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QUALIFICATION RULING

In the matter of the Department of Behavioral Health and Developmental Services
Ruling Number 2020-5101
June 24, 2020

The grievant has requested a ruling from the Office of Employment Dispute Resolution ("EDR")[1] at the Virginia Department of Human Resource Management ("DHRM") on whether his March 19, 2020 grievance with the Department of Behavioral Health and Developmental Services (the "agency") qualifies for a hearing. For the reasons discussed below, this grievance is qualified for a hearing.

FACTS

The grievant is employed as a Psychology Associate II at an agency-run hospital. Following the close of the 2018-2019 performance cycle, the grievant received an annual evaluation indicating a "Below Contributor" overall rating, based on "Below Contributor" ratings for every individual review category. The evaluation was signed by the grievant's then-supervisor ("Former Supervisor") and his department director ("Director"). In connection with the performance evaluation, the Former Supervisor also issued to the grievant a Notice of Improvement Needed/Substandard Performance.[2] After the grievant raised objections to the evaluation with facility management, the Director advised him that, at management's request, the overall rating indicated on his performance evaluation would change from "Below Contributor" to "Contributor." However, the re-issued evaluation retained the "Below Contributor" ratings for every review category as well as the supporting narrative comments.

On or about March 19, 2020, the grievant initiated a grievance challenging the re-issued performance evaluation as effectively still reflecting "Below Contributor" performance. He asserted that the narrative comments were "malicious, libelous, and false" and that the negative evaluation was a form of retaliation for the grievant's earlier reporting of his concerns that the

[1] The Office of Equal Employment and Dispute Resolution has separated into two office areas: the Office of Employment Dispute Resolution and the Office of Equity, Diversity, and Inclusion. While full updates have not yet been made to the *Grievance Procedure Manual* to reflect this change, this Office will be referred to as "EDR" in this ruling. EDR's role with regard to the grievance procedure remains the same.

[2] While the exact date when the grievant received the Notice of Improvement Needed is unknown, it appears that the Former Supervisor signed the original performance evaluation on October 15, 2019 and the Notice of Improvement Needed on November 1, 2019. To describe the performance deficiencies and improvements needed, the Notice refers to the annual performance evaluation.

Director had mishandled a patient evaluation.[3] He requested to have most or all of the performance evaluation rescinded and to work in a management chain that would not include the Former Supervisor or Director. Ultimately, the agency assigned the grievant to a different supervisor, but he remains under the Director's management authority. The agency head suggested further discussion with the Director to address the grievant's remaining concerns about his evaluation,[4] but otherwise declined to grant further relief or to qualify the grievance for a hearing. The grievant now appeals that determination to EDR.

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.[5] The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government, to include establishing performance expectations and rating employee performance against those expectations.[6] Thus, a grievance challenging a performance evaluation may qualify for a hearing only if the available facts raise a sufficient question whether the evaluation was "arbitrary or capricious,"[7] constituted a misapplication or unfair application of state policy,[8] and/or was the result of prohibited discrimination or retaliation.

Further, the grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."[9] Typically, then, a threshold question is whether the grievant has suffered an 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."[10] Adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[11]

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[3] The grievant asserts that, during the 2018-2019 performance cycle, he raised concerns that the Director improperly evaluated a patient as competent to stand trial when all other caregivers indicated the patient was clearly not competent. The grievant raised these concerns with an agency patient liaison, and he contends that the Former Supervisor and Director became aware of his reporting and subsequently issued him a Below Contributor evaluation. He asserts that his performance evaluation specifically references this reporting to justify a "Below Contributor" rating in the category of Quality Assurance/Administration. The evaluation notes that the grievant "several times in the past year ignored his chain of command to reach out to others such as the Resident Relations Liaison . . . without first seeking immediate supervision/consultation."

[4] The grievant has alleged that, following the initiation of the grievance, the Director has continued to retaliate against him by, for example, assigning him sole responsibility for duties that ordinarily require two to three staff members to cover. As a result, he contends, he recently received another Notice of Needs Improvement because he is unable to complete his tasks fully. In light of the grievant's retaliation allegations against the Director, he has expressed that he does not view further discussion with her as a productive option.

[5] *See Grievance Procedure Manual* § 4.1.

[6] *See* Va. Code § 2.2-3004(B).

[7] *Id.* § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c); *see id.* § 9 (defining arbitrary or capricious as "[i]n disregard of the facts or without a reasoned basis").

