

Issue: qualification/performance evaluation/arbitrary-capricious performance; Ruling
Date: April 21, 2006; Ruling #2006-1303; Agency: Virginia Department of Health;
Outcome: not qualified



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Department of Health
Ruling Number 2006-1303
April 21, 2006

The grievant has requested a ruling on whether his November 18, 2005 grievance with the Virginia Department of Health (VDH or the agency) qualifies for hearing. The grievant claims that his 2005 performance evaluation is arbitrary and/or capricious. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed by the agency as an Inspector Supervisor. On October 20, 2005, he received his 2005 performance evaluation. This review rated his performance as "Below Contributor" in the areas of "performance management," "review of staff work assignments," and "managerial skill," and also rated his overall performance as "Below Contributor." On November 18, 2005, the grievant initiated a grievance challenging his review as "inappropriately reflective of [his] actual performance during performance year 2005." As relief, he seeks "a revision of the arbitrary 'Below Contributor' rating to a 'Contributor' rating."

After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of the grievance for hearing by the agency head. The agency head denied the grievant's request, and the grievant appealed to this Department.

DISCUSSION

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.¹ Accordingly, for the grievant's November 18, 2005 grievance to qualify

¹ Va. Code §2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

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."²

"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.³ 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.

In this case, the grievant argues that his performance evaluation does not accurately reflect his performance for the 2005 performance cycle. In particular, he asserts that his evaluation was based on his supervisor's "dissatisfaction over the fact that the uploading of survey reports is not occurring with the timeliness that it should," rather than "being properly issued to reflect satisfaction with the voluminous contributions made with the tasks that were accomplished."

The grievant states that in the 2004 performance year, he received an overall rating of "Contributor," with three individual ratings at the "Extraordinary Contributor" level. He argues that "existing and recorded performance outcomes" during 2005 were "virtually equivalent" to those of the previous year, despite a 25% loss of staff, "[i]ncreased numbers of providers and provider types," "[s]urvey and inspection results noticeably enlarged in scope and severity," and "[e]nlarged and intensified surveillance" He claims that "[c]onsidering all assigned tasks and duties, supervisory performance outcomes during PY 2005 did not deteriorate as portrayed in the rating." In addition, he asserts that he was rated as a "Contributor" for "at least 65% of the assignments and tasks," and should therefore have received an overall rating of "Contributor."

In response to the grievant's allegations, the agency has presented evidence that during the 2005 performance cycle, the grievant received: (1) a Notice of Improvement Needed/Substandard Performance (issued in April 2005) for failing to develop and

² Va. Code §2.2-3004(A); *Grievance Procedure Manual* §4.1(b). Moreover, the grievant must show that the grieved conduct constituted an adverse employment action. Va. Code § 2.2-3004(A); *see also* 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)). For purposes of this ruling only, we will assume that the conduct challenged in the November 18, 2005 grievance satisfies this requirement.

³ *See* Norman v. Department of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

administer a systematic quality assurance procedure “to ensure the timely, accurate and complete review . . . of survey packages”; (2) a Group II Written Notice dated June 14, 2005 for failing to follow supervisory instructions to develop a systematic quality assurance procedure “to ensure the timely, accurate and complete review of ASPEN survey packages for uploading”; and (3) two counseling memoranda (dated November 22, 2005 and March 9, 2005) for failing to perform his supervisory duties adequately.

In light of the agency’s extensive documentation of concerns regarding the grievant’s performance, as well as the grievant’s own admission that survey reports were not uploaded in a timely manner, this Department concludes that there is insufficient evidence to support the grievant’s assertion that his 2005 performance evaluation was without a basis in fact or resulted from anything other than management’s reasoned evaluation of his performance in relation to established performance expectations. While we understand that the grievant is frustrated by what he considers to be a failure to consider his performance as a whole, even assuming that the untimeliness of the survey reports was the sole reason for the negative evaluation (as the grievant alleges), it was entirely within management’s discretion to consider this failure to be so significant as to warrant a “Below Contributor” rating, particularly as the agency had previously given the grievant a Notice of Improvement Needed and Written Notice regarding this issue.

The grievant asserts that he was entitled to a “Contributor” rating because he was rated at that level for 65% of his job duties, as identified on his Employee Work Profile (EWP). However, neither state nor agency policy prohibits the agency from rating an employee’s performance at a “Below Contributor” level simply because he was not rated at that level for 50% or more of his or her total duties.⁴ To the contrary, agency policy states that “[n]o minimum requirements or standard formulas have been established for the justification of an overall rating of *Extraordinary Contributor* or *Below Contributor*, beyond the general requirement that performance rated as *Extraordinary Contributor* or *Below Contributor* should represent a significant part of the job.”⁵ In this case, while the areas in which the grievant received a “Below Contributor” rating represent only 35% of his work duties, as those duties are allocated on his EWP, these functions--performance management, review of staff work assignments, and managerial skill⁶--are nevertheless clearly significant areas of performance for a supervisory employee, such as the grievant. Accordingly, this grievance does not qualify for 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

⁴ See Department of Human Resource Management Policy 1.40, “Performance Planning and Evaluation” (effective date 4/01/01, revised 8/01/01); VDH HR Policy 1.40, “Performance Management” (effective 9/4/01).

⁵ VDH HR Policy 1.40, “Performance Management,” at 3.

⁶ The agency rated “managerial skill” in the category of “special assignments, objectives and behavioral competencies”; “managerial skill” does not appear as a core responsibility on the grievant’s EWP.

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.

Claudia T. Farr
Director

Gretchen M. White
EDR Consultant