

Issue: Qualification – Performance (Arbitrary/Capricious Evaluation); Ruling  
Date: April 14, 2008; Ruling #2008-1996; Agency: Department of Juvenile  
Justice; Outcome: Not Qualified.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***  
**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Juvenile Justice  
Ruling Number 2008-1996  
April 14, 2008

The grievant has requested a ruling on whether her November 8, 2007 grievance with the Department of Juvenile Justice (the agency) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

**FACTS**

The grievant initiated this grievance on November 8, 2007 to challenge her annual performance evaluation because she received a “marginal contributor” rating on one of the “Additional Evaluation Factors.” This rating was reportedly based on “conflicts” that occurred in the workplace involving the grievant. However, during the management steps of the grievance process, the second step-respondent granted the grievant relief. The agency withdrew the “marginal contributor” rating on the one factor and moved comments about the situation to the section on “Other significant results for the performance cycle.” The grievant was not satisfied with this relief because she disputes the factual basis of the comments. As such, she seeks qualification of her grievance for hearing because she argues that her evaluation is still arbitrary and capricious.

**DISCUSSION**

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.<sup>1</sup> Accordingly, for this grievance to qualify for a hearing, there must be facts raising a sufficient question as to whether the grievant’s performance rating, or a material element thereof, was “arbitrary or capricious.”<sup>2</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

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

<sup>2</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

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. 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 has not presented evidence that the agency was arbitrary or capricious by including the comments about "conflict" on the amended version of the grievant's performance evaluation. The grievant's explanations show disagreement with management's assessment, but have not disputed that the events occurred. Indeed, the grievant has admitted to her involvement in, though not responsibility for, the "conflict." Moreover, the comments appear to have been relevant to one of the "Additional Evaluation Factors" of "Maintain professional decorum" provided in the grievant's Employee Work Profile.<sup>3</sup> The documents submitted with the grievance record indicate that the grievant's supervisor had discussed her concerns with the grievant, including during an interim evaluation. Therefore, this Department concludes that there is insufficient evidence to support the grievant's assertion that the comments included on her performance evaluation were without a basis in fact or resulted from anything other than management's reasoned evaluation of the grievant's performance. This grievance does not qualify for hearing.<sup>4</sup>

#### 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, within five workdays of receipt of this ruling, the grievant should notify the human resources office, in writing, and pursue an

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<sup>3</sup> The measures for this factor include developing and maintaining "cooperative and effective working relationships with casework and facility staff," speaking to colleagues using "respectful language and tone of voice," avoiding "verbal confrontations," being "respectful," and utilizing "appropriate conflict resolution."

<sup>4</sup> 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 she wishes to challenge, correct or explain information contained in her 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 her 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).

appeal to the circuit court pursuant to Va. Code § 2.2-3004(E). 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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Claudia T. Farr  
Director