

Issue: Qualification-Performance-Arbitrary/Capricious; Ruling Date: August 5, 2002;
Ruling #2002-058; Agency: Virginia Employment Commission; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Employment Commission/ No. 2002-058
August 5, 2002

The grievant has requested a ruling on whether her December 6, 2001 grievance with the Virginia Employment Commission (VEC) qualifies for a hearing. The grievant alleges that her 2001 performance evaluation was arbitrary and capricious because it failed to recognize her extraordinary performance during the 2001 performance cycle.¹ For the following reasons, this grievance does not qualify for a hearing.

FACTS

The grievant manages a field office for VEC. She claims that her 2001 performance review, on which she received a "Contributor" rating, was arbitrary and capricious. In support of her claim, the grievant alleges that management failed to consider her accomplishments during the performance cycle, particularly with respect to a project for one of her subordinates received an Acknowledgement of Extraordinary Contribution Form.² She claims that her own work on the project also deserved an acknowledgement form, which would have qualified her for an overall rating of "Extraordinary Contributor."

Management claims that a "Contributor" rating for the grievant is appropriate. It acknowledged that the grievant received praise on her performance evaluation for her work on the project, but cited areas of concern that justified the overall "Contributor" rating. First, the grievant's supervisor was concerned about alleged inaccurate reporting by the grievant's staff members. Second, one of the grievant's employees was six weeks behind in data entry. Finally, management claimed that the grievant's office accumulated the highest number of Quality Control errors.

¹ The grievant subsequently claimed that management misapplied policy and retaliated against her for filing complaints with EEOC. However, the grievance procedure states that "once the grievance is initiated, additional claims may not be added." *Grievance Procedure Manual* § 2.4, page 6. Therefore, this ruling will only address the grievant's claim that her performance evaluation was arbitrary and capricious.

² The grievant filled out an acknowledgement form for herself and for the co-worker (her subordinate), but while her supervisor signed off on the co-worker's form, he did not sign the grievant's form.

The grievant claims that she was not aware of these alleged concerns until after she filed her grievance. She further claims that the reporting errors took place while she was on extended leave and that one of her subordinates was responsible for the data-entry backlog. Moreover, she notes that the Quality Control Errors were out of the control of her office, and she should not be held accountable for them.³ VEC claims that regardless of whom is to blame for any of the above errors, the grievant is the manager of the office and is accountable for them.

DISCUSSION

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.⁴ 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."⁵

"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.⁶

Further, Department of Human Resources Management (DHRM) policy states that "supervisors are encouraged to recognize incidents of employee performance that truly are extraordinary."⁷ It further states that an employee must receive at least one Acknowledgement of Extraordinary Contribution form during the performance cycle in order to receive an overall rating of "Extraordinary Contributor" on her performance evaluation.⁸ While the policy encourages management to issue acknowledgement forms for extraordinary performance, nothing in the policy requires this practice. Therefore, the decision to issue an acknowledgement form is wholly within the discretion of management.

³ The grievant reported that Quality Control errors can be the result of (1) inaccurate reporting by employees, (2) inaccurate reporting by employers, or (3) the local office. She claims that the errors from her office were not caused by the local office, but by inaccurate reports from employees and employers, both of which are out of the control of the office.

⁴ Va. Code §2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

⁵ Va. Code §2.2-3004(A); *Grievance Procedure Manual* §4.1(b), page 10.

⁶ *Id.*; See *Norman v. Department of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

⁷ DHRM Policy 1.40, "Performance Planning and Evaluation."

⁸ *Id.*

The grievant and her supervisor disagree about whether she deserved an Acknowledgement of Extraordinary Contribution for her work on a particular project. He claims that he requested the grievant to provide further documentation from the client to support her assessment of her own performance, but that he never received anything from her. He further states that he merely “signed-off” on the subordinate’s acknowledgement form, but that the grievant actually issued it to the subordinate, because she is his supervisor. In any event, even if the grievant had received an acknowledgement form, it would not have mandated an overall rating of “Extraordinary Contributor.” DHRM policy notes that “the receipt of one or more Acknowledgement of Extraordinary Contribution forms does not automatically entitle an employee to an overall rating of ‘Extraordinary Contributor.’”⁹

From a careful review of the grievance record, and as management acknowledged in the step responses, it appears that the grievant is a dedicated and valued employee. Her performance evaluation reflects several extraordinary contributions. That fact, however, and the initiatives she cited, do not necessarily establish that the grievant’s performance was unquestionably extraordinary *throughout* the rating period, or that the current evaluation of “Contributor” has no basis in fact. Whether the initiatives that the grievant undertook elevated the overall rating to “Extraordinary Contributor” was a judgement within management’s discretion.

The grievant alleges that her supervisor should have alerted her to his areas of concern during the performance cycle, and that the reasons given to justify her rating are merely excuses to “cover up” an arbitrary performance evaluation. In support of her claim, the grievant points out that the backlog in her office was the responsibility of another employee and that her office could not be held accountable for quality control errors. In fact, an agency memorandum supports the conclusion that the errors were not the result of her office, but were caused by external factors.

However, although management generally should advise employees on their performance during the performance cycle, policy does not mandate that practice.¹⁰ In addition, any failure by management to advise the grievant about performance issues throughout the cycle does not lead to the conclusion that the evaluation was arbitrary or capricious. In sum, while the agency acknowledges that the grievant is an excellent employee, it has concluded that her overall performance during the 2001 cycle simply did not warrant an “Extraordinary” rating.

Although there is obvious disagreement between the grievant and her supervisor regarding her annual performance evaluation, there is insufficient evidence to support the assertion that her overall rating was determined without a basis in fact. Rather, it appears

⁹ *Id.*

¹⁰ DHRM policy states that “supervisors *should* document employees’ performance and provide feedback to them periodically throughout the performance cycle.” (emphasis added).

that her complaint substantially centers on the exercise of judgment by her supervisor in evaluating her performance. Accordingly, this grievance does not qualify for a hearing.

APPEAL RIGHTS AND OTHER INFORMATION

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, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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