

Issues: Qualification – Performance (arbitrary/capricious performance evaluation) and Work Conditions – employee/supervisor conflict); Ruling Date: May 28, 2014; Ruling No. 2014-3791; 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 Number 2014-3791
May 28, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) of the Department of Human Resource Management on whether her November 12, 2013 grievance with Virginia Commonwealth University (the University) qualifies for hearing.¹ For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about October 3, 2013, the grievant received a yearly performance evaluation which rated her overall performance as “unsatisfactory.” She appealed the evaluation to her reviewer, but the rating remained unchanged. The grievant initiated a grievance challenging the performance evaluation on November 12, 2013. After the University President denied the grievant’s request for qualification of her grievance for hearing, the grievant appealed to EDR.

DISCUSSION

Arbitrary and/or Capricious Performance Evaluation

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

“Arbitrary or capricious” means that 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

¹ With the grievant’s consent, EDR stayed its qualification ruling on the November 12, 2013 grievance pending a grievance hearing on several disciplinary actions issued to the grievant, which resulted in her termination. In a decision dated April 18, 2014, the hearing officer upheld the disciplinary actions and the grievant’s removal from employment. *See* Decision of Hearing Officer, Case No. 10278/10279/10280, April 18, 2014.

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

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


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.

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 disagreement with management's assessments. While the grievant may articulate reasonable points of dispute, EDR concludes that there is insufficient evidence to support an assertion that this performance evaluation was 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 management's reasoned review of the grievant's performance in relation to established performance expectations. Accordingly, the grievance will not be qualified on this basis.

Harassment/Hostile Work Environment

The grievant also appears to assert a claim that her performance evaluation was part of an ongoing hostile work environment created by her supervisor. For a claim of a hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status or protected conduct; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.⁴ In this case, the grievant has failed to identify any protected status or conduct as the motive for the alleged harassment by her supervisor. Further, even in the event the grievant had identified a protected status or conduct, the conduct challenged is not, under the facts and circumstances present, so sufficiently severe or pervasive as to create a hostile work environment. Accordingly, the grievant's hostile environment claim does not qualify for a hearing.

EDR's qualification rulings are final and nonappealable.⁵



Christopher M. Grab
Director
Office of Employment Dispute Resolution

⁴ See generally *White v. BFI Waste Services, LLC*, 375 F.3d 288, 296-97 (4th Cir. 2004).

⁵ Va. Code § 2.2-1202.1(5).