

Issue: Qualification – Performance Evaluation (arbitrary/capricious); Ruling Date: April 22, 2013; Ruling No. 2013-3558, 2013-3578; Agency: Virginia Commonwealth University; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of Virginia Commonwealth University
Ruling Numbers 2013-3558, 2013-3578
April 22, 2013

The grievant has requested a ruling on whether her December 19, 2012 and January 18, 2013 grievances with Virginia Commonwealth University (the “agency”) qualify for a hearing. For the reasons discussed below, these grievances do not qualify for a hearing.

FACTS

On or about November 20, 2012, the grievant received her yearly performance evaluation for 2011-2012, with an overall rating of “Unsatisfactory Performer.”¹ The grievant appealed the rating and content of the evaluation to the agency, which completed an amended evaluation on or about December 19, 2012.² On the amended evaluation, the grievant also received an overall rating of “Unsatisfactory Performer.” The grievant filed timely grievances challenging both the original and the amended evaluations, alleging that the ratings were arbitrary, capricious, and without substantive merit.³ While these grievances were pending, the grievant was re-evaluated on February 27, 2013 to assess whether her performance had improved since the completion of the two prior evaluations. She received a rating of “Unsatisfactory Performer” on the re-evaluation and was subsequently dismissed for unsatisfactory performance on March 6, 2013.⁴

¹ The agency’s performance evaluation rating scale states that an agency rating of “Unsatisfactory Performer” is equivalent to a rating of “Below Contributor” on the equivalent Department of Human Resource Management evaluation scale. *See* Department of Human Resource Management Policy 1.40: Performance Planning and Evaluation.

² Because the amended evaluation of December 19 has superseded the initial November 20 evaluation, and also contains expanded commentary on many of the statements from the November 20 evaluation, this ruling will address the claims in both grievances with reference to the amended December 19 evaluation.

³ To the extent the grievant argues that discrimination or retaliation by her immediate supervisor affected the performance evaluation, she has not presented facts or other information in support of those claims. In the absence of such supporting facts, this ruling will only address the grievant’s allegation that her performance evaluations were arbitrary or capricious.

⁴ As of the date of this ruling, EDR is unaware of any grievance being filed to challenge her termination.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.⁵ 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."⁶

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 has not raised a sufficient question as to whether the agency was arbitrary or capricious in rating her performance. The grievant's evidence is largely explanatory, showing disagreement with management's assessment, but not disputing that most of the events occurred. For example, on the "Human Resources" core responsibility, the reviewer notes that the grievant has demonstrated little ability to handle human resources tasks. On the "Fiscal Account Maintenance" core responsibility, the evaluation states that the grievant has limited accounting knowledge and does not understand basic accounting procedures. In other sections of the evaluation, it is noted that the grievant has had issues with lack of motivation, communication with colleagues, timeliness in completing assigned tasks, conducting personal business at work, and maintaining an appropriate attitude with supervisors. In her comments, the grievant challenges the conclusions stated in the evaluation, but her evidence does not contradict many of the basic facts regarding her performance as stated in the evaluation. Although there may be some reasonable dispute about comments and ratings on individual core responsibilities and competencies,⁷ EDR cannot find that this performance evaluation, as a whole, is without a basis in fact or otherwise arbitrary or capricious. EDR has reviewed nothing in the grievance paperwork that would support a conclusion that the evaluation resulted from anything other than the agency's reasoned review of the grievant's performance in relation to established

⁵ See Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

⁶ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁷ For example, the "Customer Service" competency comments primarily deal with the grievant's ability to work as part of a team in the office, and not with "anticipat[ing] customer needs" and communicating with clients. The "Ethics" competency discusses the grievant's lack of "eagerness, enthusiasm, drive, and commitment," but not integrity or ethical behavior. However, these issues, to the extent that they may be inconsistent with the grievant's overall rating of "Unsatisfactory Performer," do not invalidate the evaluation as a whole.

performance expectations. Therefore, the grievances challenging her performance evaluation, as revised, do not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.⁸



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⁸ Va. Code § 2.2-1202.1(5).