

Issue: Qualification/disability discrimination, arbitrary/capricious performance evaluation, retaliation for grievance activity participation; Ruling Date: June 2, 2006; Ruling #2006-1215, 2006-1297; Agency: Department of Correctional Education; Outcome: qualified and consolidated for hearing



*Department of Employment Dispute Resolution*

**QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR**

In the matter of the Department of Correctional Education  
Ruling Nos. 2006-1215, 2006-1297  
June 2, 2006

The grievant has requested qualification of his September 2, 2005 and October 22, 2005 grievances. For the reasons set forth below, these grievances qualify and are consolidated for hearing.

FACTS

The grievant is currently employed by the agency as a Regional Principal. On December 17, 2004, the grievant had hip replacement surgery.<sup>1</sup> As a result of the surgery, the grievant was out of work from December 17, 2004 until April 6, 2005.<sup>2</sup> On March 11, 2005, while the grievant was on leave, he was advised that the agency had decided to demote him because of alleged performance problems.<sup>3</sup> The agency offered the grievant a choice: he could either accept a voluntary demotion to the Assistant Regional Principal position with no reduction in salary and no Written Notice, or he would receive a Group II Written Notice with demotion and his salary would be reduced by five percent.<sup>4</sup> The grievant agreed to accept a self-demotion.<sup>5</sup> The agency subsequently demoted the grievant to Regional Assistant Principal and transferred him.<sup>6</sup>

The grievant returned to work on April 6, 2005. The grievant states that on his return to work, he was not given an EWP for his new position as Regional Assistant Principal. Instead, he asserts, he was given a list of "certain issues with impossible deadlines to meet, and then, they [the deadlines] were shortened up as well." This list, which was set forth in an April 11, 2005 memorandum from the grievant's immediate supervisor, required the grievant to update all inventories at X Correctional Center and all field units (including inventories of FAACS, Audio/Visual and videos, CD's and computer disks, computers/printer, tools, library books, equipment and supplies for the classroom and shop, the administration office, the library, and of all consumable supplies). As drafted, the memorandum did not identify a deadline for these inventories

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<sup>1</sup> EDR Ruling No. 2005-1045 at 1.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; *see also* Hearing Decision in Case No. 8084 (Hearing Decision) at 2.

<sup>4</sup> EDR Ruling No. 2005-1045 at 1; Hearing Decision at 2-3.

<sup>5</sup> EDR Ruling No. 2005-1045 at 2; Hearing Decision at 3.

<sup>6</sup> Hearing Decision at 4.

to be completed; however, a hand-written deadline of May 15, 2005 was subsequently added.

The April 11<sup>th</sup> memorandum also mandated that the grievant complete three written and signed observations of all teachers at the X Correctional Center and all field units. As originally prepared, the memorandum provided that this task was to be completed no later than July 15, 2005, but this deadline was subsequently crossed out and shortened to May 1, 2005. In addition, the April 11<sup>th</sup> memorandum stated that grievant had to update “memorandums of agreement” for X Correctional Center and each field unit by July 1, 2005. This deadline was also later changed to May 6, 2005. Finally, the April 11<sup>th</sup> memorandum charged the grievant with the task of updating policies and procedures manuals for each field unit and having those manuals signed by the warden or superintendent. The deadline for this final task was initially set in the memo as July 15, 2005, but it was subsequently crossed out and shortened to May 6, 2005.

On April 9, 2005, the grievant initiated a grievance challenging his transfer and demotion, as well as other alleged agency actions.<sup>7</sup> On September 15, 2005, a hearing was held on the grievant’s transfer and demotion.<sup>8</sup> The hearing officer ruled on September 26, 2005 that the agency’s actions were not in compliance with policy and ordered the agency to reinstate the grievant to his former position as Regional Principal, or if that position was occupied, to an objectively similar position.<sup>9</sup>

On August 3, 2005, prior to the hearing officer’s decision and the grievant’s reinstatement as Regional Principal, the agency conducted an observation of the grievant’s performance. This observation rated his performance as “below contributor” in a number of areas. On September 2, 2005, the grievant initiated a grievance challenging the observation and rating as retaliatory and arbitrary and capricious. On September 14, 2005, the grievant received a Notice of Improvement Needed/Substandard Performance dated September 13, 2005. Approximately a week later, on September 22, 2005, the grievant received an annual performance evaluation rating his performance as “below contributor.” The grievant initiated a grievance challenging this evaluation, as well as other alleged agency conduct, on October 22, 2005. He asserts that the evaluation constituted a continuation of the retaliation challenged in his August 3<sup>rd</sup> grievance and was one of a number of acts through which the agency also harassed and discriminated against him.<sup>10</sup> He also asserts that his performance evaluation was arbitrary and capricious, and that the agency misapplied and/or unfairly applied policy.

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<sup>7</sup> EDR Ruling No. 2005-1045 at 3; Hearing Decision at 1.

<sup>8</sup> Hearing Decision at 1.

<sup>9</sup> *Id.* at 1, 3-4.

