

Issue: Qualification – Discrimination (Race), and Compliance – Grievance Procedure (Resolution Steps); Ruling Date: June 4, 2009; Ruling #2009-2241; Agency: Department of Social Services; Outcome: Not Qualified, Agency in Compliance.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Social Services
Ruling Number 2009-2241
June 4, 2009

The grievant has requested a ruling on whether her December 23, 2008 grievance with the Department of Social Service (DSS or the agency) qualifies for hearing. The grievant claims that her 2008 performance evaluation is discriminatory based on race and the most recent example of the harassment she has endured at DSS. In addition, the grievant appears to raise an issue of noncompliance in her assertion that the agency head failed to address the issues presented in the grievance at both the third management resolution step¹ and the qualification phase.² For the reasons discussed below, this Department concludes that the grievance does not qualify for a hearing. Moreover, the agency has complied with the grievance process.

FACTS

The grievant was employed as a Program Officer with DSS.³ On or about October 10, 2008, the grievant received a Notice of Improvement Needed/Substandard Performance (NIN/SP) for her alleged failure to meet required deadlines. Shortly thereafter, the grievant received her 2008 performance evaluation. This evaluation reflects an overall rating of "Contributor," with a "Contributor" rating in four elements of the evaluation, and a "Below Contributor" in the remaining element. The grievant was rated a "Below Contributor" in her core responsibility of "Program Administration and Monitoring" due to her alleged failure to meet established deadlines when completing monitoring reports. Dissatisfied, the grievant initiated a grievance on December 23, 2008 challenging the performance evaluation as unfair and discriminatory based on race.

DISCUSSION

Compliance

The grievance procedure requires both parties to address procedural noncompliance through a specific process.⁴ That process assures that the parties first

¹ In this case, the agency head is also the designated third step respondent.

² In a letter addressed to the EDR Director, the grievant states: "Merely stating without clearly showing how [the agency head] reached his conclusion [at the third management resolution step and qualification phase] and what he considered is insufficient to reach a decision of this magnitude."

³ The grievant voluntarily resigned from her position at DSS on March 5, 2009.

⁴ *Grievance Procedure Manual*, § 6.3.

communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.⁵ If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue.⁶ Importantly, all claims of party noncompliance must be raised immediately. For example, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance.⁷

In this case, the grievant alleges that the agency head failed to adequately address the issues presented in the grievance at both the third management resolution step and the qualification for hearing phase. With regard to the grievant's claim that the agency head failed to adequately address the issues at the third step, this Department concludes that the grievant was aware of a possible procedural violation with regard to the adequacy of the agency head's third management resolution response at the third management resolution step; however, she waited until the grievance had progressed through all management resolution steps and the qualification phase before raising an issue of noncompliance with this Department. As such, the grievant has waived her right to challenge the adequacy of the third management resolution response.

As to the adequacy of the agency head's response at the qualification phase, the grievance procedure describes the agency head's obligation as follows:

Within 5 workdays of receiving the employee's hearing request, the agency head must determine whether the grievance qualifies for a hearing. The agency head must provide a written response on the grievance "Form A" or an attachment. The response should also notify the employee of his procedural options. Because this is the last opportunity to resolve the grievance within the agency, the agency head may address the issues and the relief requested by the employee.⁸

In response to the grievant's request for qualification, the agency head responded:

⁵ *Id.* In this case, it does not appear that the grievant has notified the agency of the alleged procedural violation and given the agency five workdays to correct the alleged noncompliance, as required by the grievance procedure. However, because this ruling holds that the grievance does not qualify for a hearing, and thus may be appealed to the circuit court, this Department will rule on the issue of compliance at this time to avoid any procedural inefficiencies.

⁶ Va. Code § 2.2-3003(G); *Grievance Procedure Manual*, § 6.3.

⁷ *Grievance Procedure Manual*, § 6.3.

⁸ *Grievance Procedure Manual* § 4.2.

As indicated in my third-step response, I carefully reviewed your grievance, the information that you presented to me at the third-step meeting, and information presented by management. You alleged discrimination on the basis of race. I continue to find that there is no evidence that shows you have been treated differently because of your race. The “Below Contributor” rating that you received for the Program Administration and Monitoring core responsibility is based on documented performance information.

The facts presented before me and taken as a whole do not support your issue of discrimination. Therefore, your grievance does not qualify for a hearing.

This response appears to be an adequate qualification response to the grievance, especially in light of the fact that the agency head is not *required* to address the issues of the grievance, but rather *may* do so under the grievance procedure. Accordingly, this Department concludes that the agency has complied with the grievance process in rendering its qualification determination.

