

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: June 3, 2016; Ruling No. 2016-4359; Agency: Department of Conservation and Recreation; Outcome: Not Qualified.



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

**QUALIFICATION RULING**

In the matter of the Department of Conservation and Recreation  
Ruling Number 2016-4359  
June 1, 2016

The grievant has requested a ruling from the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) on whether her February 26, 2016 grievance with the Department of Conservation and Recreation (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is not qualified for a hearing.

**FACTS**

On or about October 5, 2015, the grievant was issued a Notice of Improvement Needed/Substandard Performance. Subsequently, on November 6, 2015, the grievant received her 2014-2015 performance evaluation with an overall “Below Contributor” rating. The grievant appealed her evaluation on November 20, 2015. On or about January 29, 2016, the agency advised the grievant that it would not change the Below Contributor rating, although the evaluation was rewritten to provide greater clarity. On February 26, 2016, the grievant initiated a grievance challenging her performance evaluation and the manner in which it was handled by the agency. After the parties failed to resolve the grievance during the management resolution steps, the grievant requested that the grievance be qualified for hearing by the agency head. The agency head denied the grievant’s request, and she has appealed to EDR.

**DISCUSSION**

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.<sup>1</sup> The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.<sup>2</sup> Accordingly, for a grievance challenging a performance evaluation to qualify for a hearing, there must be facts raising a sufficient question as to whether discrimination, retaliation, or discipline may have improperly influenced management’s decision, whether state policy may have been

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<sup>1</sup> See *Grievance Procedure Manual* § 4.1.

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

misapplied or unfairly applied, or whether the performance evaluation was arbitrary and/or capricious.<sup>3</sup>

In addition, the grievance procedure generally limits grievances that qualify for a hearing to those that involve “adverse employment actions.”<sup>4</sup> Thus, typically the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action is defined as a “tangible employment action constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”<sup>5</sup> Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one’s employment.<sup>6</sup>

In this case, the grievant asserts that the agency failed to follow policy by not providing her with a timely performance plan and by not responding to her evaluation appeal in a timely fashion.<sup>7</sup> However, there is no evidence that these alleged procedural defects had a material effect on the outcome of the performance evaluation or have otherwise detrimentally altered the terms or conditions of her employment. As the grievant has not shown that the alleged lack of timeliness had any material effect on the challenged performance evaluation or her employment generally, the grievance does not qualify for a hearing on this basis.<sup>8</sup>

In addition, the grievant appears to argue that her Below Contributor rating is arbitrary and capricious. 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

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<sup>3</sup> *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

<sup>4</sup> *See Grievance Procedure Manual* § 4.1(b).

<sup>5</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

<sup>6</sup> *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

<sup>7</sup> The agency appears to argue that its failure to issue a new performance plan after the November 6, 2015 evaluation was harmless, as the grievant received a 90-day performance plan in conjunction with the October 5, 2015 Notice of Improvement Needed/Substandard Performance, the grievant was in fact reevaluated, and, in her reevaluation, she was judged to be working at the contributor level. The agency also asserts that the delays in responding to the grievant’s evaluation appeal were due to absences, scheduling difficulties, and the time necessary to “address[] all items appropriately.”

<sup>8</sup> Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the “Act”). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. *Id.*

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 overall performance as “Below Contributor” on her 2014-2015 annual performance evaluation. During the performance cycle, the grievant received a Group II Written Notice directly related to her work performance.<sup>9</sup> The Written Notice charged the grievant with failing to “provide reports, reconciliations and procedures at specific times.”<sup>10</sup> In a decision dated April 15, 2016, the Written Notice was upheld by an EDR hearing officer, who concluded that the grievant failed to comply with her supervisor’s “clear” and “repeated” instructions to submit work.<sup>11</sup> In addition to the conduct that was the subject of the Written Notice, the grievant’s revised performance evaluation also noted such concerns as her failure to make files accessible, provide adequate support for reconciliations, and update leases and related information.<sup>12</sup> The grievant has not presented evidence that would support a conclusion that the performance evaluation was without a basis in fact or otherwise arbitrary or capricious.<sup>13</sup> EDR has reviewed nothing in the grievance record 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 grievant’s claim regarding her performance evaluation will not be qualified.

EDR’s qualification rulings are final and nonappealable.<sup>14</sup>



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Director  
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<sup>9</sup> See Decision of Hearing Officer, Case No. 10753, April 15, 2016 (“Hearing Decision”).

<sup>10</sup> See Agency Exhibit 2 in Case No. 10753.

<sup>11</sup> Hearing Decision at 5.

<sup>12</sup> Under DHRM Policy 1.40, *Performance Planning and Evaluation*, either a Written Notice or a Notice of Improvement Needed/Substandard Performance during the performance cycle is a prerequisite to issuing a Below Contributor rating. In this case, the grievant received both.

<sup>13</sup> The documentation provided by the grievant in relation to her grievance appears to relate primarily to her claims regarding timeliness and procedure, rather than to the substance of her evaluation.

<sup>14</sup> Va. Code § 2.2-1202.1(5).