

Summary: Qualification; Performance-Arbitrary/Capricious; Ruling Date: June 4, 2002; Ruling #2002-039; Agency: Department of Mental Health, Mental Retardation and Substance Abuse Services; Outcome: Not qualified.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Mental Health, Mental Retardation, and  
Substance Abuse Services  
Ruling Number 2002-039  
June 4, 2002

The grievant has requested a ruling on whether her November 28, 2001 grievance with the Department of Mental Health, Mental Retardation, and Substance Abuse Services (DMHMRSAS) qualifies for a hearing. The grievant claims that her October 23, 2001 performance evaluation is arbitrary or capricious because the reviewer relied on a past Written Notice and past counseling memoranda that the grievant claims are not justified. She also claims that her reviewer's assessment of her performance should not have superceded her immediate supervisor's evaluation. Finally, the grievant asserts that she has suffered ongoing harassment from her reviewer. For the reasons discussed below, this grievance does not qualify for a hearing.

**FACTS**

The grievant is employed as a Human Services Care Worker at DMHMRSAS. In the months preceding her 2001 performance evaluation, the grievant states that her reviewer treated her differently than other employees, and harassed her by writing her up for things that she did not do. She lists several incidents where she received counseling memoranda or a Written Notice that she states she did not deserve. She claims that these alleged performance problems and her 2001 performance evaluation are examples of harassing behavior by her reviewer.

On October 23, 2001, the grievant received an overall rating of "Below Contributor" on her performance evaluation for the 2001 performance cycle. The performance evaluation consisted of six elements, of which three were rated "Contributor" and the remaining three were rated as "Below Contributor." Comments on the performance evaluation note that the ratings were based on a "Notice of Improvement Needed/Substandard Performance" memorandum issued March 27, 2001 for excessive tardiness, a counseling memorandum issued June 14, 2001, and a Written Notice issued September 1, 2001 for failing to follow lifting and positioning procedure, which the grievant did not seek to remove from her record through the grievance procedure.

The grievant maintains that her reviewer's assessment should not have "weighed more" than the assessment of her immediate supervisor and that her documented performance problems were not accurate. Specifically, she claims that (1) the March 27 "Notice of Improvement Needed/Substandard Performance" for excessive tardiness is unfair and she should have an opportunity to explain why she had been late three days in March, (2) another "Notice of Improvement Needed/Substandard Performance" issued on March 20 was unfair,<sup>1</sup> (3) she was following her supervisor's directions on June 14, and therefore should not have received a counseling memorandum for the incident that day, and (4) she did, in fact, follow lifting and positioning procedure on September 1, and thus should not have received the Written Notice. The grievant claims that because these incidents are unfounded, they should not be considered in her performance evaluation, and requests a hearing so she may prove that she should not have received the March "Notices of Improvement Needed/Substandard Performance," the June 14 counseling memorandum or the September 1 Written Notice.

### DISCUSSION

#### *Misapplication of Policy*

The grievant claims that her immediate supervisor should prepare her performance evaluation and her reviewer's opinion should not supercede that of her immediate supervisor. In essence, the grievant is claiming that management violated Department of Human Resources Management (DHRM) Policy 1.40, which states that it is the role of the supervisor to complete the performance evaluations.<sup>2</sup> The policy further states that the "reviewer," who is the employee's immediate supervisor's supervisor,<sup>3</sup> is supposed to review the evaluations before they are presented to the employee and has the authority to make any changes.<sup>4</sup> Therefore, the reviewer has the "final say" on the employee's performance evaluation. This policy gives a considerable amount of discretion and authority to the reviewer in the preparation of performance evaluations. Although the reviewer has considerable discretion, the policy does not allow management to ignore the provision that obliges the supervisor, not the reviewer, to complete the evaluation.

Here, there is no evidence that policy was violated. In a memorandum to the grievant, her reviewer states that the grievant's supervisor completed the performance evaluation and that she (the reviewer) agreed with his assessment

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<sup>1</sup> This "Notice of Improvement Needed" was not cited on the 2001 performance evaluation but was included in the grievance record. It was the result of an incident in which the grievant was to spend no more than \$25 on toiletries for a client. The grievant spent \$4.23 more than the allowed amount, but claims that she spent her own money for the excess amount.

<sup>2</sup> DHRM Policy 1.40 "Conducting Performance Evaluations - Supervisor's Role."

<sup>3</sup> *Id.* "Definitions."

<sup>4</sup> *Id.* "Conducting Performance Evaluations - Reviewer's Role."

and signed it.<sup>5</sup> Moreover, the signature page to the performance evaluation indicates that it was the grievant's supervisor who evaluated her performance, and the reviewer signed the evaluation later.<sup>6</sup> Therefore, this grievance presents insufficient evidence that management failed to follow policy on the completion of performance evaluations.

#### *Arbitrary and Capricious Performance Evaluation*

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.<sup>7</sup> Accordingly, to qualify a grievance for a hearing, there must be facts raising a sufficient question as to whether the grievant's performance ratings were "arbitrary or capricious."<sup>8</sup>

"Arbitrary or capricious" means that management determined the grievant's 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 hearing when there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations.<sup>9</sup>

The grievant claims that the low ratings reflect the reviewer's personal animosity toward her, rather than her work record. Further, the grievant maintains that management incorrectly relied on documentation that, in her opinion, does not provide accurate descriptions of what happened. The grievant hopes to show at a hearing why the Written Notice and other corrective actions were not warranted, and thus should not have been considered in assessing her performance for the 2001 cycle. Management claims, however, that her evaluation was based upon documented problems with the grievant's performance throughout the 2001 cycle.

In this case, management's perceptions of the grievant's alleged performance deficiencies have been adequately documented. Further, although

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<sup>5</sup> See Memorandum to the grievant from her reviewer, dated November 8, 2001.

<sup>6</sup> The supervisor signed the evaluation on October 1, 2001 and the reviewer signed on October 6, 2001. It appears that no revisions were made to the performance evaluation.

<sup>7</sup> Va. Code § 2.2-3004(B)(reserving to management the exclusive right to manage the affairs and operations of state government).

<sup>8</sup> Va. Code § 2.2-3004(A)(iv); *Grievance Procedure Manual*, § 4.1(b), pages 10-11.

<sup>9</sup> Va. Code § 2.2-3004(A)(iv); *Grievance Procedure Manual* § 4.1(b), page 10-11; Norman v. Dept. of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999)(Delk, J.).

the grievant contends that the reviewer's personal animosity toward her was the cause of her low ratings (and not her performance), this grievance presents insufficient evidence that her evaluation rating was without a reasoned basis related to established expectations.

### *Harassment*

While grievable through the management resolution steps, claims of supervisory harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, religion, political affiliation, age, disability, national origin, or sex.<sup>10</sup> In this case, the grievant does not assert that the actions of her reviewer were based on any of these factors. Rather, the facts cited in support of the grievant's claim can best be summarized as describing significant conflict between the grievant and her reviewer. Such claims of supervisory conflict, are not among the issues identified by the General Assembly that may qualify for a hearing.

We wish to note that mediation may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which two mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work units involved.

### CONCLUSION

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 this determination to the circuit court, she should notify her Human Resources Office, in writing, within five workdays of receipt of this ruling. If the court should qualify the grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant should notify them that she does not want to proceed.

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Claudia T. Farr  
Director

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<sup>10</sup> Va. Code § 2.2-3004(A).