Qualification

The grievant claims that she has been harassed based on race. In particular, the grievant alleges that a white co-worker, Mr. W, repeatedly failed to adequately perform, but was not disciplined or counseled for his poor performance.⁹ In contrast, the grievant has received both a NIN/SP and a “Below Contributor” rating in one element of her performance evaluation as a result of her alleged poor performance.¹⁰ The grievant states she was also advised by management to “take the high road” when dealing with Mr. W, which, according to the grievant, is further indication of management’s favorable treatment of Mr. W. In addition, the grievant believes a monitoring report of her unit

⁹ The grievant’s claim that Mr. W has not been counseled or disciplined is based on her allegedly asking him whether he had ever been “written up” and his alleged reply that he had not.

¹⁰ It should be noted that a satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation. *Rennard v. Woodworker’s Supply, Inc.*, 101 Fed. Appx. 296, 2004 U.S. App. LEXIS 11366 (10th Cir. 2004)(unpublished opinion)(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)(holding 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.) “[A] similarly thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions.” *Brown v. Brody*, 199 F.3d 446, 458 (D.C. Cir. 1999); EDR Ruling No. 2008-1986; EDR Ruling No. 2007-1612. In this case, although the grievant was rated a “Below Contributor” for her completion of monitoring reports, the overall rating and the majority of element ratings were generally positive. Most importantly, the grievant has presented no evidence that the 2008 performance evaluation has detrimentally altered the terms or conditions of her employment.

completed by a member of management was “written in a punitive manner, comparing [the grievant] and [Mr. W] rather than reviewing the program files.” Moreover, the grievant claims that staff and other members of management do not assist her in the same way that they assist Mr. W and that management “stole” one of the grievant’s files and “set her up” so that she was unable to timely complete her monitoring report relative to that file. Finally, during this Department’s investigation of her grievance, the grievant alleged the following in support of her workplace harassment claim: she was harassed about leave issues although Mr. W allegedly attended personal appointments without utilizing leave; she received a counseling memorandum in October 2007 for failure to follow her supervisor’s instructions; and in March, 2000, she was approved for an “upgrade” in her position and an in-band adjustment, which she never received.

For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.¹¹ “[W]hether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”¹²

The grievant has presented evidence that the actions allegedly taken against her were unwelcome and imputable to the agency as all alleged acts appear to have been taken by members of management. However, the grievant must raise more than a mere allegation of harassment – there must be facts that raise a sufficient question as to whether the actions described within the grievance were the result of prohibited discrimination based on race. The grievant has not presented, nor has this Department found, sufficient evidence that the actions described above, if true,¹³ were taken *because* of the grievant’s race.¹⁴ For instance, it appears that the grievant’s supervisor cited others

¹¹ See Gilliam v. S.C. Dep’t of Juvenile Justice, 474 F.3d 134, 142 (Cir. 2007).

¹² Harris v. Forklift Systems, Inc., 510 U.S. 17, 23, 114 S. Ct. 367 (1993).

¹³ While the grievant asserts that Mr. W was assisted by other staff with his monitoring visits, she seems to also admit that she was assisted with her monitoring visits as well, thereby apparently demonstrating that assistance was provided without regard to race. Moreover, the supervisor’s advice to the grievant to “take the high road” when dealing with Mr. W appears to have been expressed in response to an ongoing conflict between Mr. W and the grievant, and not in an effort to show favoritism for Mr. W because he is white. Additionally, the grievant has provided no evidence, other than her own personal belief, that management stole files from her desk.

¹⁴ In support of her claim that Mr. W is treated more favorably because of his race, the grievant states that a prior supervisor told her that he (the prior supervisor) was advised by someone in human resources to leave Mr. W alone because he is white. During this Department’s investigation, the prior supervisor denied that he was told to leave Mr. W alone. Moreover, the grievant has produced no evidence to suggest that her current supervisor (the person who cited her for the poor performance) was similarly advised. Likewise, during this Department’s investigation, the grievant’s current supervisor denied ever being told to leave Mr. W alone due to Mr. W’s race. Moreover, it appears, and the grievant admits, that she was

under his supervision for poor performance without regard to race. Because this grievance does not raise a sufficient question as to whether management's actions were taken due to her race, this grievance does not qualify for hearing.

This ruling does not mean that EDR deems any of the alleged behavior of the supervisors, if true, to be appropriate, only that the claim of harassment on the basis of a race does not qualify for a 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 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 and file a notice of appeal with 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.

Claudia T. Farr
Director

given the NIN/SP and "Below Contributor" rating in one element of her performance evaluation because she failed to timely submit monitoring reports as required.