient

evidence to support the grievant's assertion that his performance evaluation was without a basis in fact or resulted from anything other than management's reasoned evaluation of his 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.⁴



Christopher M. Grab
Director
Office of Equal Employment and Dispute Resolution

⁴ Va. Code § 2.2-1202.1(5).