

Issues: Qualification – Performance (arbitrary/capricious evaluation), Performance (performance/improvement plan), Retaliation (grievance activity), and Discipline (counseling memo); Ruling Date: March 26, 2014; Ruling No. 2014-3825, 2014-3826; Agency: University of Virginia Health System; Outcome: Partially Qualified.



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

QUALIFICATION RULING

In the matter of the University of Virginia Health System
Ruling Numbers 2014-3825, 2014-3826
March 26, 2014

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether his November 1, 2013 and January 8, 2014 grievances with the University of Virginia Health System (the “agency”) qualify for a hearing. For the reasons discussed below, the November 1 grievance is qualified for a hearing in full and the January 8 grievance is not qualified for a hearing.

FACTS

On or about August 31, 2013, the grievant received his annual performance appraisal for 2012-2013, on which he received an overall rating of “Does Not Fully Meet Expectations.”¹ On or about October 22, 2013, the grievant was issued an Employee Performance Improvement Plan (“EPIP”) to address the performance deficiencies noted in his evaluation. The grievant filed a grievance on or about November 1, 2013, alleging that the performance appraisal was arbitrary, capricious and retaliatory, the EPIP was “unfair and biased,” and that the agency misapplied and/or unfairly applied the policies relating to these management actions. After proceeding through the management resolution steps, the agency head declined to qualify the grievance for a hearing, and the grievant now appeals that decision to EDR.

On or about December 12, 2013, the grievant received a Formal Performance Counseling Form (“Formal Counseling”) pursuant to Medical Center Human Resources Policy 701, *Employee Standards of Conduct*.² The grievant initiated a grievance to challenge the Formal

¹ The agency’s performance evaluation rating scale suggests that an agency rating of “Does Not Fully Meet Expectations” is equivalent to a rating of “Below Contributor” on the DHRM evaluation scale. See Medical Center Human Resources Policy No. 209, *Performance Management Program*, § D(8); DHRM Policy 1.40, *Performance Planning and Evaluation*.

² The agency uses a classification system for disciplinary actions that differs from the DHRM *Standards of Conduct*. Agency policy classifies performance improvement counseling as a four-step process consisting of: (1) Informal Counseling, (2) Formal Counseling, (3) Performance Warning and/or Suspension, and (4) Termination. See Medical Center Human Resources Policy 701, *Employee Standards of Performance and Conduct*, § D. Policy 701 further indicates that the four steps are analogous to (1) verbal/written counseling, (2) Group I Written Notice, (3) Group II Written Notice, and (4) Group III Written Notice under the *Standards of Conduct*. See *id.* § D (classifying Steps 2, 3, and 4 as “formal discipline”); DHRM Policy 1.60, *Standards of Conduct*, § B.

Counseling on January 8, 2014. The first step-respondent determined that the Formal Counseling should be revised and reissued, which was done on January 10, 2014. The grievant filed a second grievance challenging the revised Formal Counseling on the same date. The agency permitted both the January 8 and January 10 grievances to proceed through the management resolution steps. The January 10 grievance was ultimately qualified for a hearing by the agency. The agency head declined to qualify the January 8 grievance for a hearing, and the grievant now appeals that determination to EDR.

DISCUSSION

November 1, 2013 Grievance

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.³ The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.⁴ 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."⁵

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.

The grievant asserts that his performance appraisal scores "range arbitrarily over a wide range with no apparent reason." He notes that he received a rating of "Does not Fully Meet Expectations" in several categories on the performance appraisal with no explanation to justify them, and that his overall rating was negatively impacted as a result. The agency's annual performance evaluation policy states that the performance evaluation process should "provide an accurate and objective process for identifying the employee's performance level and competency."⁶ A performance rating of "Does Not Fully Meet Expectations" is indicative of

³ See *Grievance Procedure Manual* § 4.1.

⁴ See Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

⁵ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁶ Medical Center Human Resources Policy No. 209, *Performance Management Program*, § C.

