

Issue: Qualification/grievant claims arbitrary and capricious performance evaluation;
Ruling Date: April 28, 2004; Ruling #2003-143; Agency: Virginia Department of
Transportation; Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling Number 2003-143
April 28, 2004

The grievant has requested a ruling on whether his April 30, 2003 grievance with the Department of Transportation (VDOT or the agency) qualifies for hearing. The grievant claims that his 2002 performance evaluation is arbitrary or capricious and retaliatory.¹ For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

Prior to his termination on April 22, 2003, the grievant was employed as a Project Administrator with the Department of Transportation. On April 30, 2003, the grievant initiated a grievance challenging his 2002 performance evaluation as arbitrary and capricious and retaliatory.² More specifically, the grievant alleges that although he agrees with his overall rating of "Contributor", he disagrees with the "Below Contributor" rating in the "Project Coordination" section of his 2002 performance evaluation. Additionally, the grievant disagrees with certain comments contained in the "Performance Management" and "Administrative Coordination" sections of his 2002 performance evaluation.

DISCUSSION

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

¹ The grievant has presented a large volume of information to support his claims. Additionally, the grievant has presented numerous documents to support issues not contained in his April 30, 2003 grievance. Issues not encompassed within his April 30, 2003 grievance will not be addressed in this qualification ruling. *See Grievance Procedure Manual* § 2.4, page 6.

² While not specifically mentioned on Form A, during the management resolution steps and this Department's investigation, the grievant repeatedly cited retaliation as a primary reason for the alleged arbitrary or capricious performance evaluation.

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 rating, or an element thereof, was "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.

Performance Management: The grievant received a rating of "Contributor" in the "Performance Management" section of his 2002 performance evaluation; however he is dissatisfied with a comment contained in this section. Specifically, the agency asserts that the grievant, in supervising another employee, "was expected to consult with management to recommend or suggest approval of work hours, training and related activities before approving" and that the grievant was consulted about the need to discuss these decisions in advance and obtain his supervisor's approval before making any decisions. The grievant claims that he always consulted his supervisor with regard to these activities before approving. VDOT, however, has provided evidence in the form of emails between the grievant and his supervisor confirming that at least on one occasion, the grievant failed to consult management prior to approving the work hours of an employee he supervised.

Project Coordination: In support of the "Below Contributor" rating for project coordination, the agency claims that the grievant (1) failed to "exercise good judgment during interactions with his immediate supervisor, fellow employees, external customers, and the general public;" (2) received a disciplinary memorandum for exhibiting threatening and harassing behavior; (3) received a written memorandum for not complying with instructions related to his attendance at an internal meeting⁶; (4) failed to coordinate utilities on a project that caused a one-year delay of the project; and (5) temporarily halted the utility operations on a project without his supervisor's approval,

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

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

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

⁶ This remark was later removed during the management resolution steps because the event referenced did not occur during the performance cycle.

creating a delay on the project. The grievant claims that the “Below Contributor” rating in this section of his 2002 performance evaluation should be changed.

In support of its claim that the grievant failed to “exercise good judgment during interactions with his immediate supervisor, fellow employees, external customers, and the general public” the agency has provided the following documents and information: (1) e-mails showing that the grievant failed to cooperate with his supervisor when requested to provide a copy of a vehicle accident report; (2) a workplace violence incident report detailing the grievant’s threatening comments in the workplace; and (3) an e-mail detailing staff frustration with the grievant approaching them regarding a staff effort to stop smoking in state vehicles and employee rights to receive training.⁷

The grievant asserts that he has never demonstrated threatening or harassing behavior against his supervisor as implicated in a September 12, 2002 memorandum and referenced in his 2002 performance evaluation. Further, the grievant claims that the investigation into his alleged threatening behavior was one-sided and that his counter claim against his supervisor alleging workplace violence was never investigated. However, an investigation into the grievant’s alleged threatening and harassing behavior by VDOT’s District Crisis Management Team, the District Human Resources Office and the District Equal Opportunity Office revealed that the grievant acted improperly.

