

Issue: Qualification/Position/Classification/Demotion; Ruling Date: February 21, 2003;
Ruling #2002-161; Agency: Marine Resources Commission; Outcome: Not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Marine Resources Commission
Ruling Number 2002-161
February 21, 2002

The grievant has requested a ruling on whether his July 3, 2002 grievance with the Marine Resources Commission qualifies for a hearing. The grievant claims that his demotion was unwarranted.¹ For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant was formerly employed as a Fisheries Management Specialist Senior, Pay Band 4. Commencing in May 2001, management documented the grievant's need for improvement in performance through the issuance of interim evaluations and Notices of Improvement.² On October 30, 2001, the grievant received his annual performance evaluation with an overall rating of "Below Contributor." On November 7, the grievant was issued a performance re-evaluation plan setting forth performance measures for the following three-month re-evaluation period. On January 30, 2002, the grievant was re-evaluated and again issued an overall rating of "Below Contributor."

Under Performance Evaluation Policy, management had the option of demoting, reassigning, or terminating the grievant by the end of the three-month re-evaluation period.³ Instead, Management elected to provide more specific guidelines and observe the grievant's performance for an additional three-month period. On April 8, 2002, the grievant was again re-evaluated and issued an overall rating of "Below Contributor." As a consequence, he was issued a revised job description and Performance Plan, and

¹ The grievant also stated that he could not access documents related to his grievance. During this Department's investigation of this matter, however, the grievant stated that he had been provided the requested documents and the issue was resolved. Accordingly, this issue will not be further addressed in this ruling.

² On May 15 and August 23, 2001, the grievant was issued interim evaluations citing substandard performance. On July 5 and October 12, 2001, the grievance was issued Notices of Improvement/Substandard Performance.

³ See the Department of Human Resources Management (DHRM) Policy 1.40, Performing Planning and Evaluation, page 14.

forewarned that failure to meet performance measures could result in demotion or termination of his employment.

On June 11, 2002, the grievant was re-evaluated with an overall rating of "Below Contributor." The re-evaluation consisted of four elements upon which the grievant's performance was rated. He received a rating of "Below Contributor" on each of the four job elements. As a result, he was demoted to his current position of Fisheries Management Technician, Pay Band 3, with a 15% decrease in pay.

DISCUSSION

The applicable policy is Department of Human Resource Management (DHRM) Policy No. 1.40, Performance Planning and Evaluation.⁴ Under the DHRM policy, supervisors should document employees' performance and provide feedback periodically throughout the performance cycle. Such feedback may in the form of interim evaluations.⁵ Supervisors should also identify poor, substandard, or unacceptable performance and document such performance by issuing a Notice of Improvement Needed/Substandard Performance form.⁶

An employee who receives a rating of "Below Contributor" on his annual performance evaluation must have a performance re-evaluation plan developed and be re-evaluated for up to a three-month period.⁷ If the employee's performance during the re-evaluation period is documented as not improving, he may be demoted, reassigned, or terminated.⁸

In this case, rating officials provided periodic feedback to the grievant through the issuance of interim evaluations and Notices of Needed Improvement/Substandard Performance during the six-month period prior to his 2001 annual performance evaluation, which resulted in an overall rating of "Below Contributor." Subsequently, management went far beyond what was mandated by policy to assist the grievant in improving his performance. Although Performance Evaluation Policy allows management the option of demoting, reassigning, or terminating the grievant in January 2002, at the end of the initial three-month re-evaluation period, the agency chose instead to allow him until June 10, 2002 to meet established performance measures.

In conclusion, the evidence provided by the grievant is insufficient to support his claim that his demotion was unwarranted.⁹ In contrast, the agency has repeatedly

⁴ See DHRM Policy 1.40 revised 8/01/01.

⁵ See DHRM Policy 1.40, *Feedback*, page 4.

⁶ See DHRM Policy 1.40, *Identifying Substandard Performance*, page 5.

⁷ See DHRM Policy 1.40, *RE-EVALUATION*, page 13.

⁸ See DHRM Policy 1.40, *If Performance Does Not Improve*, page 14.

⁹ To show that his demotion was unwarranted, the grievant would have to show that the "Below Contributor" rating was "arbitrary or capricious." "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

documented a reasoned basis for its evaluation of the grievant's performance in relation to established expectations, and has complied with all established policy guidelines in implementing the demotion. 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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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. Norman v. Dept. of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999)(Delk, J.). Here, the evidence provided by the grievant was carefully reviewed for this ruling, but it failed to raise a sufficient question as to whether his performance evaluation was arbitrary or capricious and thus this grievance does not qualify for a hearing.