Issue: Qualification/Retaliation/Grievance Activity; Compliance/Documents Ruling Date: June 18, 2003; Ruling #2002-199 and 2002-217; Agency: Virginia Polytechnic Institute and State University; Outcome: qualified for hearing; agency in compliance.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

COMPLIANCE AND QUALIFICATION
RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University
Ruling Numbers 2002-199 and 2002-217
June 18, 2003

The grievant has requested a ruling on whether her November 9, 2001 grievance with the Virginia Polytechnic Institute and State University (Virginia Tech or the agency) qualifies for a hearing. The grievant claims that her 2001 performance evaluation is retaliatory and arbitrary or capricious. Additionally, she has requested a compliance ruling for management's alleged failure to provide her with documentation related to her grievance. For the reasons discussed below, this Department concludes that the November 9, 2001 grievance qualifies for hearing and that management is not out of compliance with the grievance process.

FACTS

Prior to her layoff in November 2002, the grievant was employed as an Administrative Program Specialist III at Virginia Tech. On October 17, 2000, the grievant initiated a grievance claiming, in part, that her 2000 performance evaluation was arbitrary or capricious and retaliatory. On January 30th, February 1st, and March 21st of 2001, the grievant received Group I Written Notices for separate instances of alleged unprofessional behavior in fulfilling her job duties and interacting with her co-workers. On February 1st, February 5th, and March 22nd of 2001, the grievant initiated three grievances challenging each Written Notice as unwarranted and retaliatory for having filed her October 17, 2000 grievance. Subsequently, the four grievances were consolidated for purposes of hearing. In a decision rendered on July 27, 2001, a hearing officer upheld the grievant's October 17, 2000 challenge to her performance evaluation as arbitrary or capricious and her February 1, 2001 challenge of a Group I Written Notice as unwarranted. Further, although the hearing officer found that certain actions taken by management seemed inappropriate, the hearing officer concluded that the grievant had not been retaliated against.

On July 19, 2001, the grievant initiated another grievance challenging a July 5, 2001 Group I Written Notice with termination[1] as unwarranted and retaliatory. In a hearing decision rendered on September 17, 2001, a hearing officer rescinded the disciplinary action in part because the Group I Written Notice could have resulted from the obvious friction between the grievant and her co-workers and supervisor following the previous hearing. Because the July 27, 2001 hearing decision rescinded one of the accumulated Group I Written Notices, the necessary number of active written notices no longer existed to warrant the grievant's termination, and the grievant was reinstated.[2]

On August 13, 2002, the grievant received a Notice of Improvement Needed/ Unsatisfactory Performance for unprofessional conduct in the workplace. Thereafter, on October 12, 2001, the grievant received her 2001 performance evaluation with an overall rating of Below Contributor. The evaluation consisted of four elements upon which her performance was rated. She received a rating of Contributor on one job element and a rating of Below Contributor on the remaining three elements. The primary basis of the Below Contributor ratings on each element relates to the grievant's alleged unprofessional attitude and behavior in the workplace. On October 19, 2001, a three-month Re-evaluation Performance Plan was developed. The grievant's subsequent three-month re-evaluation earned her an overall rating of Contributor.

On October 24, 2002, the grievant requested documents apparently relative to her November 9, 2001 grievance.[3] The agency processed the document request under the Freedom of Information Act and sought a deposit of $591.00 from the grievant.[4] Subsequently, the grievant sent a notice of noncompliance to the agency head. In response, the agency claimed that the grievant failed to assert that the document request was related to a pending grievance and that the grievance process is independent from the Freedom of Information Act and contains no provision waiving the grievant's obligation to pay for searches. The grievant requested a compliance ruling on this issue on November 18, 2002.