[8] For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, the available facts must raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action in its totality was so unfair as to amount to a disregard of the applicable policy's intent. *See, e.g.*, EDR Ruling No. 2020-4983.

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

[10] Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

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

Adverse Employment Action

Here, the record raises a sufficient question whether the grievant has experienced an adverse employment action. EDR has consistently recognized that unsatisfactory annual performance evaluations amount to tangible actions affecting the terms, benefits, or conditions of employment.[12] In this case, the grievant's original evaluation indicating "Below Contributor" for every rating, including the overall rating, was clearly an unsatisfactory annual performance evaluation. Although it appears that the agency subsequently amended the overall rating field to check the "Contributor" box instead of "Below Contributor," the body of the evaluation continues to reflect the same substandard performance on every metric that originally supported a "Below Contributor" overall rating. The record does not suggest any performance-based rationale for the discrepancy on the re-issued evaluation. As a result, the new "Contributor" overall rating appears to be nominal, at best.

Under these circumstances, EDR cannot conclude that the grievant's amended annual evaluation indicates satisfactory performance. Instead, the available facts raise a sufficient question whether the grievant's re-issued annual performance evaluation effectively rates him as "Below Contributor," meeting the threshold standard to qualify for a hearing.

Basis for Qualification

The grievant alleges that much of the content retained in his re-issued annual evaluation is false and the result of improper motives, *i.e.* retaliation for reporting unethical conduct by the Director. Generally, a performance evaluation may qualify for a hearing as arbitrary or capricious if management determined the rating without regard to the facts, such that no reasonable person could reach such a determination after considering all available evidence. 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.[13] However, if the grievance raises a sufficient question as to whether a performance evaluation resulted merely from personal animosity or some other improper motive, a further exploration of the facts by a hearing officer may be warranted.

In this case, while it appears that certain aspects of the performance feedback detailed on the evaluation may be justified or at least fairly debatable, other considerations call the validity of the content into question. First, the preparation of the evaluation indicates procedural problems. DHRM Policy 1.40, *Performance Planning and Evaluation*, states that, to receive a "Below Contributor" rating on his annual evaluation, an employee must have received "[a]t least one documented Notice of Improvement Needed/Substandard Performance form" during the evaluation cycle.[14] Such a Notice of Improvement Needed/Substandard Performance "must

[12] According to state policy, receiving a "Below Contributor" overall rating on an annual performance evaluation triggers a mandatory re-evaluation process that can potentially conclude with the employee's termination if their performance does not improve within three months. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*; *see, e.g.*, EDR Ruling No. 2017-4413; EDR Ruling No. 2017-4389.
[13] *See, e.g.*, EDR Ruling No. 2018-4701; EDR Ruling No. 2017-4571.
[14] DHRM Policy 1.40, *Performance Planning and Evaluation*. 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, 2018 to October 24, 2019). *Id.*

include an improvement plan, which . . . shall be developed by the supervisor and the employee."[15] The improvement plan "should be included on the form or attached to it."[16] Here, the record suggests that the grievant was initially given a "Below Contributor" rating without having received any such Notice during the evaluation cycle. Instead, he received a Notice signed after the close of the performance cycle advising him of substandard performance by reference to the evaluation. Rather than identifying any management-generated standards, the Notice simply instructed the grievant to "create his own plan of correction."

While the agency later amended the "Below Contributor" overall rating, as explained above, the change appears purely nominal or procedural in that it retains all other unsatisfactory feedback as well as the associated Notice, which raises legitimate concerns about the nature of the evaluation. By indicating satisfactory performance that is not substantiated by any of the grievant's review categories, the overall rating is, at the least, inconsistent and does not appear to be one that any reasonable person could assign in consideration of the remainder of the evaluation form.

Beyond this facial inconsistency, the record suggests at least some grounds to question whether the "Below Contributor" category ratings are arbitrary or capricious in substance. For example, in the category of Direct Patient Care, the evaluation states that the grievant is sometimes disengaged or absent from treatment team meetings and failed to assign patient care coverage during a two-week absence. However, the grievant alleges that he has long been assigned to multiple treatment teams that often meet at the same time, which means he is necessarily absent and coordinates with the teams accordingly. The grievant contends that the Former Supervisor never attended a team meeting to judge his engagement, and he has produced a letter from one of the team heads describing in detail his active and regular team contributions, even when he cannot attend due to his multiple assignments. The grievant also alleges that his cited absence was the result of unexpected complications following his own surgery. The grievant further asserts that management regularly assisted in assigning coverage for other employees' absences, but appears to hold him accountable in the evaluation for his own excused absences.

