

Issue: Qualification – Performance (arbitrary/capricious evaluation); Ruling Date: January 16, 2018; Ruling No. 2018-4657; Agency: University of Virginia Medical Center; Outcome: Not Qualified.



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

QUALIFICATION RULING

In the matter of the University of Virginia Medical Center
Ruling Number 2018-4657
January 16, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management on whether her September 29, 2017 grievance with the University of Virginia Medical Center (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed by the agency as a RN Care Coordinator, with a professional status of Clinician 3. On or about August 30, 2017, the grievant received her annual performance evaluation for 2016-2017, with an overall rating of “Fully Meets Expectations.”¹ However, due to two individual factor ratings of “Does Not Fully Meet Expectations” for specific job responsibilities, the grievant was notified that she would have to revalidate her status as a Clinician 3 or be reduced to Clinician 2 status, with an accompanying salary reduction. The grievant filed a grievance on September 29, 2017, alleging that her performance evaluation did not accurately reflect her work performance during the evaluation cycle and was inconsistent with the agency’s performance management policy. 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

Although state employees with access to the grievance procedure may generally grieve anything related to their employment, only certain grievances qualify for a hearing.² The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.³ Accordingly, for this grievance to qualify for a hearing, there must be facts raising a sufficient

¹ The agency’s performance evaluation rating scale suggests that an agency rating of “Fully Meets Expectations” is equivalent to a rating of “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 *See Grievance Procedure Manual* § 4.1.

³ *See* Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

question as to whether the grievant's performance rating, or an element thereof, was "arbitrary or capricious."⁴

Adverse Employment Action

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."⁵ 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."⁶ Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.⁷

In general, a satisfactory performance evaluation is not an adverse employment action.⁸ When the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. However, the facts of this case present a unique situation. The agency's professional standards for its nursing staff, as described in its Clinical Career Ladder Clinician 1-4 Reference Handbook, provide that "clinicians receive an annual Performance Appraisal that revalidates their level of practice" on the agency's Clinical Career Ladder.⁹ The Handbook states that a Clinician 3 may successfully revalidate "through the annual Performance Appraisal process . . . when [she] meets or exceeds expectations in all categories of the Job Function & Responsibilities."¹⁰ If, on the other hand, there is a "lack of evidence" to show that the Clinician 3 met "expectations in any one category of the Job Function & Responsibilities section," she will fail to revalidate.¹¹ A Clinician 3 who fails to revalidate through her performance evaluation must "submit a full portfolio and participate in a panel interview" to revalidate or she will "revert to a lower level position which will result in [her] pay being adjusted downward"¹²

In this case, the grievant received an overall rating of "Fully Meet Expectations." However, management determined the grievant should receive ratings of "Does Not Fully Meet Expectations" on two of her core job functions: "Empowered Leaders" and "Quality

⁴ *Id.* § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

⁵ *See Grievance Procedure Manual* § 4.1(b).

⁶ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

⁷ *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).

⁸ *E.g.*, EDR Ruling No. 2013-3580; EDR Ruling No. 2010-2358; EDR Ruling No. 2008-1986; *see also James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377-378 (4th Cir. 2004) (holding that although his performance rating was lower than his previous yearly evaluation, there was no adverse employment action where the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment).

⁹ University of Virginia Health System Professional Nursing Staff Organization, Clinical Career Ladder Clinician 1-4 Reference Handbook 15 (Summer 2017). The agency has a series of progressively higher clinician statuses for the career advancement of staff employed in nursing positions. *See id.* at 3-6.

¹⁰ *Id.* at 16.

¹¹ *Id.*

¹² *Id.*

Achievement.” As a result, while the grievant’s evaluation in this case was satisfactory overall, the two specific factor ratings of “Does Not Fully Meet Expectations” triggered the agency’s policy requirement that she either revalidate her Clinician 3 status by submitting a portfolio and participating in a panel interview, or face a reduction to Clinician 2 status and an accompanying salary decrease. Accordingly, for purposes of this ruling, EEDR finds that the grievant has raised a sufficient question as to whether her performance evaluation constituted an adverse employment action, in that it has the potential to detrimentally alter the terms or conditions of her employment through the revalidation process.

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.