“[i]nconsistent results and/or behaviors; improvement needed; minimum expectations not met.”⁷ An employee’s receipt of his performance appraisal “should not be the first notice the employee receives of a performance issue.”⁸ The policy further states that “[a]n EPIP is required for any employee who receives an overall rating of ‘Does Not Fully Meet Expectations’ on his/her annual performance appraisal.”⁹

The grievant’s job description states that one of his essential duties is to “plan[] and analyze[] project budgets,” which includes responsibilities such as reviewing available solutions, planning for the “prudent use of available . . . resources,” and developing a “[p]rocess for repeatable solutions.” The grievant’s essential duties also include “[performing] System support.” This job responsibility requires the grievant to provide “[b]asic and advanced support” to customers, “plan[] for growth and System refresh,” and consistently maintain change management. The grievant received a rating of “Does Not Fully Meet Expectations” in both of these areas on his evaluation.

While the performance appraisal cites deficiencies related to advance planning for certain work projects, taking on tasks without notifying his supervisor in advance, and failing to complete one work task in a timely manner, there is no description of how these performance issues relate specifically to analyzing and planning project budgets, or performing system support, or whether there are additional performance issues that would justify the rating for these essential duties. Advance planning, notifying one’s supervisors about work tasks, and failing to complete a single task on time could be viewed in connection with planning and analyzing project budgets or providing system support. However, there is no information in the evaluation to demonstrate that these deficiencies relate to the areas in which the grievant was rated “Does Not Fully Meet Expectations.” For example, the issues cited on the evaluation could potentially be viewed as equally relating to the grievant’s ability to effectively perform “advanced implementation/support for systems,” “LAN administration/maintenance of assigned servers,” or “server hardware maintenance.”

In short, it is difficult to understand from the evaluation document precisely how the grievant’s noted performance deficiencies relate to certain job responsibilities (planning and analyzing project budgets; providing system support) in which he was rated “Does Not Fully Meet Expectations.” The agency’s performance evaluation rating scale averages all of the individual scores based on a numerical weighted scale to calculate an employee’s overall performance rating. Based on EDR’s analysis, it appears that, if the grievant’s ratings in the areas of planning and analyzing project budgets and providing system support were changed from from “Does Not Fully Meet Expectations” to “Fully Meets Expectations, then the grievant’s overall rating would also be modified from “Does Not Fully Meet Expectations” to “Fully Meets Expectations” by the slimmest of margins. Having reviewed the grievant’s performance appraisal and the agency’s job description for his position, we find that this grievance raises a sufficient question as to whether the grievant’s overall rating on his performance appraisal was arbitrary or capricious.

⁷ *Id.* § D(8).

⁸ *Id.*

⁹ *Id.* § D(9).

Furthermore, the grievant claims that his negative performance evaluation was motivated in part by retaliation. 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;¹⁰ (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 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.¹¹ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹²

"[P]articipating in the grievance process" is a protected activity under the grievance procedure.¹³ The grievant in this case engaged in prior grievance activity in 2013, during the months immediately preceding the issuance of the performance appraisal at issue here. EDR has held in the past that an overall performance evaluation rating of "Below Contributor" on the DHRM evaluation scale, which is equivalent to the grievant's rating of "Does Not Fully Meet Expectations" on the agency's scale, constitutes an adverse employment action.¹⁴ There is a temporal connection between the grievant's past protected activity and the performance appraisal. That fact, taken together with the lack of information in the evaluation to justify the grievant's rating in certain aspects as discussed above, leads us to conclude that the grievant has raised a sufficient question as to whether there is a causal link between the grievant's prior protected activity and his negative performance appraisal in this case. This ruling in no way determines that the agency engaged in retaliatory behavior based on an improper motive; it only concludes that, based on the particular facts of this case, the grievant's claims support an inference that his performance appraisal may been the result of retaliation based on past protected activity.