One of the grievant’s core responsibilities in this section of his Employee Work Profile (EWP) requires that he manage “all R/W/U portions of the project from project conception to completion.” This entails coordinating with utility companies regarding relocations and authorizing those companies to conduct relocations if needed based on project plans. The agency claims that the grievant’s delay in relocating a utility company’s transmission line (Utility Company A) resulted in a one-year delay on a project.⁸ In support of its claim, the agency has provided this Department with e-mails reflecting an assessment that the grievant should be removed from the project for his lack of coordination and failure to follow through. The grievant asserts that he managed the utility coordination to the best of his ability based on available resources and with close communications and consultation from his supervisor. More specifically, the grievant claims that he could not conduct his project coordination duties for Utility Company A until he received some preliminary bridge plans from VDOT’s central office in Richmond. The grievant further maintains that his supervisor was informed repeatedly at monthly meetings that the necessary plans had not been received in order to coordinate with Utility Company A. According to the grievant, the plans were not received until

⁷ Additionally, VDOT provided documentation detailing the grievant’s inappropriate communications with a property owner regarding the proposed relocation of utility poles and power lines; however, it appears that these communications occurred outside the performance evaluation period (i.e. October 25, 2001 to October 24, 2002). Thus, they will not be considered in support of the agency’s position for purposes of this ruling.

⁸ According to the agency, the project was scheduled to be advertised in July 2002, however the grievant’s alleged delay caused the advertisement date to be extended until July 2003, the date upon which Utility Company A anticipates completing its relocation work.

early February 2002.⁹ Shortly thereafter, the grievant was issued a 30-day disciplinary suspension unrelated to the project coordination. Moreover, the grievant asserts that other factors contributed to the one-year delay, not just the relocation coordination with Utility Company A.¹⁰

In support of its claim that the grievant halted utility operations on a project without his supervisor's approval creating a delay on the project, the agency has provided this Department with documentation detailing the grievant's attempts to change a relocation plan based upon a property owner's requests. However, it appears that the utility operations halted and referenced in the Project Coordination section of the 2002 Performance Evaluation occurred during the 2001 performance cycle (i.e. between October 25, 2000 and October 25, 2001). As such, the grievant's alleged suspension of utility operations referenced should not have been considered in his 2002 Performance Evaluation, and will not be considered in support of the agency's position for purposes of this ruling.

Importantly, however, the grievant was issued a Group II Written Notice with termination on April 22, 2003 for failing to "perform the work for which he was responsible as Project Administrator." The incident for which the grievant was terminated occurred during the 2001-2002 performance evaluation cycle, yet was not included in his written 2002 performance evaluation for that cycle. The grievant challenged the discipline and termination through the grievance process and proceeded to hearing on August 4, 2003. In his decision, the hearing officer found that the grievant failed to meet the performance expectations of a Project Administrator and upheld the termination.¹¹ While not necessarily dispositive of this ruling's outcome, an independent hearing officer's finding that the grievant failed to meet performance expectations is additional evidence that the agency's assessment of the grievant's performance in the Project Coordination element of his 2002 performance evaluation was not arbitrary or capricious.

Administrative Coordination: The grievant received a rating of "Contributor" in the "Administrative Coordination" section of his 2002 performance evaluation; however he is dissatisfied with a comment contained in this section. Specifically, the agency asserts that the grievant "needs to improve his overall level of customer service." Further, the agency states that the grievant's "interactions with internal customers and external customers has resulted in tension with his peers and receipt of letters and phone calls from external entities complaining of his demeanor."¹² The grievant claims that his

⁹ The agency claims that the grievant first received the preliminary bridge plans in December 2000, not February 2002 as claimed.

¹⁰ The agency admits that other factors surfaced during the delay for Utility Company A's relocation; however, VDOT claims that there still would have been a one-year delay as a result of Utility Company A's relocation regardless of these other factors.

¹¹ The hearing officer reduced the Group II Written Notice to a Group I Written Notice and upheld the termination based upon an accumulation of active group notices.

