

Summary: Qualification-Performance-Arbitrary/Capricious, Misapplication; Retaliation-Grievance Activity; Ruling Date: June 5, 2002; Ruling #2002-005; Agency: Department of Social Services; Outcome: Retaliation and Performance Evaluation issues qualified; Misapplication issue not qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Social Services/No.2002-005
June 5, 2002

The grievant has requested a ruling on whether her October 16, 2001 grievance with the Department of Social Services (DSS) qualifies for a hearing. The grievant claims that management gave her an arbitrary or capricious rating in one element of her 2001 performance evaluation. The grievant further claims that management misapplied policy and retaliated against her by allowing her former supervisor to evaluate this element of her work and sign her evaluation.¹ For the reasons discussed below, this grievance qualifies for a hearing on the allegations of an arbitrary or capricious performance evaluation and retaliation.

FACTS

The grievant is employed at DSS as a Financial Services Practitioner I, following a promotion in June 2000. On September 25, 2000, she received an overall annual performance evaluation of "Exceeds Expectations" from her supervisor at that time (Supervisor A), who also rated her as "Exceeds Expectations" in setting up and disposing of the agency's "Chart of Accounts," stating on the evaluation that the grievant had "worked very diligently to ensure the timely disposition and set-up of the Chart of Accounts" and "continues to exhibit the skills and knowledge" needed to understand the agency's accounting structure.

On October 11, 2000, Supervisor A issued a Group I Written Notice to the grievant for allegedly having "walked out of [a] meeting refusing to meet and discuss unit concerns and issues" with him and another manager that day. In November 2000, the grievant challenged the Written Notice through a grievance, which concluded at the Third Resolution Step with the Notice remaining in the grievant's personnel file.

Thereafter, management became aware of ongoing conflict between the grievant and Supervisor A. In January 2001, a new supervisor (Supervisor Z) was assigned to evaluate the grievant's performance in all core responsibilities except one -- that of the

¹ Even though the Form A did not specifically allege that the management's actions constituted a misapplication of policy, the facts presented on her Form A attachments make out such a claim.

Chart of Accounts. Supervisor A continued to evaluate grievant's performance with the Chart of Accounts because his own performance plan required that he provide supervision of this element. On February 15, 2001, Supervisor A completed an interim evaluation in which he categorized the grievant's Chart of Accounts performance as "Identified for Improvement/Substandard." In a July 2001 meeting with Supervisors A and Z, the grievant asserts that Supervisor A "stood up and viciously screamed that he was [her] supervisor" and "shouted that he did not like [her]."

On September 28, 2001, the grievant received her 2001 performance evaluation with an overall rating of Contributor. Supervisor Z had rated her as a Contributor on the two core responsibilities under his supervision, but Supervisor A gave her the lowest of three possible ratings, Below Contributor, on the "Chart of Accounts" core responsibility. Effective November 1, 2001, the grievant was reassigned to another chain of command, where she does not report at all to Supervisor A or Z.

DISCUSSION

Misapplication or Unfair Application of Policy

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy. In this case, the grievant claims that management misapplied or unfairly applied policy by allowing Supervisor A to evaluate her performance in the Chart of Accounts area of her 2001 performance evaluation and to sign that evaluation.

The controlling policy in this case is DHRM Policy 1.40.² This policy provides that an employee who is working for two or more supervisors at the same time *should* be evaluated by only one of the supervisors with input from the other supervisor, and that only the evaluating supervisor *should* sign the evaluation form. In this case, both Supervisor A and Z (former and new) signed the grievant's performance evaluation. Ideally, Supervisor Z should have evaluated the grievant's performance with input from Supervisor A, and only Supervisor Z should have signed the evaluation. Nevertheless, the applicable policy uses language that only suggests how an employee with two supervisors should be evaluated. The policy does not use mandatory language (e.g., "must" or "shall"). Accordingly, this grievance provides no evidence that a mandatory policy was misapplied or so unfairly applied as to amount to a disregard of the underlying intent of that policy. Accordingly, this issue does not qualify for a hearing.

Arbitrary or Capricious Performance Evaluation

² DHRM Policy 1.40 (effective April 1, 2001).

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.³ Accordingly, to qualify this issue for a hearing, there must be facts raising a sufficient question as to whether the grievant's performance ratings were "arbitrary or capricious."⁴

"Arbitrary or capricious" means that 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.⁵ 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.

