

Issue: Qualification/Performance Evaluation/arbitrary/capricious performance; Ruling
Date: January 25, 2007; Ruling #2007-1531; 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
Ruling Number 2007-1531
January 25, 2007

The grievant has requested a ruling on whether his November 8, 2006 grievance with the Department of State Police (VSP or the agency) qualifies for hearing. The grievant claims that his 2006 performance evaluation is arbitrary and/or capricious. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant worked as a Sergeant with the agency. Beginning in January 2006, the grievant's supervisors began counseling him in various areas. On May 25, 2006, the grievant met with his supervisors and received a Notice of Improvement Needed Substandard Performance, as well as an interim performance evaluation that rated the grievant "Below Contributor." On October 10, 2006, the grievant received his 2006 annual performance evaluation. This review rated his performance as "Below Contributor" in all core responsibilities, except one, and rated his overall performance as "Below Contributor." On November 8, 2006, the grievant initiated a grievance challenging his review on three grounds: "1) whether the employee improvement plan was timely given; 2) whether the facts, taken as a whole, raise a sufficient question as to whether the performance evaluation was arbitrary or capricious; and 3) whether positive accomplishments were appropriately considered." As relief, he seeks a revision of the "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 8, 2006 grievance to qualify 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

Performance Evaluation

"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.

The grievant argues that his performance evaluation does not take into account various facts. In particular, he provides explanation and context to the many instances of substandard performance identified in the performance evaluation. The grievant also discussed the fact that his wife's serious illness during the last year and the care and support he provided was a mitigating circumstance.⁴ In addition, the grievant provided evidence of the many successful missions accomplished by his team in the past year. On the other hand, the agency provided examples of problems associated with the grievant's performance in every area in which he was rated "Below Contributor." The agency also provided a Notice of Improvement Needed well before the annual performance evaluation, which indicated the following areas of concern in the improvement plan:

Give employees clear concise documentation relating to job performance.
Work closely with the team and observe work habits and work efforts.
Perform supervisory responsibilities as outlined in the CCI Operations

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

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)).

³ *Duke v. Commonwealth*, 50 Va. Cir. 413, 414-15 (Richmond 1999); *Robinson v. Commonwealth*, 36 Va. Cir. 509, 510 (Richmond 1995).

⁴ While the evidence of the grievant's wife's medical condition is certainly worthy of sympathy, mitigation is not a question that is before this Department in this qualification ruling. We also note that the grievant presented this evidence to provide context to his assertion that he was "distracted" and found it "difficult to concentrate." The grievant has not claimed any detrimental treatment for having taken FMLA leave during this period. Moreover, the grievant stated that the agency did not hold his FMLA leave against him.

Manual. Be where you are supposed to be when working. Follow the chain of command. Coordinate operations with other units and agencies. Know and follow established written policies. Handle evidence in accordance with policies established for the evidence custodian. Conduct criminal case reviews as outlined by the policy. Conduct detailed investigations of personnel matters including endorsements in a timely and accurate fashion. Inspect employee's vehicles and correct deficiencies. Dress appropriately for work and comply with the weight control program. Review all paperwork submitted by the area for accuracy and compliance with policy.

This list of concerns was supplemented in the interim evaluation and annual evaluation with specific instances in which the grievant had performed inadequately in these areas.

The grievant has not presented evidence that the agency was arbitrary or capricious in rating the grievant "Below Contributor." In addition, he did not offer any evidence that the evaluation was given because of an improper motive. The grievant's evidence is largely explanatory, showing disagreement with management's assessment, but not disputing that the events occurred. The grievant has admitted his "shortcomings," and notes in his appeal that he is "not ignoring or abdicating responsibility for my actions, simply supplying information that may have been overlooked or not taken into consideration." In light of the agency's extensive concerns regarding the grievant's performance, this Department concludes that there is insufficient evidence to support the grievant's assertion that his 2006 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.

Misapplication or Unfair Application of Policy

The grievant has also argued that the agency misapplied or unfairly applied its internal policy, General Order 11. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy.

The grievant claims that the agency misapplied the portion of General Order 11 that provides: "Supervisors shall notify employees, in writing, by using the Need Improvement/Substandard Performance form, at least 90 days prior to the end of the performance cycle, that they will receive an overall rating noting substandard performance."⁵ The grievant argues that his rating period ended August 4, 2006, according to an internal weekly activity reporting system. As such, when he received the interim evaluation and Notice of Improvement Needed form on May 25, 2006, it was

⁵ Department of State Police, General Order No. 11, *Performance Management System*, at ¶ 9(e).

fewer than 90 days before his rating period ended. The grievant's argument, however, is incorrect.

General Order 11 requires that the employee receive a Notice of Improvement Needed form "at least 90 days prior to the end of the *performance cycle*."⁶ "Performance cycle" is defined by General Order 11 as "October 25th to October 24th of the following year."⁷ Consequently, the grievant's rating period ended October 24, 2006. The Notice of Improvement Needed form that he received in May was given to him more than 90 days prior to this date. There is no evidence that the agency misapplied or unfairly applied this provision of General Order 11.

The grievant also contends that the agency failed to provide him with a training partner or mentor as stated in General Order 11. The paragraph the grievant cites states: "The supervisor shall also suggest a means for the employee to pursue the necessary level of proficiency, such as training, time management, improvement of work habits, and assignment of a training partner or mentor."⁸ There does not appear to be any mandatory policy provision stated by this paragraph that would require the grievant to have received a training partner or mentor. This paragraph mandates that the supervisor suggest a means for the employee to pursue the necessary level of proficiency, but it only provides examples of how that can be carried out, including the use of a mentor. A reasonable interpretation of the paragraph would not require a supervisor to provide the specific means of using a training partner or mentor. As such, there is no evidence that the agency misapplied or unfairly applied any mandatory provision of this paragraph of General Order 11.

CONCLUSION, APPEAL RIGHTS, AND OTHER INFORMATION

For the reasons stated above, this grievance does not qualify for hearing. 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.

Claudia T. Farr
Director

⁶ *Id.* (emphasis added).

⁷ *Id.* at ¶ 2(h).

⁸ *Id.* at ¶ 10(e).