¹² This remark was later changed during the management resolution steps to read: the grievant's "interactions with internal customers and colleagues has resulted in complaints of his ability to work with and communicate with others."

interactions with internal customers and colleagues were discussed with his supervisor and he requested that someone speak with these people regarding their alleged unfair and unprofessional behavior toward the grievant. In support of its comments in the Administrative Coordination section, the agency has provided documents evidencing the grievant's inappropriate communications with a property owner regarding the proposed relocation of utility poles and power lines, e-mails and memoranda between the grievant and his supervisor regarding the grievant's accountability at work, and an e-mail detailing staff frustration with the grievant approaching them regarding an effort to stop smoking in state vehicles and employee rights to receive training.

Alleged Failure to Advise: The grievant further alleges that his supervisor failed to alert him of problems with his performance until September 2002. Although management generally should advise employees on their performance during the performance cycle, policy does not mandate that practice.¹³ 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.

Summary: In light of all the above, this Department concludes that there is insufficient evidence to support the grievant's assertion that his rating on the "Project Coordination" responsibility was determined without a basis in fact or resulted from anything other than management's reasoned evaluation of his performance in relation to established performance expectations. This Department further concludes that there is insufficient evidence in support of the grievant's assertion that the comments contained in the "Performance Management" and "Administrative Coordination" sections were determined without a basis in fact or resulted from anything other than management's reasoned evaluation of his performance in relation to established performance expectations. Accordingly, the issue of arbitrary or capricious performance evaluation does not qualify for a hearing.

Retaliation

The grievant claims that the "Below Contributor" rating on Element B and the contents of Elements A and D of his 2002 Performance Evaluation constitute retaliation for his promotion in 2000 and for "standing up for his rights."¹⁴ For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;¹⁵ (2) the employee suffered an adverse

¹³ DHRM policy states that "supervisors *should* document employees' performance and provide feedback to them periodically throughout the performance cycle." (emphasis added). DHRM Policy 1.40, page 4 of 16.

¹⁴ Although not specifically mentioned on Form A or attachments thereto, the grievant confirmed during this Department's investigation that he "stood up for his rights" by filing grievances and discrimination complaints with EEOC and OEES.

¹⁵ See Va. Code § 2.2-3004(A). 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 of the General Assembly,

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's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.¹⁶ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁷

By filing a grievance, the grievant has engaged in a protected activity.¹⁸ Additionally, under the grievance procedure, another "protected" activity that will support a claim of retaliation is "exercising any right otherwise protected by law."¹⁹ Title VII of the Civil Rights Act of 1964 characterizes two broad categories of activities as protected for purposes of a retaliation claim -- an employer may not retaliate against an employee for (i) participating in an ongoing investigation or proceeding under Title VII or (ii) opposing discriminatory practices in the workplace.²⁰

Moreover, the receipt of a "Below Contributor" rating in the "Project Coordination" element of his 2002 performance evaluation, which arguably could reduce his opportunities for higher level assignments and promotions, could be viewed as an adverse employment action.²¹ Thus, the only question remaining is whether a causal link exists between the grievant's protected acts and the comments and "Below Contributor" rating on Element B of his 2002 performance evaluation. This Department concludes that the grievant has presented insufficient evidence to indicate that the "Below Contributor" rating and alleged adverse comments resulted from his previous grievance activity and/or discriminatory complaints. In addition, as discussed above, VDOT has provided nonretaliatory business reasons for the low evaluation on element B. As such, the grievant's retaliation claim does not qualify for hearing. Further, again while not necessarily dispositive of this issue, it should be noted that the hearing officer in his August 13, 2003 hearing decision on the grievant's termination found no credible

reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁶ See *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000); *Dowe v. Total Action Against Poverty in Roanoke Valley*, 145 F.3d 653, 656 (4th Cir. 1998).

¹⁷ See *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

¹⁸ See *Grievance Procedure Manual* § 4.1(b)(4), page 10.

¹⁹ See *Grievance Procedure Manual* § 4.1(b)(4), 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 Congress or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law.

²⁰ 42 U.S.C.A. § 20003(a).

²¹ See *Boone v. Goldin*, 178 F.3d 253, 256-257 (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).

evidence to support the grievant's assertion that his formal discipline for performance reasons and resulting termination had been retaliatory.

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 notifies the agency that he wishes to conclude the grievance.

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