<sup>10</sup> From the grievant’s response to the agency head’s denial of qualification on his October 22<sup>nd</sup> grievance, it appears that he is asserting that he has been discriminated against on the basis of “[h]andicap.” In his attachment to his Form A, the grievant does not specifically identify the basis on which he alleges the agency discriminated against him, although he does allude to his “disability” in his supporting facts. Because the grievant clearly raised discrimination as an issue in the attachments to his Form A and specifically mentioned his alleged disability status in the supporting facts, we conclude that the grievant’s claim of disability discrimination may be considered as part of the October 22<sup>nd</sup> grievance.

Because the grievant alleged discrimination by his immediate supervisor in his September 2<sup>nd</sup> grievance, he initiated it with the next-level supervisor, who apparently was also the second-step respondent. The agency administratively closed the grievance on the basis that it was untimely, on the stated basis that it was postmarked, but not received, within the 30-calendar-day period. The grievant appealed the agency's action, and on October 7, 2005, this Department issued a ruling which concluded that the September 2<sup>nd</sup> grievance was timely.<sup>11</sup> Subsequently, during the course of the resolution steps, the agency advised the grievant that all the relief he sought had been or would be granted. However, the agency conditioned its offer of a new observation (and removal and destruction of the old observation) on the closing of his grievance.

Similarly, during the management resolution steps on the October 22<sup>nd</sup> grievance, the agency advised the grievant that the relief he sought had been or would be granted to the extent possible or warranted. Specifically, the agency advised the grievant of its position that with respect to the grievant's request that the retaliation and harassment cease, he had received the relief "de facto" as he has been assigned to a new supervisor; that with respect to the grievant's request for disciplinary action for "those participating," that information regarding disciplinary action against other employees cannot be divulged; that with respect to the grievant's request for the "same workload environment as those in similar situations," the agency's position was that the grievant already had the same or a better workload and therefore relief had been granted; and with respect to the grievant's request for travel costs resulting from his transfer and demotion, such a request was outside the scope of the grievance procedure and was untimely. In addition, the agency agreed to conduct a new evaluation of the grievant, but it expressly conditioned its agreement on the closing of the October 22<sup>nd</sup> grievance.

Disagreeing with the agency's assessment of the granted relief and seeking an affirmative finding of misconduct by the agency, the grievant instead elected to proceed with his grievance. The agency, however, asserts that because the grievant elected to pursue his grievance, he is engaging in harassment and impeding the efficiency of state government.

## DISCUSSION

### Qualification:

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.<sup>12</sup> Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out generally do not qualify for a hearing, unless the agency's actions result in an adverse employment action<sup>13</sup> and the grievant presents evidence raising a sufficient

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<sup>11</sup> EDR Ruling No. 2006-1155.

<sup>12</sup> Va. Code § 2.2-3004(B).

<sup>13</sup> 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

question as to whether the actions were taken for disciplinary reasons, were influenced by discrimination or retaliation, or were the result of a misapplication or unfair application of policy.<sup>14</sup>

In the grievant's September 2, 2005 grievance, he asserts that his August 2005 observation was arbitrary and capricious, and that his "below contributor" rating on that observation was in retaliation for previous protected activity. The grievant's October 22, 2005 grievance alleges that he has been subjected to retaliation, harassment, and discrimination; that the agency has misapplied and/or unfairly applied policy; and that his October 2005 performance evaluation was arbitrary and capricious. These claims will be addressed below.

### *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.<sup>15</sup> Accordingly, to qualify this issue 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."<sup>16</sup>

"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.<sup>17</sup> 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 grievant accepted a demotion from his position as Regional Principal in March 2005, in lieu of formal discipline, demotion, and salary reduction, for what the agency stated were performance-based reasons. After his demotion, the agency

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different responsibilities, or a decision causing a significant change in benefits." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

<sup>14</sup> Va. Code § 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1(C).

<sup>15</sup> Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

<sup>16</sup> Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §4.1(b). We note that the grievant has shown that his "below contributor" rating constituted an adverse employment action because it resulted in his not receiving a 3% raise.

<sup>17</sup> See *Norman v. Department of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

provided the grievant with a memo listing tasks to complete, with specific deadlines that appear to have at some point been crossed out and replaced with closer deadlines. The agency did not, apparently, provide the grievant with an EWP for his new position as Regional Assistant Principal. Subsequently, in August 2005, the grievant received an observation rating his performance as “below contributor.” The agency appears to admit that at the time this observation was conducted, the grievant did not have a current EWP.

In October 2005, the grievant received his 2005 performance evaluation, which also rated his performance as “below contributor.” That evaluation appears to assess the grievant’s performance in his position as Assistant Principal, a role he had assumed in April 2005. The agency apparently admits that the grievant did not have a current EWP while he worked as an Assistant Principal.<sup>18</sup> In response to the grievant’s request for a “fair and honest evaluation,” the agency agreed to conduct a new annual evaluation, on those duties identified in the April 11, 2005 memorandum, when, and apparently only if, the grievant concluded his grievance.

