

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: September 12, 2017; Ruling No. 2018-4599; Agency: Virginia Commonwealth University; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of Virginia Commonwealth University  
Ruling Number 2018-4599  
September 12, 2017

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 May 24, 2017 grievance with Virginia Commonwealth University (the “University”) qualifies for a hearing. For the reasons discussed below, the grievance does not qualify for a hearing.

FACTS

On or about April 25, 2017, the grievant received her annual performance evaluation for 2015-2016, with an overall rating of “Unsatisfactory Performer.” The grievant internally appealed the evaluation to agency management, and on or about May 18, 2017, a “Revised” performance evaluation was issued to her, which still indicated that her overall rating was “Unsatisfactory Performer.” On May 24, 2017, the grievant initiated a grievance, alleging that the performance evaluation was arbitrary, capricious, and the result of retaliation and “discrimination/disparate treatment.” 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.<sup>1</sup> 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,” or, the result of impermissible discrimination or retaliation.<sup>2</sup>

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<sup>1</sup> See Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

<sup>2</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

*Arbitrary/Capricious Performance Evaluation*

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 two Written Notices. Each Written Notice cited deficiencies in the grievant's performance, such as failure to follow policy and procedures regarding human resource functions such as timekeeping and hiring appointments. The agency had further concerns with the grievant's failure to attend scheduled meetings, tracking of work study students at the University, and failure to complete special projects. These issues are all cited in her performance evaluation as support for the overall "Unsatisfactory Performer" rating, along with additional general concerns. The evaluation further notes that the grievant "has had issues with honest communication" and does not accommodate co-workers, often becoming argumentative instead of working to resolve conflict.

In support of her position, the grievant has provided a detailed refutation of the allegedly unsatisfactory aspects of her performance described in her evaluation. She also alleges that, in order to receive an overall rating of "Unsatisfactory Performer," she should have received at least one Notice of Improvement Needed during the performance cycle.<sup>3</sup> Having reviewed the information provided by the parties, EEDR finds that, although the grievant challenges the conclusions stated in the evaluation and asserts repeatedly that she has been assigned an overwhelming workload, her evidence does not contradict many of the basic facts relating to her 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 she believes to be a failure to consider her 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 disciplinary action, were of sufficient significance that an

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<sup>3</sup> As the University's first step respondent pointed out in her response, a Written Notice issued for any reason may support a rating of "Below Contributor" (or, as here, the University's equivalent of "Unsatisfactory Performer" on the employee's annual evaluation. See DHRM Policy 1.40, *Performance Planning and Evaluation*. In this instance, the grievant received multiple Written Notices during the evaluation period.

“Unsatisfactory Performer” 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 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*

The grievant states that her performance evaluation results from “discrimination/disparate treatment.” 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.<sup>4</sup> 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 a hearing, absent sufficient evidence that the agency’s professed business reason was a pretext for discrimination.<sup>5</sup>

In this case, the grievant asserts that she was discriminated against and subject to different treatment from her supervisor than her coworkers, but she does not specifically assert a protected status upon which such discrimination allegedly occurred.<sup>6</sup> While the grievant may disagree with the agency’s characterization of her work as outlined in the performance evaluation, this disagreement does not render the agency’s decision discriminatory. Here, the grievant has not provided evidence raising a sufficient question that the agency rated her as “Unsatisfactory Performer” because of any protected class. A mere allegation of discrimination, without more, is not appropriate for adjudication by a hearing officer. Accordingly, the grievance does not qualify for a hearing on this basis.

### *Retaliation*

The grievant claims that her performance evaluation was retaliatory. 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;<sup>7</sup> (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business

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<sup>4</sup> See, e.g., Executive Order 1, *Equal Opportunity* (2014); DHRM Policy 2.05, *Equal Employment Opportunity*.

<sup>5</sup> See, e.g., *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).


<sup>6</sup> See, e.g., DHRM Policy 2.05, *Equal Employment Opportunity*.

<sup>7</sup> 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 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).

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.<sup>8</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>9</sup>

In this instance, though the grievant does not specifically identify protected activity, the grievant has participated in the grievance process. However, even assuming that the grievant has engaged in protected activity, she still has not presented facts that raise a sufficient question of a connection between her performance evaluation and any such activity. Because there is not a factual basis to support the grievant's allegation of retaliation, the grievance does not qualify for a hearing on this basis.

EDR's qualification rulings are final and nonappealable.<sup>10</sup>



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<sup>8</sup> *E.g.*, EEOC v. Navy Fed. Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

<sup>9</sup> *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

<sup>10</sup> *See* Va. Code § 2.2-1202.1(5).