

Issue: Qualification/Performance Evaluation/Arbitrary and Capricious/Retaliatory Harassment; Ruling Date: March 30, 2005; Ruling #2005-970; Agency: Virginia State Police; Outcome: not qualified. Appealed to the Circuit Court of Henrico County; Case No. CL05-422; Outcome: EDR ruling affirmed; Decision Date: May 3, 2005.



COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia State Police
Ruling Number 2005-970
March 30, 2005

The grievant has requested a ruling on whether his December 16, 2004 grievance with Virginia State Police (VSP or the agency) qualifies for hearing. The December 16th grievance alleges that the grievant's 2004 performance evaluation is arbitrary and capricious and the most recent example of retaliatory harassment against the grievant by his supervisor.¹ The grievant further alleges VSP has misapplied policy. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as a Law Enforcement Officer III with VSP. The grievant's 2004 performance evaluation reflects an overall rating of "Contributor" with a "Contributor" rating in three marked elements of the evaluation and a "Marginal Contributor" in the remaining two elements.² The grievant received an overall rating of "Extraordinary Contributor" the previous year.

¹ It should be noted that since the initiation of his December 16th grievance, the grievant has been permanently reassigned to another unit with VSP and is currently under new supervision.

² VSP's Performance Management Policy allows a supervisor to rate an employee's performance as a Below Contributor, Marginal Contributor, Contributor, Major Contributor or Extraordinary Contributor. *See* VSP General Order No. 11, Performance Management System, page 11-2 – 11-3. A Marginal Contributor rating is defined as "[a] performance rating recognizing marginal job performance not quite at the 'Contributor' level, but demonstrating the capability to improve with additional training." VSP General Order No. 11, Performance Management System, page 11-2. A Contributor rating is defined as "[a] performance rating recognizing work that is at or above the performance standards by achieving the criteria of the job function throughout the performance cycle. Employees at this level are achieving the core responsibilities and performance measures as outlined by the supervisor." VSP General Order No. 11, Performance Management System, page 11-2.

Dissatisfied with his 2004 evaluation, the grievant initiated his December 16, 2004 grievance challenging the performance evaluation as arbitrary and capricious and retaliatory. Additionally, the grievant claims that the agency has misapplied VSP's Performance Management policy by failing to (1) timely provide him with his 2004 performance evaluation;³ and (2) include the content from his self-evaluation in his final performance evaluation.⁴

DISCUSSION

Arbitrary and Capricious Performance Evaluation/Misapplication of Policy

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."⁵ An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."⁶ Thus, for the grievant's claim of arbitrary and capricious performance evaluation and/or misapplication of policy to qualify for hearing, the action taken against the grievant must result in an adverse effect *on the terms, conditions, or benefits* of his employment.⁷

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.⁸ In this case, although the grievant disagrees with portions of his 2004

³ VSP General Order No. 11 provides that written employee performance evaluations must be finalized by supervisors between August 10th and October 15th. The grievant's 2004 performance evaluation is dated September 24, 2004; however, the grievant did not actually receive the evaluation until November 18, 2004. The agency requested, and presumably was approved for, an extension of the performance evaluation due date until the completion of an internal affairs investigation against the grievant.

⁴ VSP General Order No. 11 provides that "[s]upervisors shall also review and consider the employee's self-assessment when preparing the final performance evaluation."

⁵ Va. Code § 2.2-3004(A).

⁶ Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

⁷ Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

⁸ See Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 2004 U.S. App. LEXIS 11366 (10th Cir. 2004)(citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994)). See also James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004)(The court held that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.) Brown v. Brody, 199 F.3d 446 (D.C. Cir 1999), "[A] thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions." Brown, 199 F.3d at 458 citing to Mattern v. Eastman

performance evaluation and believes it to be arbitrary given his overall performance rating of “Extraordinary Contributor” the previous year, the overall rating was generally positive. Most importantly, the grievant has presented no evidence that the 2004 performance evaluation has detrimentally altered the terms or conditions of his employment. Likewise, the grievant has presented insufficient evidence that his late receipt of the performance evaluation⁹ and the agency’s failure to include information from his self-evaluation in the final performance evaluation has detrimentally altered the terms or conditions of his employment.

