

Issue: Qualification/Performance/Arbitrary-Capricious; Ruling Date: February 12, 2003;  
Ruling #2002-222; Agency: Department of State Police; Outcome: not qualified.



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of State Police/No.2002-222  
February 12, 2003

The grievant has requested a ruling on whether his October 15, 2002 grievance with the Department of State Police (agency) qualifies for a hearing. The grievant claims that management gave him an arbitrary or capricious rating in one element of his 2002 performance evaluation and for relief, asks that the rating for that element be raised to Contributor and that his Overall Performance Evaluation rating be raised to Major Contributor.<sup>1</sup> For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a State Police Senior Trooper. On September 16, 2002, he received an overall annual performance evaluation of "Contributor" from his supervisor. This supervisor had originally rated him as "Below Contributor" in the first category of "Promotes Highway Safety," in large part for not issuing enough traffic tickets. On October 15, 2002, the grievant filed his grievance claiming that his performance evaluation was arbitrary and capricious. During the grievance process, the Captain changed the "Promotes Highway Safety" rating to "Marginal Contributor" but the overall rating remained "Contributor."<sup>2</sup> The agency head denied qualification, and the grievant subsequently requested that the Director of this Department qualify the grievance for hearing.

DISCUSSION

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.<sup>3</sup> Accordingly, to qualify this issue for a hearing, there must be facts raising

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<sup>1</sup> See Grievance Form A dated 10/15/2002.

<sup>2</sup> See Second Step Response dated October 25, 2002.

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

a sufficient question as to whether the grievant's performance rating was "arbitrary or capricious."<sup>4</sup>

"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.<sup>5</sup> 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.

"Promotes Highway Safety" Rating: The grievant asserts that receiving a "Marginal Contributor" rating in the "Promotes Highway Safety" area was arbitrary or capricious. His performance evaluations indicate that he issued 169 summons and made two DUI arrests during the 2001-2002 performance cycle, an increase over the 2000-2001 performance cycle when he had been rated "Contributor" with only 168 summons and one DUI arrest.<sup>6</sup> Further, the grievant contends that his supervisor failed to fully credit the time he must spend off the road working in his specialty area, crime prevention. Moreover, the grievant asserts that he asked his supervisors to define the criteria for "Contributor" and "Exceptional Contributor" at each quarterly review, and did not receive an answer. The grievant states that he asked his supervisor at the annual review to define the meaning of "write more tickets" and to explain what had changed since the previous year. The grievant asserts that the supervisor indicated that he did not have an answer to those questions and that the grievant needed to ask the Lieutenant.<sup>7</sup> The grievant claims that initially the Lieutenant would only respond that his numbers were not acceptable but eventually told him, when pressed, that his numbers needed to increase by approximately three times.<sup>8</sup> The grievant proffers the agency's General Order No. 23 (Patrol Duty) that defines the role of a sworn employee who observes a violation of the law and does not include any reference to an officer writing a certain number of tickets.<sup>9</sup>

In support of the 2002 "Marginal Contributor" rating for "Promotes Highway Safety," management asserts that the performance rating levels were increased from three

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

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

<sup>6</sup> See 2002 Employee Performance Evaluation dated 9/16/02 and 2001 Employee Performance Evaluation dated 10/2/01. An attachment to the Grievance Form A states that 180 (not 169) tickets were written in 2002; however, whether 169 or 180 tickets were written is immaterial under the facts of this case.

<sup>7</sup> See Attachment #1 to Grievance, page 1, dated 10/15/02.

<sup>8</sup> *Id.*, page 2.

<sup>9</sup> See Department of State Police General Order No. 23, page 23-3, revised October 1, 1998.

to five during 2002, allowing for the differentiation between a “Marginal Contributor” and a “Contributor,” a distinction that did not exist at the time of the 2001 performance evaluation. Management claims that if the “Marginal Contributor” category had existed in 2001, the grievant would have received a “Marginal Contributor” rating for this core responsibility in that year as well. Management also states that the grievant’s performance in this first and most important core area was well below that of his peers, similarly situated Troopers, during the 2001-2002 performance cycle.<sup>10</sup> Additionally, management asserts that while there exists no ticket “quota,” the grievant had been advised throughout the performance cycle of the need for better performance in this area. Finally, management notes that it did give the grievant credit for his “off the road” work by rating him as “Extraordinary Contributor” in the “Perform Crime Prevention Specialty” area.<sup>11</sup>

Overall Rating: The grievant asserts that his overall annual evaluation should be “Major Contributor.” However, management asserts that the grievant is ineligible to receive a “Major Contributor” rating as he received less than a “Contributor” for the primary core responsibility, “Promotes Highway Safety.” Management proffered a copy of the Performance Evaluation Handbook for Supervisors, which states in pertinent part that “[i]f an employee receives a rating below “Contributor” for any core responsibility, he or she is ineligible to receive an overall performance level of “Extraordinary Contributor” or “Major Contributor.”<sup>12</sup> Moreover, management asserts that the grievant is ineligible for an overall rating of “Major Contributor” because he had not received at least one Acknowledgement of Extraordinary Contribution during the performance year as required by policy.<sup>13</sup>

In light of all the above, we conclude that there is insufficient evidence to support the grievant’s assertion that his rating on the “Promotes Highway Safety” responsibility and his overall rating were determined without a basis in fact or resulted from anything other than management’s reasoned evaluation of his performance in relation to that of similarly-situated peers. Accordingly, this grievance does not qualify for a hearing.

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<sup>10</sup> During this investigation, management provided to this Department copies of the ratings of sixteen similarly situated Troopers (with personally identifiable information redacted), who had been evaluated as marginal to extraordinary in the “Promotes Highway Safety” core responsibility. The grievant’s numbers were the lowest of all. The next lowest numbers were for a Trooper who had issued 235 summons and six DUI’s, (substantially higher than the grievant’s), and had received a “Contributor” rating. The highest numbers belonged to a Trooper rated as “Extraordinary,” who had issued 1,367 summons and sixteen DUI’s.

<sup>11</sup> See 2002 Employee Performance Evaluation dated 9/16/02, Section (F).

<sup>12</sup> See Performance Evaluation Handbook for Supervisors, page 18. See also Clarification of General Order 11 – Performance Evaluation, dated September 6, 2002.

<sup>13</sup> See EWP Performance Evaluation Part VIII (3) (“[a]n employee receiving an overall rating of “Extraordinary Contributor” or “Major Contributor” must have received at least one Acknowledgement of Extraordinary Contribution form during the performance cycle”).

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions that 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, he should notify his Human Resources Office, in writing, within five workdays of receipt of this ruling. If the court should qualify his grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless he notifies them that he does not want to proceed.

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Claudia T. Farr  
Director

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