DISCUSSION

Qualification

Retaliation

In her November 9, 2001 grievance, the grievant claims that the Below Contributor rating on her 2001 performance evaluation was in retaliation for her past use

[1] The grievant's termination resulted from an accumulation of four active Group I Written Notices.
[2] *See* Department of Human Resource Management Policy 1.60 ("A fourth active written notice for a Group I offense normally should result in discharge.")
[3] It should be noted that the grievant's document request expressly cited to neither the Freedom of Information Act or the grievance procedure as the basis for the document request.
[4] Va. Code § 2.2-3704(F) states, "In any case where a public body determines in advance that charges for producing the requested records are likely to exceed $200, the public body may, before continuing to process the request, require the requestor to agree to payment of a deposit not to exceed the amount of the advance determination."

of the grievance procedure. 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;[5] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; 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 action, the grievance does not qualify for a hearing, unless the employee's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

It is undisputed that the grievant engaged in a protected activity by participating in the grievance process.[8] In addition, she potentially suffered an adverse employment action – an overall Below Contributor rating, which arguably could reduce her opportunities for higher level assignments and promotions.[9] Thus, the only question remaining is whether a causal link exists between the grievant's participation in the grievance process and the Below Contributor rating. While the agency has provided documentation supporting its Below Contributor rating, this Department concludes that, based on the totality of the circumstances, including the ongoing antagonism between the grievant and the agency and the proximity in time between the grievant's participation in the grievance process and her overall performance rating,[10] a sufficient question remains as to the existence of a causal link between the grievant's overall performance rating and her participation in the grievance process. The hearing officer, as a fact finder, is in a better position to determine whether retaliatory intent contributed to the grievant's 2001 Below Contributor performance evaluation.[11] As such, the issue of retaliation is qualified for hearing.

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[5] *See* Va. Code § 2.2-3004 (A)(v). 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.

[6] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

[7] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S.Ct. 1089 (Title VII discrimination case).

[8] *See* Va. Code § 2.2-3004(A)(v) and *Grievance Procedure Manual* § 4.1(b)(4), page 10.

[9] *See* Boone v. Goldin, 178 F.3d 253, 256-257 (4th Cir. 1999) (under Title VII, "adverse employment action" typically requires discharge, demotion, or reduction in grade, salary, benefits, level of responsibility, title, or opportunities for future reassignments or promotions).

[10] *See* Tinsley v. First Union National Bank, 155 F.3d 435,443 (4th Cir. 1998) (noting that merely the closeness in time between a protected act and an adverse employment action is sufficient to make a prima facie case of causality). *See also* Jaudon v. Elder Health, Inc., 125 F. Supp. 2d 153, 165 (D. Md. 2000) (indicating that temporal proximity and ongoing antagonism can be a sufficient basis to establish a causal link.)

[11] *See* Ross v. Communications Satellite Corp., 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) quoting Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) ("[r]esolution of questions of intent often depends upon the 'credibility of

Arbitrary and Capricious Performance Evaluation

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.[12] Accordingly, to qualify this issue for a hearing, there must be facts raising a sufficient question as to whether the grievant's overall performance rating was "arbitrary or capricious."[13]

"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.[14] 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.

As discussed in the *Retaliation* section above, this grievance raises a sufficient question as to whether the overall 2001 Below Contributor rating resulted from an improper motive, namely retaliation. If retaliatory intent motivated the poor performance evaluation, it could be argued that the evaluation did not result from a reasoned basis related to established expectations. Moreover, the issue of the grievant's performance is central to both claims in her grievance: (i) retaliation and (ii) arbitrary or capricious performance evaluation. The factual issues presented by each claim are significantly intertwined. As such, this Department deems it appropriate to send the ancillary issue of whether the grievant's 2001 performance evaluation was arbitrary or capricious for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

Compliance

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the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.'")

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

[13] Va. Code §2.2-3004(A); *Grievance Procedure Manual* §4.1(b), page 10.

[14] *Id.*; S*ee* Norman v. Department of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[15] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily without this Department'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.[16] If the party fails to correct the alleged noncompliance, the complaining party may request a ruling from this Department. Should this Department find that the party has violated a substantial procedural requirement and that the grievance presents a qualifiable issue, this Department may render a decision against the noncomplying party unless that party can establish just cause for its noncompliance.[17]

The grievance statute provides that "[a]bsent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia, relating to actions grieved shall be made available upon request from a party to the grievance, by the opposing party."[18] This Department's interpretation of the mandatory language "shall be made available" is that absent just cause, all relevant grievance-related information *must* be provided.

The grievance statute further states that "[d]ocuments pertaining to nonparties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance."[19] Documents, as defined by the Rules of the Supreme Court of Virginia, include "writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form."[20] However, a party is not required to create a document if the document does not exist.[21] To summarize, absent just cause, a party must provide the other party with all **relevant** documents upon request, in a manner that preserves the privacy of other individuals. Finally, as a general rule, an agency may charge a grievant its actual cost to retrieve and duplicate the requested documents.

