Issue: Qualification/performance evaluation, access to personnel records; Compliance/consolidation of grievances for purposes of hearing; Ruling #2003-526, 2003-527; Ruling Date: February 5, 2004; Agency: Virginia Commonwealth University; Outcome: performance evaluation issue qualified and consolidated with Written Notice hearing; personnel records issue not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION and COMPLIANCE RULING OF DIRECTOR

In the matter of Virginia Commonwealth University/ Nos. 2003-526 & 2003-527
February 5, 2004

The grievant has requested qualification of two grievances that she initiated with Virginia Commonwealth University (VCU). The first grievance challenges the grievant's annual performance evaluation. The second alleges that the grievant has been denied access to her personnel documents. In addition, she seeks to have these two grievances consolidated for hearing purposes with a previously qualified grievance, which challenges a Group I Written Notice.[1] For the reasons set forth below, the grievance challenging her performance evaluation is qualified and consolidated with the Written Notice grievance. The grievance challenging the grievant's access to her personnel records, however, is not qualified, and therefore not consolidated with the other grievances.

FACTS

The grievant is a Housekeeping Supervisor. On September 18, 2002, the grievant was instructed in the placement of entry way floor mats. Approximately one year later, on September 9, 2003, management sent the grievant an e-mail informing her that the floor mat placement standards were not being met. On September 12, 15, and 30, 2003, management allegedly observed that floor mats were still not being properly placed. On October 7, 2003, management issued the grievant a Group I Written Notice based on the alleged misplacement of floor mats. The grievant challenged the Written Notice via a grievance which she initiated on October 27, 2003. The agency head qualified the grievance for hearing on December 11, 2003.

On or about October 8, 2003, the grievant was presented with her 2002-03 annual performance evaluation which rated her as a "Fair Performer." The grievant challenged this evaluation on October 27, 2003, (the same day that she initiated her Written Notice grievance). The performance evaluation grievance advanced through the management resolution steps and on December 11, 2003, the agency head denied qualification of the grievance. The grievant then requested that this Department qualify the grievance and consolidate it with the Written Notice grievance.

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[1] Originally, the grievant was issued a Group II Written Notice that was subsequently reduced to a Group I at the Second Resolution Step.

On November 5, 2003, the grievant initiated a grievance asserting that she had been denied access to personnel records relating to her. In the grievance she claimed that her supervisor had placed information into a supervisory file without her knowledge and without giving her the privilege to review the information. She requested that the documentation be removed from the file and that she be allowed to review any future documentation of a similar nature.

DISCUSSION

Qualification

Arbitrary and Capricious Performance Evaluation

In her October 27th grievance, the grievant claims that management rated her performance in an arbitrary and capricious manner. "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.[2] 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.

In this case, the second-step respondent in the grievance challenging the grievant's access to her personnel records observed "an extreme lack of communication between [the grievant] and [her immediate supervisor] on matters related to a normal supervisory relationship." An "extreme lack of communication" between an employee and her supervisor does not guarantee that an ensuing performance evaluation will be arbitrary, although it could signal that possibility. More importantly, where a grievance based on poor job performance during the 2002-2003 performance cycle has already been qualified for hearing, it simply makes sense to qualify a grievance that challenges the veracity of the annual performance rating for the same period. Thus, in order to ensure a full exploration of what could be interrelated facts and issues, the October 27th performance evaluation grievance is qualified for hearing.

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[2] Norman v. Department of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

Misapplication of Personnel Records Policies

The grievant claims that management misapplied policy by maintaining a fact file on her and by placing information in the file without informing her that the information was being placed in the file. She also claims that the she was not given the privilege to review these documents.

Under the Department of Human Resources Management Policy 6.05, "[e]mployees have access to information retained in all personnel files of which they are the subject, in accordance with law."[3] In addition, employees may review supervisors' files of which they are the subject.[4] According to policy: "[e]mployees should make arrangements with their supervisors to review these files" and "[t]he supervisor or a designee normally should be present during the review."[5] Furthermore, under DHRM Policy 6.10, "[e]mployees should normally be given copies of the information [placed in the supervisor's file] at the time it is placed in the file."[6]

For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Furthermore, the General Assembly has limited issues that may qualify for a hearing to those that involve "adverse employment actions."[7] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[8] A misapplication of policy may constitute an adverse employment action if,

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[3] Department of Human Resources Management (DHRM) Policy 6.05 VI (A). There are two exceptions to this general rule: (1) When employees' physicians have requested in writing that employees' medical and/or mental health records remain confidential, their request shall be honored and employees will be denied access to those records; and (2) Letters of reference and recommendation are confidential in nature and, therefore, employees are not required to have access to them.
[4] (DHRM) Policy 6.05 VI (C).
[5] Id.
[6] (DHRM) Policy 6.10 V (C)(3). Supervisory files should contain only work related information including the following: (1) documentation regarding employees' work performance or performance evaluation; (2) documentation of counseling sessions with employees on such things as performance or behavior problems or department policies and procedures; (3) interim performance evaluations; (4) copies of annual evaluations; (5) copies of Written Notices; (6) letters or memoranda from other sources regarding employees' job performance such as letters of commendation or complaint; (7) attendance records; (8) copies of training certificates and/or other training records; (9) copies of position descriptions and performance standards; and (10) copies of agency personnel forms used to initiate personnel transactions. DHRM Policy 6.10 V(C)(2)
[7] Va. Code § 2.2-3004(A).
[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

but only if, the misapplication results in an adverse effect *on the terms, conditions, or benefits* of one's employment.[9]

In this case, the supervisor's failure to provide the grievant with notice that he had placed information about her in his supervisory file does not, *by itself*, appear to have caused the grievant to suffer an adverse employment action. Therefore, this issue is not qualified for hearing as a separate claim for which relief can be granted. However, while placing performance information in the supervisory file without the grievant's knowledge does not have an adverse impact on the grievant's employment, it is not clear whether this information (and the grievant's lack of access to that information) was used later to support an adverse employment action against the grievant, such as her Written Notice or her annual performance evaluation rating. Even though the supervisory file issue does not qualify for adjudication by a hearing officer, the grievant is not precluded from offering evidence related to the supervisory file issue to challenge the merits of the Written Notice and her annual performance evaluation.

Compliance

The grievant seeks consolidation of her grievances for hearing purposes. EDR strongly favors consolidation and will grant consolidation for hearing when two or more grievances are each at the hearing stage, and involve the same parties, legal issues, policies, and/or factual background, unless consolidation would be impracticable.[10] Both October 27th grievances involve the same parties and challenge alleged poor performance during the 2002-2003 performance cycle. In order to maximize the efficiency of the factual exploration of the October 27th grievances, they are consolidated for the hearing purposes and will be heard before one hearing officer at a single hearing. The November 5th grievance, which did not qualify for hearing, is not consolidated with the others. This Department's rulings on compliance are final and nonappealable.[11]

CONCLUSION

For the reasons discussed above, this Department qualifies the grievant's October 27, 2003 performance evaluation grievance for a hearing and consolidates it with the October 27, 2003 Written Notice grievance. This qualification ruling in no way determines that the agency's assessment of the grievant's performance was arbitrary and capricious or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

The November 5, 2003 grievance does not qualify for a hearing and is not consolidated with the other two grievances. If the grievant wishes to appeal this

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[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).
[10] Grievance Procedure Manual 8.5, page 22. *Cf.* EDR Rulings Nos. 2003-494, 2003-050.
[11] Va. Code § 2.2-1001 (5).

determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr
Director

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