In light of the foregoing, this Department finds that the grievant has raised a sufficient question of whether his 2005 performance evaluation was arbitrary and capricious to qualify for hearing. Under the *Grievance Procedure Manual*, “arbitrary and capricious” is defined as being “[i]n disregard of the facts or without a reasoned basis.”<sup>19</sup> In determining that the grievant has presented sufficient evidence to qualify for hearing, we note, in particular, that the alleged lack of an EWP, particularly in light of the grievant’s assumption of a new position, raises questions about the standards against which the grievant’s performance was evaluated (i.e., whether the evaluation had a “reasoned basis”), and whether he had adequate notice of those standards. However, this qualification ruling in no way determines that the agency’s actions with respect to the grievant were arbitrary and capricious or otherwise improper. Rather, we merely recognize that, in light of the evidence presented, further exploration of the facts by a hearing officer is appropriate.

#### *Alternative Theories and Claims*

The grievant also claims the agency has retaliated against him for his previous protected activity, discriminated against him on the basis of a disability, harassed him, given him an arbitrary and capricious evaluation, and misapplied and/or unfairly applied policy. Because the issue of an arbitrary and capricious performance evaluation qualifies for a hearing, this Department deems it appropriate to send all the grievant’s alternative theories and claims, as set forth in his September 2, 2005 and October 22, 2005 grievances, for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

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<sup>18</sup> We note that the 2005 performance evaluation appears to have been prepared by the reviewer, rather than the immediate supervisor, as the reviewer signed and dated the form, with her comments, approximately one week before the supervisor signed the form.

<sup>19</sup> *Grievance Procedure Manual* § 9.

Consolidation:

Written approval by the Director of this Department or her designee in the form of a compliance ruling is required before two or more grievances are permitted to be consolidated in a single hearing. EDR strongly favors consolidation and will generally consolidate grievances involving the same parties, legal issues, policies, and/or factual background, unless there is a persuasive reason to process the grievances individually.<sup>20</sup>

This Department finds that consolidation of the September 2, 2005 and October 22, 2005 grievances is appropriate. The grievances involve the same parties, potential witnesses, and share common themes. Furthermore, consolidation is not impracticable in this instance. This Department's rulings on compliance are final and nonappealable.<sup>21</sup>

Finally, it is necessary for this Department to address the agency's conduct throughout the course of the grievant's participation in the grievance process. We believe that this conduct, when considered in the aggregate, suggests a troubling disregard for, and perhaps even hostility to, the grievance procedure itself.

First, we note that during the course of the grievant's April 9, 2005 grievance, an agency manager advised the grievant that a favorable ruling by the hearing officer could possibly open the door to the agency again considering terminating the grievant.<sup>22</sup> Even in the absence of any retaliatory intent, such a comment could reasonably be construed by the grievant as a threat of termination if he continued to exercise his grievance rights.

Subsequently, the agency administratively closed the grievant's September 2, 2005 grievance as untimely, because it had been received after the 30-day period.<sup>23</sup> On October 7, 2005, this Department issued a compliance ruling holding that the grievance had been timely filed, as it was apparently undisputed that the grievance was mailed within the 30-day period.<sup>24</sup> We note that, contrary to the agency's stated basis for closing the grievance, the *Grievance Procedure Manual* has long expressly stated that "for purposes of establishing when a mailed grievance was initiated, the postmark date is considered the initiation date."<sup>25</sup> We further observe that this same rule has been repeatedly stated in this Department's rulings, which may be searched and reviewed on our website.<sup>26</sup>

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<sup>20</sup> *Grievance Procedure Manual*, § 8.5.

<sup>21</sup> Va. Code § 2.2-1001 (5).

<sup>22</sup> EDR Ruling No. 2005-1045 at n. 12.

<sup>23</sup> EDR Ruling No. 2006-1155.

<sup>24</sup> *Id.*

<sup>25</sup> *Grievance Procedure Manual* § 2.4

<sup>26</sup> See, e.g., EDR Ruling No. 2004-645, EDR Ruling No. 2004-608, EDR Ruling No. 2003-147.

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In addition, although the agency has agreed to re-evaluate the grievant, it has expressly conditioned any re-evaluation on the grievant's conclusion of his grievances, even though the agency appears to concede, at least in part, that the initial observation and subsequent evaluation were conducted in the absence of a current EWP. Because the grievant has instead elected to continue his grievances, the agency has repeatedly charged that the grievant is harassing the agency and impeding the operations of state government. The agency head also asserted, in his response to the grievant's request for qualification, that because the grievant has refused to close his grievance, for EDR to qualify the October 22<sup>nd</sup> grievance for hearing "could be viewed as an abuse of state funds."

Regardless of the agency's opinion of the merits of the grievant's claims or its frustration over his desire to proceed with those claims, the grievant's decision in this case to continue his grievances, in accordance with his rights under the grievance procedure, cannot be viewed as harassment or as an abuse of state funds. This is particularly true where, as here, the grievant seeks not only unqualified and full relief, but also a finding of wrongful conduct by the agency and related injunctive relief, (e.g., an order, enforceable by a circuit court, barring any future retaliation.)

#### CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's September 2, 2005 and October 22, 2005 grievances are qualified and consolidated for a single hearing. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

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Claudia T. Farr  
Director