The November 1 grievance also contains multiple allegations of unfair and/or biased treatment and misapplication and/or unfair application of agency policy related to the issuance and administration of the EPIP that was issued to address the performance deficiencies noted in the grievant's performance appraisal. Because there are potential issues with the performance appraisal, as discussed above, the subsequent EPIP, issued because the grievant received an overall rating of "Does Not Fully Meet Expectations," may also be tainted if a hearing officer should determine that the performance appraisal itself was arbitrary or capricious or retaliatory. For that reason, it is sensible to qualify the grievant's additional claims in relation to the EPIP to

¹⁰ 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).

¹¹ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

¹² See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981).

¹³ *Grievance Procedure Manual* § 4.1(b); see also Va. Code § 2.2-3004(A).

¹⁴ See EDR Ruling No. 2006-1280; EDR Ruling Nos. 2006-1221, 2006-1222.

ensure a full exploration at a hearing of what could be interrelated facts and issues.¹⁵ Accordingly, the November 1, 2013 grievance is qualified for a hearing in full.

Whether the grievant's claims related to his performance appraisal and the EPIP are supported by the evidence in this case are factual determinations that a hearing officer, not EDR, should make. At the hearing, the grievant will have the burden of proof.¹⁶ If the hearing officer finds that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure.¹⁷ This qualification ruling in no way determines that any of the grievant's claim are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted.

January 8, 2014 Grievance

Grievances challenging formal disciplinary action, such as the Formal Counseling that is the subject of the January 8 grievance, ordinarily automatically qualify for a hearing.¹⁸ This case, however, presents a unique procedural question. The January 8 grievance, as originally filed to challenge the December 12 Formal Counseling, would have qualified for a hearing. The December 12 Formal Counseling was superseded, however, when the agency determined that the Formal Counseling should be revised and reissued on January 10. At that point, it ceased to exist as an act of formal discipline because it had been replaced by the revised Formal Counseling.

While the grievant continued to advance the January 8 grievance through the management resolution steps, he also filed a grievance on January 10 directly challenging the revised Formal Counseling. The agency permitted both grievances to proceed through the management resolution steps to the qualification stage, even though they arguably challenge the same act of formal discipline. The grievance filed on January 10, challenging the revised Formal Counseling, has already been qualified for a hearing by the agency. There is no reason to qualify the January 8 grievance, therefore, because it challenges an act of formal discipline that was replaced by a subsequent revision, and that revised Formal Counseling has already been qualified for an administrative hearing.¹⁹

Accordingly, the January 8 grievance is not qualified for a hearing. At the hearing for the January 10 grievance challenging the revised Formal Counseling, the grievant may argue any alternative theories and claims raised in the January 8 grievance that are not also contained in the January 10 grievance.

¹⁵ The grievant has also filed at least two additional grievances challenging acts of formal discipline issued in relation to the October 22, 2013 EPIP referenced in the November 1 grievance. Those disciplinary actions have already been qualified for a hearing by the agency. This ruling in no way addresses or qualifies the grievant's claims in relation to any issue other than the actions grieved in the November 1 grievance.

¹⁶ *Rules for Conducting Grievance Hearings* § VI(C).

¹⁷ Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

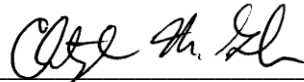
¹⁸ *Grievance Procedure Manual* § 4.1(a).

¹⁹ As the December 12 Formal Counseling no longer exists in the grievant's personnel file, it arguably is not susceptible to any effectual relief from the hearing officer. *Grievance Procedure Manual* § 5.9(a) (describing the relief a hearing officer may award). It cannot be reduced or rescinded, for example, because it has been replaced by the revised Formal Counseling.

CONCLUSION

The grievant's November 1, 2013 grievance is qualified for hearing to the extent described above. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.²⁰



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²⁰ See Va. Code § 2.2-1202.1(5).