In her grievance, the grievant asserts that her work performance during the cycle should have warranted individual factor ratings of “Fully Meets Expectations,” and further argues that she was not given counseling or other feedback during the evaluation cycle advising that her Clinician 3 status could be impacted by the ratings on her performance evaluation. The agency’s policy states that management “shall observe and monitor performance” during the evaluation cycle and “provide regular, timely, and constructive feedback.”¹³ The policy further advises that “[t]he performance appraisal should not be the first notice the employee receives of a performance issue.”¹⁴ Although the grievant may have understandable concerns about a lack of performance management during the evaluation cycle, the relevant policy language appears to be advisory in nature. While it may be a good management practice to give employees as much opportunity as possible to improve areas of deficient performance, EEDR has not identified any specific policy requirement that employees must receive notice of Clinician revalidation requirements throughout the evaluation cycle. Agency management has significant discretion in the administration of its policies and standard operating procedures,¹⁵ and under the circumstances present in this case, EEDR cannot find that the lack of performance feedback alleged by the grievant violated a mandatory policy provision or was so unfair as to amount to a disregard of the intent of the policy.¹⁶

¹³ Medical Center Human Resources Policy No. 209, *Performance Management Program*, § D(4).

¹⁴ *Id.* § D(8).

¹⁵ *See, e.g.*, EDR Ruling No. 2011-2903.

¹⁶ To the extent the grievant’s claim regarding performance management during the evaluation cycle is based on the agency’s decision not to issue formal counseling or other written corrective action during the cycle, there is no

In addition, EEDR has reviewed the grievance record and finds that the grievant has not raised a sufficient question as to whether the agency was arbitrary or capricious in rating her performance on the “Empowered Leaders” and “Quality Achievement” responsibilities. The grievant’s evidence is largely explanatory, showing disagreement with management’s assessment, but does not dispute many of the basic facts relating to her performance during the evaluation cycle. For example, in the “Empowered Leaders” responsibility, the grievant’s evaluation notes that she had not “[a]ctively participat[ed] in Shared Governance” by attending meetings and/or participating in committees during the evaluation cycle. The grievant does not appear to dispute the accuracy of this statement, but instead argues that “patient care must be [her] first priority” and she was unable to participate more actively in shared governance due to her workload.

Furthermore, the grievant’s performance standards for “Quality Achievement” require, in part, “engagement in performance improvement activities and commitment to standard work.” With regard to these responsibilities, the evaluation states that the grievant “voiced her dissatisfaction with standard work . . . numerous times” during the cycle and was “not consistently using” certain required behaviors that are intended to “create[] effective and efficient ways to deliver care and improve the quality of work” In her comments on the evaluation, the grievant does not appear to dispute the agency’s assessment, stating that she does “not always agree with the minutia of standardized work.” The grievant also notes that she does “not like checking boxes” and provides examples of work requirements she believes are unnecessary for her to satisfactorily complete assigned tasks. She additionally argues that her workload did not allow her to carry out certain tasks related to this performance area.

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 instances of deficient performance described above were of sufficient significance that the individual factor ratings of “Does Not Fully Meet Expectations” were warranted. Accordingly, 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

In addition, the grievant appears to argue that the agency’s evaluation of her work performance was discriminatory in nature. 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 or expression, age, political affiliation, genetics, disability, or veteran status.¹⁷ 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

general requirement that an employee receive written performance management documentation prior to receipt of an annual performance evaluation with an overall satisfactory rating. See DHRM Policy 1.40, *Performance Planning and Evaluation*.

¹⁷ See, e.g., Executive Order 1, *Equal Opportunity* (2018); DHRM Policy 2.05, *Equal Employment Opportunity*.

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 hearing, absent sufficient evidence that the agency's professed business reason was a pretext for discrimination.¹⁸

In support of her position, the grievant alleges that agency management has shown a "lack of support" for her and engaged in "unfair treatment" on the basis of her disability status. EEDR has reviewed the grievance record as well as information submitted for this ruling and found no basis to support a conclusion that the grievant's performance evaluation was arbitrary, capricious, or otherwise improper, as discussed more fully above. While the grievant may disagree with the agency's assessment of her work performance, such disagreement alone does not establish that the individual factor ratings of "Does Not Fully Meet Expectations" were motivated by discrimination, and there is otherwise insufficient evidence to show that the agency's stated business reasons were pretextual. To qualify for a hearing, a grievance must present more than a mere allegation of discrimination – 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. There are no such facts here, and, accordingly, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.¹⁹



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¹⁸ See, e.g., *Hutchinson v. INOVA Health Sys., Inc.*, Civil Action No. 97-293-A, 1998 U.S. Dist. LEXIS 7723, at *4 (E.D. Va. April 8, 1998).

¹⁹ Va. Code § 2.2-1202.1(5).