

Issue: Qualification – Performance Evaluation (Arbitrary/Capricious); Ruling Date: February 5, 2013; Ruling No. 2012-3362; Agency: University of Virginia Medical Center; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

QUALIFICATION RULING

In the matter of the University of Virginia Health System
Ruling Number 2012-3362
February 5, 2013

The grievant has requested a ruling on whether her April 3, 2012 grievance with the University of Virginia Health System (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 or about April 3, 2012 to challenge her annual performance evaluation because she received an overall “does not fully meet expectations” rating. This rating was reportedly based on such issues as the grievant’s apparent communication issues and difficulties in working with colleagues. The grievant disputes the agency’s assessments and now seeks qualification of her grievance for a hearing in a ruling request to the Office of Employment Dispute Resolution (EDR).

DISCUSSION

Arbitrary and/or Capricious Performance Evaluation

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.¹ 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 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

¹ See 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).

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 raised a sufficient question as to whether the agency was arbitrary or capricious in rating her performance. The grievant's evidence is largely disagreement with management's assessments. While the grievant may articulate reasonable points of dispute, EDR concludes that there is insufficient evidence to support an assertion that this performance evaluation was without a basis in fact or otherwise arbitrary or capricious. EDR has reviewed nothing in the grievance paperwork that would support a conclusion that the evaluation resulted from anything other than management's reasoned review of the grievant's performance in relation to established performance expectations. Indeed, counseling documentation during the performance cycle supports management's review here, as well as input from colleagues.

Retaliation

The grievant's Grievance Form A also includes an allegation that her performance evaluation was retaliatory. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;³ (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity;⁴ in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.⁵ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.⁶

The grievant's retaliation claim fails to qualify for hearing because she has not presented sufficient evidence of a causal link between the alleged protected activities (prior grievance activity) and her performance evaluation. There is no other indication of potential retaliation other than the grievant has filed at least one grievance in the past and now did not receive a satisfactory performance evaluation. However, as stated above, the grievant's performance evaluation appears to have been based upon a reasonable review of the grievant's performance in

³ See Va. Code § 2.2-3004(A). Only the following activities are protected activities under the grievance procedure: "participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

⁴ EDR Ruling Nos. 2013-3446, 2013-3447.


⁵ E.g., *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

⁶ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

relation to her duties and took into account feedback from colleagues. There is no indication that retaliation tainted this action. As such, the grievant's retaliation claim does not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

EDR's qualification rulings are final and nonappealable.⁷ The nonappealability of such rulings became effective on July 1, 2012. Therefore, because the grievant's April 3, 2012 grievance was initiated prior to that date, it is not EDR's role to foreclose any appeal rights that may still exist for the grievant under prior law. If the grievant wishes to attempt 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 former Va. Code § 2.2-3004(E). EDR makes no representations as to whether such an appeal is proper or can be accepted by the circuit court. Such matters are for the circuit court to decide. If the court should qualify the April 3, 2012 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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⁷ Va. Code § 2.2-1202.1(5).