In the category of Quality Assurance/Administration, the evaluation indicates that the grievant eschews supervision, is disengaged and/or hostile and insubordinate toward supervisors, and "has been repeatedly unwilling to examine personal or professional problems with this supervisor or his department head and in fact several times in the past year ignored his chain of command to reach out to others . . . without first seeking immediate supervision/consultation." In response, the grievant likewise characterizes his managers as consistently unprofessional toward him and notes that the evaluation specifically criticizes him for reporting concerns in that regard. In the category of Professional Development, the evaluation indicates that the grievant had not attended any of six seminars he was required to complete by the end of the year. The grievant contends he had in fact attended two seminars and ultimately met the attendance requirement on time.

Finally, the performance evaluation and the record as a whole illustrate a relationship between the grievant and his Former Supervisor and Director that appears to be fraught with distrust, mutual frustration, and general dysfunction. To the extent that the grievant contributed to this dynamic, such conduct could appropriately be addressed in his annual performance evaluation;

[15] *Id.*
[16] *Id.*

however, the grievant asserts that he is unable to "examine personal or professional problems" with his managers because they are unreliable, unresponsive, and groundlessly suspicious and punitive toward him. While the grievant now has a new direct supervisor, he remains under the authority of the Director, who he alleges continues to retaliate against him by assigning him an excessive workload and then citing him for inevitable work deficiencies. In consideration of the totality of the circumstances presented in this case, the nature and substance of the grievant's unsatisfactory performance evaluation presents factual disputes that would be best resolved by a hearing officer.

Similarly, the record also supports a hearing officer's consideration of the grievant's claims of retaliation. Such claims may qualify for hearing based on evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[17] (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 non-retaliatory business reason for the adverse employment action, the grievance may qualify for a hearing only if the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[18]

In this case, the grievant appears to have engaged in protected activity and then at least arguably experienced an adverse employment action. The grievant cites multiple instances where he reported work-related concerns about the Former Supervisor and/or Director both to them individually and to other agency staff,[19] most notably an occasion where he discussed with a patient liaison a report by the Director that the grievant viewed as potentially fraudulent. The grievant's reporting of this and other concerns to appropriate agency authorities appears to be specifically referenced on his initial performance evaluation as a partial basis to rate his performance as "Below Contributor." Given the procedural irregularity of the performance evaluation, the numerous substantive factual disputes raised by its feedback, and the apparent long-standing dysfunction between the grievant and his managers, EDR concludes that the record raises a sufficient question whether the grievant's unsatisfactory annual performance evaluation was causally linked to his protected activity. EDR further considers it appropriate to include the grievant's retaliation theory for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

Accordingly, at the hearing, the grievant will have the opportunity to present evidence that the evaluation was arbitrary or capricious and/or motivated by unlawful retaliation. The grievant will have the burden of proof on these issues.[20] If the hearing officer finds that the grievant has met this burden, they may order corrective action as authorized by the grievance statutes and

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[17] *See* Va. Code § 2.2-3004(A). Only the following activities are protected activities under the agency's 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." *See also Grievance Procedure Manual* § 4.1(b)(4).

[18] *See* Felt v. MEI Techs., Inc., 584 Fed. App'x 139, 140 (4th Cir. 2014) (citing Univ. of Tex. S.W. Med. Ctr. v. Nassar, 570 U.S. 338 (2013)). Ultimately, a successful retaliation claim must raise a sufficient question as to whether, but for the grievant's protected activity, the adverse action would not have occurred. *Id.*

[19] State law mandates that employees of the Commonwealth "shall be able to discuss freely, and without retaliation, their concerns with their immediate supervisors and management." Va. Code § 2.2-3000.

[20] *Rules for Conducting Grievance Hearings* § VI(C).

grievance procedure.[21] This qualification ruling in no way determines that any of the grievant's claims are supported by the evidence, but only that further exploration of the facts by a hearing officer is warranted.

In sum, the facts presented by the grievant constitute certain claims that qualify for a hearing under the grievance procedure.[22] Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing, using the Grievance Form B.

EDR's qualification rulings are final and nonappealable.[23]

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[21] Va. Code § 2.2-3005.1(A). For example, the hearing officer may order the agency to repeat the evaluation process or to create a work environment free from retaliation. *Rules for Conducting Grievance Hearings* § VI(C).
[22] *See Grievance Procedure Manual* § 4.1.
[23] *See* Va. Code § 2.2-1202.1(5).