Issues: Qualification – Performance (arbitrary/capricious evaluation), and Retaliation (complying with any law); Ruling Date: March 20, 2019; Ruling No. 2019-4856; 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 Department of State Police
Ruling Number 2019-4856
March 20, 2019

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 October 29, 2018 grievance with the Department of State Police (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On or about September 27, 2018, the grievant received her annual performance evaluation for 2017-2018, with an overall rating of "Contributor." The grievant filed a grievance on October 29, 2018, alleging that her performance evaluation was arbitrary, capricious, and did not accurately reflect her work performance during the evaluation cycle. 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]

Adverse Employment Action

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[4] Thus, typically the threshold question is whether the grievant has suffered an adverse employment action. An adverse employment action

[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).
[4] *See Grievance Procedure Manual* § 4.1(b).

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."[5] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[6]

In general, a satisfactory performance evaluation is not an adverse employment action.[7] When the grievant presents no evidence of an adverse action relating to the evaluation, such a grievance does not qualify for a hearing. In this case, however, the agency has indicated that employees who receive an overall rating of "Major Contributor" or "Extraordinary Contributor" receive additional hours of paid leave to recognize their exemplary performance.[8] As a result, and while the grievant's evaluation in this case was satisfactory overall, she did not receive a benefit of employment—paid leave—that was awarded to employees who received higher overall ratings on their annual performance evaluations. 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 had a detrimental impact on the benefits of her employment.

Performance Evaluation

The grievant contends that she should have received an overall rating of "Extraordinary Contributor" on her evaluation, alleges that her supervisor did not fairly evaluate her work performance as compared with two other employees who received overall "Extraordinary Contributor" ratings, and claims that her supervisor did not complete the evaluation process in a manner consistent with state and/or agency policy. 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

[5] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).
[6] Holland v. Wash. Homes, Inc., 487 F.3d 208, 219 (4th Cir. 2007) (citation omitted).
[7] *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).
[8] In addition, the General Assembly has approved salary increases for certain classified state employees, effective June 10, 2019, that are based, at least in part, on employee performance as recorded in their 2017-2018 evaluations. While the agency does not appear to have determined whether employees who received an overall "Contributor" rating for 2017-2018 would not be eligible for some portion of a merit-based salary increase, it is possible that the grievant's overall rating could have an impact on her salary.

some other improper motive—rather than a reasonable basis—a further exploration of the facts by a hearing officer may be warranted.

There appears to be no dispute that the grievant is a valued and competent employee of the agency. For example, she received a Recognition of Extraordinary Performance/Major Contributions Form for her performance on a special assignment during the evaluation cycle. As the Form itself notes, however, receipt of such a form "does not automatically entitle an employee to the 'Extraordinary Contributor' or 'Major Contributor' rating." The agency has further indicated that the grievant's performance during the evaluation cycle was satisfactory and thereby justified an overall "Contributor" rating, but her performance did not usually exceed or was not consistently above job requirements such that her rating could rise to the level of an "Extraordinary Contributor" or a "Major Contributor." Further, and although the grievant claims that her supervisor improperly held her absence on extended medical leave during the evaluation cycle against her, EEDR has not reviewed anything to suggest that her absence was a factor in the agency's assessment of her performance or, indeed, that it had any impact on her evaluation. While 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.

In support of her position, the grievant further contends that two similarly situated employees received overall ratings of "Extraordinary Contributor," and that her work performance during the 2017-2018 evaluation cycle was comparable to theirs. The comparators appear to have Employee Work Profiles and performance expectations that are identical to the grievant's, and they report to the same supervisor as the grievant. On the one hand, the agency's written descriptions of the grievant's performance and the comparators' performance on some individual factors ratings appears to be nearly identical, yet the grievant received a lower overall rating as to those factors. On the other hand, the information provided by the parties demonstrates that the agency's assessment of the grievant's performance, when compared with that of the two comparators, was based on identifiable differences in their performance during the evaluation cycle. For example, it appears that the two comparators completed assignments in the areas of outreach and presentations that justified ratings of "Extraordinary Contributor" as to those factors and the comparators' evaluations as a whole. EEDR finds that there are recognizable differences between the grievant's and the comparators' performance that support the agency's decision to rate them differently overall.

