

Issue: Qualification/Performance Evaluation/arbitrary and capricious evaluation;  
Retaliation/grievance activity participation; Ruling Date: May 3, 2006; Ruling #2006-1221,  
2006-1222; Agency: Department of Forensic Science; Outcome: both grievances qualified



## ***COMMONWEALTH of VIRGINIA***

### ***Department of Employment Dispute Resolution***

### **QUALIFICATION RULING OF DIRECTOR**

In the matter of the Department of Forensic Science  
Ruling Number 2006-1221 and 2006-1222  
May 3, 2006

The grievant has requested a ruling on whether her two November 7, 2005 grievances with the Department of Forensic Science (DFS or the agency) qualify for hearing. In one grievance, the grievant claims that her 2005 performance evaluation is arbitrary and capricious. In the second, she asserts that she was retaliated against for her prior grievance activity. For the reasons discussed below, these grievances are qualified.

#### **FACTS**

The grievant was employed as a Forensic Evidence Specialist with DFS. The grievant, like several other Forensic Evidence Specialists, had previously worked in security positions. In lieu of being laid off, those individuals were moved into forensic positions.

In January of 2005, the grievant filed an informal complaint against the individual who served as reviewer for her performance evaluation. Several months later, in March of 2005, the grievant received a Notice of Improvement Needed/Substandard Performance form, for purported excessive administrative and procedural errors when processing cases. The Notice described cases with incorrect data that the grievant had been told to correct; her failure to return cases that should have been returned; and returning a case which should not have been returned as well as returning it to the wrong agency.

On September 12, 2005, the grievant was issued a Written Notice for her job performance. The grievant challenged the Written Notice by initiating a grievance. During the management resolution steps the discipline was rescinded by the second-step respondent because the grievant's immediate supervisor stated, at the second-step meeting, that the conduct for which the grievant was being disciplined had been observed with others who were not disciplined.

In October, the grievant was presented with her 2005 performance evaluation. The evaluation rated her overall as "Below Contributor" with "Contributor" marked for three elements and "Below Contributor" rating for the remaining three elements. Dissatisfied with her evaluation, the grievant initiated a grievance on November 7, 2005 challenging the evaluation as

arbitrary and capricious. The grievant initiated a second grievance on the same day, asserting that she was being retaliated against for having grieved the Written Notice that was rescinded.

Since initiating these grievances, the grievant resigned her position with the agency.

## DISCUSSION

### *Arbitrary and Capricious Performance Evaluation Grievance*

The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.<sup>1</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>2</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>3</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 agency has provided evidence that the grievant was provided with notice of deficiencies with her performance and was given an opportunity to correct them. As noted above, she was presented with a Notice of Improvement Needed/Substandard Performance Form in March. The Notice cited the grievant for her incorrect data entry in the Division's case management tracking system (FACE). In one of the elements of the grievant's 2005 performance evaluation for which the grievant received a "Below Contributor" rating, the grievant's immediate supervisor notes that the grievant "has been plagued by a host of data entry problems related to transferring and returning cases in the FACE system that at one point caused immense inventory problems for the Department and Section." He further noted that "she didn't know how to correct the problems." The supervisor also cited the grievant for improper transfer of cases and noted that the grievant "continues to have problems understanding the routine working of the chain of custody on the RFLE and other documents used in the evidence transfer

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<sup>1</sup> Va. Code §2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).

<sup>2</sup> Va. Code §2.2-3004(A); *Grievance Procedure Manual* §4.1(b).

<sup>3</sup> See *Norman v. Department of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.).

process.” He concluded that she needs to work on her data entry skills to cut down on the number of primary data entry mistakes. The reviewer’s comments generally track the supervisor’s.<sup>4</sup> In response to the performance evaluation, the grievant challenged the reviewer’s comments as general, subjective, and biased. In contrast, she describes her immediate supervisor’s comments as constructive, objective and specific.

The grievant’s immediate supervisor, who appears to have been largely responsible for having the Written Notice rescinded because of his statement at the grievant’s second step meeting, evidently found the grievant’s performance problematic. During the course of the investigation for this ruling, he conceded that the grievant “wasn’t a model employee.” Echoing his appraisal in the Performance Evaluation, the supervisor explained that she had difficulty with certain tasks and that he had to explain things repeatedly. However, he further explained that a number of the other former security employees also had problems. Moreover, he maintains that even though the grievant had more problems than others, he did not believe that her performance justified the overall “Below Contributor” rating.

#### *Motive*

As noted above, 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 immediate supervisor, the individual who would presumably be most familiar with the quality of the grievant’s work, disagreed with the reviewer’s assessment of her work. In fact, the immediate supervisor attempted to arrange a meeting with the reviewer’s supervisor regarding the disagreement between the immediate supervisor and the reviewer over the grievant’s evaluation. This meeting never took place. Given the history of the apparently strained relationship between the grievant and the reviewer, which predates the grievant’s January 2005 complaint regarding the reviewer to the reviewer’s supervisor, including the issuance of a Written Notice that was subsequently overturned, and the immediate supervisor’s conviction that the grievant was being improperly rated, this Department believes that a further exploration of the facts by a hearing officer is warranted to determine whether the grievant’s performance rating may have been influenced by personal animosity or some other improper motive, rather than a reasonable basis.

#### *Retaliation Grievance*

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<sup>4</sup> The reviewer stated that the grievant “needs to improve on the number of data entry errors,” and “had not returned evidence to the agency in the FACE system, returned evidence in the FACE system that was still in the evidence and receiving storage, returned the original RFLE to the agency or returned evidence to the wrong agency in the FACE system.” The reviewer further noted that the grievant “has had several documented problems when transferring evidence to laboratory personnel,” and also “transferred numerous drug cases in the drug administrative storage when she should have transferred these cases to the personal custody of the examiner.” She concludes by noting that the grievant does not seem to “understand her errors or how to make the necessary corrective action,” and that the grievant “does not retain or understand the function of the FACE system and the function of the Evidence Specialist duties.”

In her second grievance, the grievant claims that as a result of her success in challenging the Written Notice through the grievance process, she has been subject to retaliation.

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;<sup>5</sup> (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 presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.<sup>6</sup> Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.<sup>7</sup>

The initiation of a grievance is clearly a protected activity.<sup>8</sup> The grievant suffered an adverse employment action when she received the "Below Contributor" rating on her evaluation.<sup>9</sup> For the reasons discussed above in the *Motive* section and because the performance evaluation grievance has been qualified for hearing, this Department believes that a further exploration of the facts by a hearing officer is warranted to determine whether the grievant was subject to retaliation for her grievance activity.

#### CONCLUSION

For the reasons discussed above, this Department concludes that the November 7<sup>th</sup> grievances are qualified for hearing. This qualification ruling in no way determines that the agency retaliated against the grievant or rated her performance in an arbitrary manner, only that further exploration of the facts by a hearing officer is appropriate. 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

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<sup>5</sup> See *Grievance Procedure Manual* §4.1(b)(4). 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."

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

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

<sup>8</sup> See Va. Code 2.2-3004(A) and *Grievance Procedure Manual* §4.1(b)(4).

<sup>9</sup> The retaliation grievance does not expressly reference the evaluation as a specific retaliatory act. However, the retaliation grievance states that "Every [sic] since I had a grievance overturned in my favor, my work environment has been stressful and un-healthy [sic]." The grievant further cites to "on going [sic] conflict."

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William G. Anderson, Jr.  
EDR Consultant, Sr.