

Issues: Qualification – Performance Evaluation (Arbitrary/Capricious),  
Qualification – Retaliation (Grievance Activity), and Consolidation of Grievances  
for a Single Hearing; Ruling Date: July 13, 2009; Ruling #2009-2235;  
Agency: Department of Social Services; Outcome: Qualified for Hearing and  
Consolidation Granted.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

**QUALIFICATION and CONSOLIDATION RULING OF  
DIRECTOR**

In the matter of Department of Social Services  
Ruling No. 2009-2235  
July 13, 2009

The grievant has requested qualification of her December 15, 2008 grievance. In her grievance, the grievant alleges that her annual performance evaluation rating of "Below Contributor" was arbitrary and capricious, a misapplication of policy and retaliatory. For the reasons set forth below, this grievance is qualified for hearing.

FACTS

The grievant was employed as a Human Services Program Coordinator. On or about November 17, 2008, the grievant was presented with her annual performance evaluation, in which she received an overall "Below Contributor" rating. On or about December 15, 2008, the grievant initiated a grievance in which she challenged her performance evaluation (Grievance 1). The agency head denied qualification of this grievance. Accordingly, the grievant has appealed to this Department.

The grievant was subsequently terminated from employment on or about February 20, 2009 for alleged unsatisfactory job performance. She challenged her termination via a grievance, initiated on or about March 18, 2009 (Grievance 2). Grievance 2 was qualified by the agency head on June 25, 2009.

DISCUSSION

*Qualification*

Under the grievance procedure, formal discipline and dismissals for unsatisfactory performance automatically qualify for a grievance hearing.<sup>1</sup> On the other hand, grievances that challenge performance evaluations are generally not qualified for hearing unless the grievant provides sufficient evidence in support of her claims. However, as the grievant in this case will be afforded a hearing to challenge her dismissal for unsatisfactory performance, we find that her grievance challenging her annual performance evaluation (Grievance 1) should be qualified for hearing as well, without further exploration of the merits at the qualification stage.

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<sup>1</sup> *Grievance Procedure Manual* § 4.1(a).

In making this determination, we note that the “Below Contributor” rating on her annual performance evaluation led to a 3-month performance re-evaluation plan. The agency has already granted the grievant a hearing to challenge the “Below Contributor” rating for the 3-month performance re-evaluation plan, as well as her subsequent dismissal. It was the “Below Contributor” rating on her annual performance evaluation that prompted the 3-month performance re-evaluation plan. As a matter of fairness and procedural economy, it simply makes sense to allow the grievant to present her evidence regarding the alleged impropriety of both the “Below Contributor” on her annual performance evaluation and the “Below Contributor” on her three month re-evaluation while at hearing. Thus, Grievance 1 is also qualified for hearing.<sup>2</sup> We further note, that this qualification ruling in no way determines that the rating that the grievant received on her annual evaluation (or 3-month re-evaluation) was arbitrary, capricious, or otherwise improper, but only that further exploration of the facts by a hearing officer is appropriate.

### *Consolidation*

Approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances may be consolidated in a single hearing. Moreover, EDR may consolidate grievances for hearing without a request from either party.<sup>3</sup> EDR strongly favors consolidation and will consolidate grievances when they involve the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.<sup>4</sup>

This Department finds that consolidation of the Grievance 1 and Grievance 2 is appropriate. Both grievances concern a single grievant and share related themes and claims. Moreover, we find that consolidation is not impracticable in this instance.

The agency has requested the appointment of a hearing officer for Grievance 2. Further, the agency is directed to submit an updated Form B for Grievances 1 and 2 reflecting the qualification of both grievances in full. Grievance 1 will be assigned to the same hearing officer who will hear both grievances at a single grievance hearing.

This Department’s rulings on compliance are final and nonappealable.<sup>5</sup>

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Claudia T. Farr  
Director

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<sup>2</sup> See, e.g., EDR Ruling No. 2009-2215; EDR Ruling No. 2006-1354 (related claims qualified for hearing).

<sup>3</sup> *Grievance Procedure Manual* § 8.5.

<sup>4</sup> See *id.*

<sup>5</sup> See Va. Code §§ 2.2-1001(5), 2.2-3003(G).