In addition, the grievant argues that her supervisor did not comply with policy because he did not provide feedback about her performance to her during the evaluation cycle or allow her adequate time to complete a self-evaluation before she received her annual evaluation. DHRM Policy 1.40, *Performance Planning and Evaluation*, states that "[s]upervisors *should* . . . provide feedback . . . periodically throughout the performance cycle."[9] Similarly, the agency's General Order ADM 10.02, *Performance Management and Evaluations*, states that "[a]ll performance . . . *should* be acknowledged and recognized throughout the performance cycle.[10] Even accepting as

[9] DHRM Policy 1.40, *Performance Planning and Evaluation*.
[10] General Order ADM 10.02, *Performance Management and Evaluations*, § 1(a).

true the grievant's contention that she did not receive feedback from her supervisor during the evaluation cycle, and while it may be a good management practice for agency managers to provide such feedback about employee performance, the supervisor does not appear to have acted in a manner that was inconsistent with state and/or agency policy here. Further, it is not clear, even if the supervisor had done so, that the behavior complained of by the grievant would have invalidated her evaluation rating.

With regard to self-evaluations, DHRM Policy 1.40 provides that an employee "should be asked to provide a self-evaluation at least two weeks prior to the evaluation meeting."[11] ADM 10.02 further states that management should provide the employee with materials to complete the self-assessment "[a]t least one month prior to the end of the performance cycle."[12] The grievant states that an email received from her supervisor on September 7, 2018, asked her to complete her self-evaluation. The grievant has relied on notes from two meetings in August 2018 to support her contention that employee self-evaluations must be submitted by September 7. However, the meeting notes appear to indicate that the September 7 deadline was for supervisors to have completed draft evaluations and submitted them to the reviewer, not a deadline for self-evaluations. The supervisor did not provide a deadline in his email to the grievant, and she does not appear have asked for clarification or an extension of the perceived deadline. Nonetheless, the grievant was asked to complete her self-evaluation more than two weeks before she received her evaluation (i.e., September 27, 2018). Although EEDR is sympathetic to the grievant's concerns, and acknowledges that she may not have had an opportunity to provide the thoughtful and reasoned response she might have otherwise prepared, the circumstances surrounding her self-evaluation do not appear to be inconsistent with policy or suggest that her evaluation is arbitrary or capricious.

In summary, and 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 grievant's work performance warranted an overall rating of "Contributor" rather than a rating of "Major Contributor" or "Extraordinary Contributor." Accordingly, EEDR finds that the grievance does not raise a sufficient question that the grievant's 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.

Retaliation

Finally, the grievant alleges that the agency gave her a rating of "Contributor" on her evaluation as a form a retaliation, apparently because she attempted to informally address work-related concerns with her supervisor in the past. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee

[11] DHRM Policy 1.40, *Performance Planning and Evaluation*; *see also* General Order ADM 10.02, *Performance Management and Evaluations*, § 6(b).
[12] General Order ADM 10.02, *Performance Management and Evaluations*, § 6(b).

engaged in a protected activity[13]; (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.[14] Ultimately, to support a finding of retaliation, EEDR must find that the protected activity was a but-for cause of the alleged adverse action by the employer.[15]

In this case, the grievant arguably engaged in protected activity by discussing workplace-related concerns with her supervisor.[16] Even inferring a causal connection between the grievant's exercise of protected activity and the "Contributor" rating on her performance evaluation, however, EEDR finds that the agency has provided legitimate, nonretaliatory business reasons for its assessment of her work performance. As discussed above, the information provided by the parties shows that the grievant's performance evaluation was based on management's reasoned evaluation of her performance in relation to established performance expectations. Furthermore, there are no facts that would indicate the grievant's protected activity was a but-for cause of her allegedly retaliatory performance evaluation. Accordingly, EEDR concludes that the grievant has not raised a sufficient question as to whether retaliation has occurred, and the grievance does not qualify for a hearing on this basis.

EEDR's qualification rulings are final and nonappealable.[17]

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[13] *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)(4).
[14] *See, e.g.*, Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014).
[15] *See id.* (citing Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013)).
[16] *See* Va. Code § 2.2-3000(A).
[17] *Id.* § 2.2-1202.1(5).