Accordingly, the grievant’s arbitrary and capricious performance evaluation and misapplication of policy claims do not qualify for hearing.¹⁰ We note, however, that should the 2004 performance evaluation somehow later serve to support an adverse employment action against the grievant, (e.g., demotion, termination, suspension and/or other discipline) the grievant may address the underlying merits of the evaluation through a subsequent grievance challenging any related adverse employment action.

Retaliatory Harassment

The grievant asserts that he is being harassed by his supervisor as a result of his prompting a criminal investigation two years ago against a member of VSP upper management. The grievant cites to numerous examples of alleged retaliatory acts by his supervisor. Such examples include, but are not necessarily limited to, the following: (1) his 2004 performance evaluation is arbitrary and capricious; (2) his supervisor is holding his reports “to a different standard than the rest of the office”

Kodak Co., 104 F.3d 702, 708, 710 (5th Cir. 1997); Rabinovitz v. Pena, 89 F.3d 482, 486, 488-90 (7th Cir. 1996); Smart, 89 F.3d at 442-43; Keleic v. Board of Regents, 1997 U.S. Dist. LEXIS 7991, No. 94 C 50381, 1997 WL 311540, at *9 (N.D. Ill. June 6, 1997); Lucas v. Cheney, 821 F. Supp. 374, 375-76 (D. Md. 1992); Nelson v. University of Me. Sys., 923 F. Supp. 275, 280-82 (D. Me. 1996); cf. Raley v. St. Mary’s County Comm’rs, 752 F. Supp. 1272, 1278 (D. Md. 1990).

⁹ The grievant’s 2004 performance evaluation is dated September 28, 2004 however the grievant did not actually receive the evaluation until November 18, 2004. The grievant alleges that the agency purposefully delayed the completion of his performance evaluation until an internal affairs investigation of the alleged harassment by his supervisor was complete thereby preventing him from using the evaluation as evidence in support of his harassment complaint with Internal Affairs. However, the agency requested, and presumably was approved for, an extension of the performance evaluation due date until the completion of an Internal Affairs Investigation against the grievant.

¹⁰ Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that he wishes to challenge, correct or explain information contained in his personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth his position regarding the information. Va. Code § 2.2-3806(A)(5). This “statement of dispute” shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

and requires him to rewrite reports/documents and return the uncorrected copy to her; (3) he is not allowed to work his cases without his supervisor's specific permission; (4) his supervisor initiated a complaint against him with Internal Affairs; and (5) his supervisor has criticized him for working closely with Commonwealth Attorneys.

For a claim of retaliatory harassment to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.¹¹

The grievant has demonstrated that the conduct alleged was unwelcome. Moreover, the grievant's initiation of a criminal investigation of VSP upper management is a protected activity.¹² However, assuming without deciding that the conduct was sufficiently severe or pervasive so as to alter the grievant's conditions of employment and imputable to the agency, the grievant has failed to demonstrate that the alleged acts were taken based on his prior protected activity. In other words, the grievant has failed to present any evidence that his supervisor's conduct is a result of the criminal investigation he prompted against VSP management. Accordingly, the grievant's claim of retaliatory harassment does not qualify for hearing.

We also note that although this issue does not qualify for a hearing, mediation may be a viable option for the parties to pursue. EDR's mediation program is a voluntary and confidential process in which one or more 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 unit involved. For more information on this Department's Workplace Mediation program, call 804-786-7994, or toll-free 1-888-232-3842.

¹¹ See generally *Von Gunten v. State of Maryland*, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); *Morris v. Oldham County Fiscal Court*, 201 F.3d 784, 791-92 (6th Cir. 2000); *Ray v. Henderson*, 217 F.3d 1234, 1245-46 (9th Cir. 2000); *Gunnell v. Utah Valley State College*, 152 F.3d, 1253, 1264 (10th Cir. 1998).

¹² See *Grievance Procedure Manual* §4.1(b)(4). 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 or the General Assembly, reporting a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

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 the qualification 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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