This grievance should be allowed to proceed to hearing because the allegations and undisputed facts, when viewed in their totality, raise a sufficient question as to whether the grievant's Below Contributor rating in the Chart of Accounts area was arbitrary or capricious. For instance, the grievant claims that her former supervisor's statements about account discrepancies are factually unsubstantiated, and that he has evaluated her performance in areas for which she was not responsible, and for which expectations had not been established.⁶ In support of the rating, management has offered a copy of her interim evaluation and a series of e-mails related to her work. Both parties have presented lengthy and detailed documentation to support their conflicting positions, from which factual conclusions should not (nor could not) be drawn within the context of a qualification determination. Accordingly, further development of the facts at hearing is warranted in light of the significant dip between the grievant's September 2000 and September 2001 annual performance ratings in the Chart of Accounts area; the undisputed interpersonal conflict between the grievant and Supervisor A since at least October 2000, including the alleged offense cited in the Group Notice and the resulting November 2000 grievance; and the parties' conflicting allegations and documentary evidence as to whether Supervisor A's September 2001 evaluation of the grievant's performance had a reasoned basis related to established expectations.

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

⁴ See Va. Code §2.2-3004(A); *Grievance Procedure Manual* §4.1(b), page 10.

⁵ *Id.*; see also *Norman v. Department of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

⁶ The grievant points out that the purported discrepancies in Chart of Accounts-related data cited by Supervisor A could have arisen because the Web data is updated at different times from the data contained in other automated systems within the agency. The grievant also notes that she is not the only person with access to the Chart of Accounts, so she should not be automatically held accountable for all discrepancies.

Retaliation

For a retaliation claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;⁷ (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 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.⁸

In this case, the grievant claims that management retaliated against her for filing her November 2000 grievance by allowing Supervisor A to evaluate an important element of her work and to sign her evaluation, knowing that she had experienced significant interpersonal conflict with him. Further, she claims that Supervisor A retaliated against her for the same reason by assigning a Below Contributor rating.⁹ The agency asserts that the grievant's Below Contributor evaluation had a reasoned basis consistent with established expectations, and was not the result of retaliation.

It is undisputed that the grievant engaged in a protected activity by filing a grievance with Supervisor A in November 2000. In addition, she potentially suffered an adverse employment action -- a Below Contributor rating on a key job element, which arguably could reduce her opportunities for higher level assignments and promotions (even though she received an overall rating of Contributor).¹⁰ Further, for the reasons discussed above in the *Arbitrary or Capricious Performance Evaluation* section, this grievance raises a sufficient question as to whether a causal link exists, in other words, whether the Below Contributor evaluation resulted from an intent to retaliate against the grievant for her prior grievance activity, from personal animosity unrelated to her prior grievance activity, or from a reasoned basis related to established expectations. Thus, the issue of retaliation is also qualified for hearing.

⁷ See the *Grievance Procedure Manual* § 4.1(b), page 10. 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 a violation of fraud, waste or abuse to the state Hotline; or exercising any right otherwise protected by law."

⁸ See *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653 (4th Cir. 1998); see also *Kubicko v. Ogden Logistics Services*, 181 F. 3d 544, 552 n.7 (providing that a Title VII plaintiff must prove that retaliation was *the* motivating factor not just *a* motivating factor).

⁹ The grievant offered other examples of retaliation, including but not limited to, her former supervisor embarrassing her in front of co-workers, and making unreasonable demands. See grievant's Form A and attachments.

¹⁰ See *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999) (under Title VII, "adverse employment action" typically requires discharge, demotion, or reduction in grade, salary, benefits, level of responsibility, title, or opportunities for future reassignments or promotions).

APPEAL RIGHTS AND OTHER INFORMATION

This ruling is not a finding of an arbitrary performance evaluation or retaliation, only that the evidence is conflicting and warrants further review by a hearing officer. The parties should note that in deciding a case, a hearing officer may not substitute his or her judgment for that of management, or order that a specific rating be given. A hearing officer may only determine whether the grievant's evaluation is arbitrary or capricious, and if he or she so finds, order the agency to reconduct the evaluation on an objective basis related to the performance expectations established in the grievant's performance plan. Also, the grievant will have the burden of proving that the performance evaluation was retaliatory. Please note, however, that if the hearing officer finds that the evaluation was retaliatory, the scope of relief he or she can offer is limited. In retaliation cases, a hearing officer may only issue a general order that the agency cease the retaliation and take measures to prevent any future retaliation. A hearing officer can only recommend, not order, that the agency take specific actions to remedy the retaliation.¹¹

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal to the circuit court this Department's determination regarding the issue not qualified for hearing (misapplication/unfair application of policy), she must notify the human resources office, in writing, within five workdays of receipt of this ruling.

Claudia T. Farr
Director

¹¹ *Rules for Conducting Grievance Hearings*, page 11.