In this case, the grievant has requested records dating from November 1, 2000 through July 5, 2001. The records requested include: all correspondence, news articles, newsletters, reports, all accounts payable records/invoices, mailing lists, individual telephone message books, two wall calendars, agent's sign in/out notebook and all receipt books for the unit's office. During this Department's investigation, the investigating consultant sought clarification from the grievant as to the relevancy of the documents

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[15] *See Grievance Procedure Manual*, § 6.1, pages 16-17.
[16] *See Grievance Procedure Manual* § 6.3, page 17. In a case where the agency is purportedly out of compliance, the notification of non-compliance is directed to the agency head.
[17] *Id*.
[18] Va. Code § 2.2-3003(E); *Grievance Procedure Manual,* § 8.2, page 21.
[19] *Id.*
[20] *See* Rules of the Supreme Court of Virginia, Rule 4.9(a)(1).
[21] Va. Code § 2.2-3003(E); *Grievance Procedure Manual* § 8.2, page 21.

requested to her November 9, 2001.[22] Despite this Department's numerous requests, the grievant failed to state with specificity the relevancy of such records. As such, this Department cannot conclude that Virginia Tech has failed to comply with the grievance process.

However, if the grievant is dissatisfied with management's response to her request -- its production of documents, its written response to her request, and/or its cost assessment -- she may raise the issue again at a prehearing conference with the hearing officer. Absent just cause, the agency's failure to provide the grievant with any of the requested documents could result in adverse inferences drawn against the agency during the qualification and/or hearing stages. For example, if documents are withheld absent just cause, and those documents could resolve a disputed material fact pertaining to the grievance, at the hearing stage, a hearing officer could resolve the factual dispute in the grievant's favor.

APPEAL RIGHTS AND OTHER INFORMATION

This ruling is not a finding of retaliation or an arbitrary performance evaluation, only that the evidence is conflicting and warrants further review by a hearing officer. The parties should note that in deciding a case, a hearing officer may not substitute his or her judgment for that of management, or order that a specific performance rating be given. A hearing officer may only determine whether the grievant's evaluation is arbitrary or capricious, and if he or she so finds, order the agency to reconduct the evaluation on an objective basis related to the performance expectations established in the grievant's performance plan. Also, the grievant will have the burden of proving that the performance evaluation was retaliatory. Please note, however, that if the hearing officer finds that the evaluation was retaliatory, the scope of relief he or she can offer is limited. In retaliation cases, a hearing officer may only issue a general order that the agency cease the retaliation and take measures to prevent any future retaliation. A hearing officer can

[22] The investigating consultant first sought clarification of the relevancy of the documents requested by telephone on February 6, 2003. Because the grievant was unsure at that time as to whether she wanted to continue with her ruling requests, she stated that she would get back with the consultant regarding the requested information. On February 21, 2003, the consultant attempted to contact the grievant by telephone regarding her intentions and the relevancy of the documents requested. When the grievant did not respond, the investigating consultant sent the grievant a letter advising her that if she did not contact EDR by March 10, 2003, a decision would be made without the benefit of her input. On March 10, 2003, the grievant faxed the investigating consultant a letter with documentation attached. The attached information failed to inform how the documents requested are relevant to the November 9, 2001 grievance, but merely stated how often the records sought were generated. Still uncertain as to the relevancy of the documents requested, on March 27, 2003, the investigating consultant phoned the grievant again and asked that she provide information as to the relevancy of the records sought. The grievant responded by letter dated April 2, 2003. In the letter, the grievant maintains that the information is relative to her being able to defend her job performance evaluation written October 2001 and will provide her with necessary evidence to prove her case because she will be able to indicate dates.

only recommend, not order, that the agency take specific actions to remedy the retaliation.[23]

Additionally, based on the lack of information provided by the grievant, this Department cannot conclude that the agency has failed to comply with the grievance process. This Department's rulings on matters of compliance are final and nonappealable and have no bearing on the substantive merits of a grievance.[24] However, the grievant may raise the issue again with the hearing officer, providing that she provide some showing of the purported relevancy of the request documents..

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Claudia T. Farr
Director

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Jennifer S.C. Alger
Employment Relations Consultant

[23] *Rules for Conducting Grievance Hearings*, page 11.
[24] Va. Code § 2.2-1001(5).