

Issue: Qualification – Performance (re-evaluation); Ruling Date: February 15, 2018, Ruling No. 2018-4673; Agency: Virginia Employment Commission; 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 Virginia Employment Commission  
Ruling Number 2018-4673  
February 15, 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 November 7, 2017 grievance with the Virginia Employment Commission (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On November 7, 2017, sixty days after receiving her annual performance evaluation for 2016-2017 with an overall “Below Contributor” rating, the grievant received a re-evaluation, again with an overall rating of “Below Contributor.”<sup>1</sup> The grievant initiated a grievance on November 7, 2017, alleging that the re-evaluation did not accurately reflect her work performance during the evaluation cycle and, thus, she should have received a “Contributor” rating. 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.<sup>2</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>3</sup> 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.”<sup>4</sup>

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<sup>1</sup> This “sixty-day” re-evaluation was not the final re-evaluation at the end of the 90-day period. The final re-evaluation, which led to the grievant’s termination, occurred subsequent to the management actions challenged in the grievance at issue in this ruling. The grievant’s final re-evaluation and termination are at issue in a separate grievance that is proceeding to hearing.

<sup>2</sup> See *Grievance Procedure Manual* § 4.1.

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


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

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, or, as in this case, a re-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.

During the sixty day re-evaluation cycle, the agency noted several deficiencies in the grievant's work performance. For example, the grievant was issued a Group II Written Notice on October 25, 2017, for failing to follow her supervisor's instructions in relation to the completion of a work assignment. Further, the sixty day re-evaluation notes that the grievant has "made it clear" that she does not want to perform particular assignments because she "do[es] not see the value" in doing so. The grievant received a "Below Contributor" rating in four out of six of the core responsibilities listed on the re-evaluation.

Having reviewed the grievance information, EEDR finds that, although the grievant challenges the conclusions stated in the re-evaluation, she has not provided evidence to contradict many of the basic facts relating to her performance during the evaluation cycle. Although there may be some reasonable dispute about comments and ratings on individual core responsibilities and competencies, EEDR cannot find that this performance evaluation, as a whole, is without a basis in fact or otherwise arbitrary or capricious. 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, particularly those that were addressed with the issuance of a Group II Written Notice, were of sufficient significance that a "Below Contributor" rating was warranted. Accordingly, EEDR finds that there is insufficient evidence to support the grievant's assertion that her re-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.

EEDR's qualification rulings are final and nonappealable.<sup>5</sup>

  
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Office of Equal Employment and Dispute Resolution

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