

Issue: Qualification (Performance) – arbitrary/capricious evaluation; Ruling Date: March 30, 2018; Ruling No. 2018-4691; Agency: Virginia Department of Transportation; 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 Department of Transportation
Ruling Number 2018-4691
March 30, 2018

The grievant has requested a ruling from the Office of Equal Employment and Dispute Resolution (“EEDR”) at the Department of Human Resource Management (“DHRM”) on whether his January 5, 2018 grievance with the Virginia Department of Transportation (the “agency”) qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about December 8, 2017, the grievant received his annual performance evaluation for 2016-2017, with an overall rating of “Below Contributor.” The grievant filed a grievance on January 5, 2018, alleging that his performance evaluation was arbitrary, capricious, and did not accurately reflect his work performance during the evaluation cycle. The grievant further asserts that he did not properly receive a Notice of Improvement Needed/Substandard Performance (“NOIN”) during the evaluation cycle to support the “Below Contributor” rating, as required by DHRM Policy 1.40, *Performance Planning and Evaluation*. 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.¹ 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

¹ See *Grievance Procedure Manual* § 4.1.

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

³ *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 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 this case, the grievant argues that he was not properly issued a NOIN during the 2016-2017 evaluation cycle. DHRM Policy 1.40, *Performance Planning and Evaluation*, provides that “[a]n employee cannot be rated ‘Below Contributor’ on the annual evaluation unless he/she has received” either a NOIN or a Written Notice during the performance evaluation cycle.⁴ Under the policy, the annual performance evaluation cycle begins on October 25 of each year and ends on October 24 of the following year (e.g., from October 25, 2016 to October 24, 2017).⁵ On September 8, 2017, the grievant received a NOIN identifying deficiencies in his work performance and was placed on a Performance Improvement Plan that was effective from September 11 through December 1. The grievant raised several issues with the content of the NOIN, which was ultimately revised by agency management. The revised NOIN was finalized and entered into the agency’s computer records database on or about October 31, after the 2016-2017 evaluation cycle had ended. The grievant asserts that the NOIN was not effective until it was finalized, and therefore cannot be used to support an overall “Below Contributor” rating on his 2016-2017 evaluation.

A NOIN or other performance management document is effective on the date it is issued to the employee. Revisions that result in a reissuance or finalization of the NOIN at a later date do not act to delay the effective date of the document. In this case, the NOIN was effective on September 8, 2017, when it was given to the grievant. This conclusion is further supported by the fact that the grievant had weekly meetings with his supervisor to discuss his progress in completing the Performance Improvement Plan from September 2017 through December 2017, while the NOIN was being revised. Relatedly, the agency also chose to delay the issuance of the grievant’s performance evaluation to December 8, 2017, in order to allow him to complete the Performance Improvement Plan. Due to the grievant’s alleged failure to improve his work performance after the issuance of the NOIN, the agency determined an overall “Below Contributor” rating was warranted on his performance evaluation.⁶ While an evaluation would ordinarily be completed at or before the end of the evaluation cycle,⁷ the agency’s decision to

⁴ DHRM Policy 1.40, *Performance Planning and Evaluation*.

⁵ *Id.*

⁶ The agency asserts that, had the grievant’s performance improved during this time, he would not have received an overall “Below Contributor” rating on his evaluation.

⁷ DHRM Policy 1.40, *Performance Planning and Evaluation*.

delay the completion of the grievant's evaluation here appears to have been reasonable under the circumstances.

In addition, the NOIN and Performance Improvement Plan identified specific deficiencies in the grievant's work performance and directed the actions necessary for improvement. For example, the NOIN explains the grievant had not successfully completed certain "tasks as assigned by [their] due date," with the result that the tasks were either reassigned to other to another team member and/or completed by the grievant's supervisor. The NOIN also states that the grievant was spending "a considerable amount of work time . . . on personal activities and phone calls." The Performance Improvement Plan further specified that the grievant was assigned a project in March 2017 and had not made progress by August 2017, that several other projects were underway and the grievant was "not leading those efforts" and/or "staff [were] not seeking [his] help or guidance" on those projects, and that several tasks within the grievant's area of responsibility had been "accomplished by other [] staff members." The Performance Improvement Plan included a detailed list of specific tasks the grievant was required to complete to display satisfactory work performance. Records of weekly meetings between the grievant and his supervisor while the Performance Improvement Plan was in effect show that, while the grievant made improvements in some areas, he continued to experience difficulties in effectively working with others on projects and completing assigned tasks in a timely manner. The incidents of unsatisfactory performance that were addressed through the NOIN and Performance Improvement Plan are cited in the grievant's evaluation as support for the overall "Below Contributor" rating.

In support of his position that his performance during the evaluation cycle was satisfactory, the grievant argues that there were "no regular staff meetings, progress reviews, or action item tracking procedures" to identify the tasks to be completed on a particular project, that his performance during the evaluation cycle was "virtually identical" to the previous year where he received a satisfactory evaluation, that he "responded to all internal and external services requests in [a] timely fashion," and that the agency did not consider certain other tasks he successfully completed during the evaluation cycle.

Having reviewed the information provided by the parties, EEDR finds that, although the grievant challenges the conclusions stated in the evaluation, he has not provided evidence to contradict many of the basic facts relating to his performance during the evaluation cycle. The grievant appears to primarily argue that his work performance was similar to what was considered acceptable in previous years and that he did not receive sufficient management guidance to complete tasks as assigned. However, the grievant's performance evaluation noted that he works in a higher-level position, that he is expected to be "both a leader and a doer" within the work unit, and that "[l]eadership should not have to provide him with task level direction." Likewise, it is not necessarily unreasonable for an agency's expectations regarding an employee's performance to vary from year to year, depending upon the specific projects and tasks to be completed.

In summary, although there may be some reasonable dispute about comments and ratings on individual core responsibilities and competencies, EEDR cannot find that the grievant's

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 he believes to be a failure to consider his 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 through the NOIN and Performance Improvement Plan, 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 his performance evaluation was without a basis in fact or resulted from anything other than management's reasoned evaluation of his performance in relation to established performance expectations. As a result, the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.⁸



Christopher M. Grab
Director

Office of Equal Employment and Dispute Resolution

⁸ Va. Code § 2.2-1202.1(5).