

Issues: Qualification – Performance (arbitrary/capricious evaluation), Discrimination (race), and Retaliation (other protected right); Ruling Date: October 5, 2016; Ruling No. 2017-4413; Agency: Department of Social Services; Outcome: Qualified.



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

**QUALIFICATION RULING**

In the matter of the Department of Social Services  
Ruling Number 2017-4413  
October 5, 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 his February 29, 2016 grievance with the Department of Social Services (the “agency”) qualifies for a hearing. For the reasons discussed below, the grievance is qualified for a hearing to the extent discussed below.

FACTS

On or about December 21, 2015, the grievant received his annual performance evaluation for 2014-2015, with an overall rating of “Below Contributor.” During the performance evaluation cycle, agency management issued two corrective actions to address issues with the grievant’s work performance: a Notice of Improvement Needed/Substandard Performance (“NOIN”) issued on or about January 15, 2015, and a Group I Written Notice issued on or about September 11, 2015. The grievant submitted a dispute to the agency regarding the overall rating on the evaluation, as well as the agency’s assessment of his performance with respect to certain job responsibilities. Having apparently received no additional response from the agency regarding his concerns with the evaluation, the grievant initiated a grievance on or about February 29, 2016 alleging that his performance evaluation was arbitrary and capricious. In the grievance, the grievant further asserts that the agency has engaged in discrimination, retaliation, and/or workplace harassment.<sup>1</sup> After the grievance proceeded through the management steps, the agency head declined to qualify it for a hearing. The grievant now appeals that determination to EDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those

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<sup>1</sup> The grievant also claims that two managers engaged in misconduct and requests that they be disciplined. While the alleged improper actions will be discussed below as it relates to the issues in this case, a hearing officer cannot direct an agency to “[t]ak[e] any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance) . . . .” See *Grievance Procedure Manual* § 5.9(b). While the agency may take corrective action as appropriate to address employee misconduct, such action is not available as a remedy under the grievance procedure. Accordingly, the grievant’s claim that the managers should be disciplined will not be discussed further in this ruling.

expectations.<sup>2</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>3</sup>

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.

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.<sup>4</sup> In this case, the grievant received both a NOIN and Written Notice during the evaluation cycle. The NOIN was issued to the grievant because he did not ensure that his work unit met assigned work targets and did not provide satisfactory customer service. The Group I Written Notice states, in part, that the grievant had not improved his work performance in the areas discussed in the NOIN.

On the grievant's performance evaluation, the reviewer stated that the grievant did not consistently address or monitor performance issues and that the agency received "an increased number of escalated customer services issues" due to the grievant's work performance in this area. The evaluation further noted that "[m]any [customer service] complaints were due to workers' lack of responsiveness," and some were related to the grievant's "interaction with customers . . ." Furthermore, the reviewer determined that the grievant "did not monitor caseload size" and the "number of pleadings filed by his team" was inconsistent and below the required volume for much of the evaluation cycle. Other sections of the grievant's performance evaluation also noted that the grievant did not "consistently conduct[] case review to ensure case compliance or to monitor performance," that the grievant "does not consistently model behavior expected of management team members" and that he "often . . . interacts with management team members negatively." Based on this information, it appears that the performance issues the NOIN and the Written Notice were issued to address were the primary reasons cited in the grievant's performance evaluation in support of the overall "Below Contributor" rating.

The grievant filed a grievance to challenge the issuance of the Group I Written Notice on or about October 11, 2015. That grievance has been qualified for a hearing by the agency head,

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<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).

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

<sup>4</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*.

and the agency's request for the appointment of a hearing officer is currently pending with EDR.<sup>5</sup> If the Written Notice is rescinded by a hearing officer, the performance issues cited in the NOIN may be sufficient, by themselves, to justify the overall rating of "Below Contributor" on the grievant's performance evaluation. However, it is also possible that the performance issues discussed in the NOIN would not support the "Below Contributor" rating. For example, an interim review conducted while the NOIN was active states that the grievant had made "Satisfactory Progress" or "Good Progress" in several areas relating to performance management and his work unit's completion of assigned tasks. In other words, whether the overall rating of "Below Contributor" is supported by the facts is dependent, to some degree, on the outcome of the hearing on the Group I Written Notice. A hearing officer will be in the best position to evaluate whether the grievant's performance evaluation is supported by the facts, most specifically those facts relating to the issuance of the Group I Written Notice. Accordingly, it is EDR's conclusion that the grievant's challenge to his performance evaluation raises a sufficient question as to whether it was arbitrary or capricious and should proceed to a hearing.

In addition, the grievance alleges that the agency has engaged in discrimination, retaliation, and/or harassment that resulted in or motivated its decision to rate him an overall "Below Contributor" on his performance evaluation. For example, the grievant asserts that his performance evaluation was not completed within the timeline set forth in DHRM Policy 1.40, *Performance Planning and Evaluation*, while other supervisors received their evaluations in a timely manner. He further argues that he was evaluated differently with respect to certain job responsibilities than other employees, and that this alleged disparate treatment was based on his race, sex, and/or age. In addition, the grievant claims he complained about the untimely completion of his performance evaluation and the allegedly discriminatory and/or harassing behavior to which he was subjected and was subsequently evaluated more critically than other employees and allegedly treated in a rude, disrespectful, and/or inappropriate manner by a supervisor. Because the grievant's claim that his performance evaluation was arbitrary and capricious qualifies for a hearing, EDR considers it appropriate to send these alternative theories and claims regarding the performance evaluation, including any alleged procedural abnormalities in its completion, for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.<sup>6</sup> Accordingly, the grievance is qualified for a hearing.

Whether the grievant's claims related to his performance evaluation are supported by the evidence in this case are factual determinations that a hearing officer, not EDR, should make. At the hearing, the grievant will have the burden of proof on this issue.<sup>7</sup> If the hearing officer finds that the grievant has met this burden, he or she may order corrective action as authorized by the grievance statutes and grievance procedure.<sup>8</sup> This qualification ruling in no way determines that

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<sup>5</sup> The grievant has five total pending grievances: the grievance at issue in this ruling, the October 11 grievance challenging the Group I Written Notice, and three additional grievances disputing disciplinary actions that were issued after the grievant received his annual performance evaluation. All of the other grievances have been qualified for a hearing by the agency head and are currently awaiting the appointment of a hearing officer by EDR.

<sup>6</sup> As with his claim that the evaluation was arbitrary and capricious, the grievant will have the burden of proving that the agency's action was discriminatory, retaliatory, and/or constituted a hostile work environment. *Rules for Conducting Grievance Hearings* §§ VI(C)(1), VI(C)(3).

<sup>7</sup> *Rules for Conducting Grievance Hearings* § VI(C).


<sup>8</sup> Va. Code § 2.2-3005.1(A); *Rules for Conducting Grievance Hearings* § VI(C).

any of the grievant's claim are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted.

CONCLUSION

The grievant's February 29, 2016 grievance is qualified for a hearing as described above. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for a hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.<sup>9</sup>

  
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Christopher M. Grab  
Director  
Office of Employment Dispute Resolution

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<sup>9</sup> See Va. Code § 2.2-1202.1(5).