Issue: Qualification/arbitrary and capricious performance evaluation; Ruling Date: March 23, 2006; Ruling #2006-1280; Agency: Department of Transportation; Outcome: qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation
Ruling No. 2006-1280
March 23, 2006

The grievant has requested a ruling on whether her November 10, 2005 grievance with the Department of Transportation (VDOT or the agency) qualifies for a hearing. The grievant claims that the agency retaliated and misapplied and/or unfairly applied policy by giving her an arbitrary and capricious performance evaluation. For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant is employed as an Architect/Engineer I. The grievant states that on June 1, 2005, she received a Notice of Improvement Needed, and on October 11, 2005, she received an overall rating of "Below Contributor" on her 2005 performance evaluation. She further states that she subsequently received a Re-Evaluation Plan on October 17, 2005, and was told that if her performance did not improve in 90 days, she would be demoted to Team Leader with a five percent reduction in pay.

On November 10, 2005, the grievant initiated a grievance challenging her performance evaluation. She asserts that these actions are continued retaliation against her for two hot line investigations occurring in 2004-2005, as well as a previous grievance initiated in November 2004. These investigations related to the Bridge Engineer's alleged pre-selection of her immediate supervisor, Mr. B, for the Assistant Bridge Engineer position and the "outside work" of another employee managed by Mr.

B.[1] The grievant also asserts that management has misapplied and/or unfairly applied policy and procedures.

DISCUSSION

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;[2] (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' stated reason was a mere pretext or excuse for retaliation.[3] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[4]

Here, the grievant easily satisfies the first and second of these requirements. She has presented evidence raising a sufficient question as to whether she engaged in a protected activity[5] and subsequently received a Below Contributor rating, which resulted in her not receiving a three percent raise. At issue, then, is whether there is sufficient evidence of a causal connection between the grievant's protected activity and her 2005 performance evaluation.

In support of her claim of retaliation, the grievant has presented, among other evidence, notes taken by an agency human resource staff member at meetings relating to her grievance held on November 18, 2005 and December 2, 2005. Those notes indicate that one witness stated that the Bridge Engineer said, apparently in the context of a discussion about a hotline complaint, that he was going to "take care of that problem," which the witness understood to be a threat against the grievant; and that Mr. B and the

[1] Mr. B, as the grievant's immediate supervisor, completed her performance evaluation; the Bridge Engineer acted as reviewer.

[2] *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.

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

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

[5] We note that a grievant may satisfy the "protected activity" requirement by demonstrating either that he or she engaged in a protected activity or was perceived as doing so by the agency. *See generally* United States EEOC v. Bojangles Rests, Inc., 284 F. Supp. 2d 320, 328, 330 (M.D.N.C. 2003); EEOC v. Union Bank of Arizona, 1976 U.S. Dist. LEXIS 17081, at ** 4-5 (D. Ariz. Jan. 20, 1976).

Bridge Engineer were "very upset with her" and "could not leave it alone." Another witness stated that he overheard the bridge engineer screaming at the grievant from behind a closed door, and that it "[a]ctually stopped [the witness] in his tracks." The same witness stated that he and another employee told Mr. B, in the context of a discussion about the pre-selection issue, that he should "just leave [the grievant] alone." He also stated that he was afraid of revenge, apparently because he believes that management "give[s] [the grievant] a duty and before she gets that done, they give her another. Inspection people say she cannot satisfy them."[6]

A third witness at the second-step meeting stated that he felt the grievant was being harassed. He explained, "Seems like everything she does is wrong. Told to do something by one person and written up by another. Was afraid anything he said would be used against [the grievant]. The feeling is there—may not be true but that is the feeling." Still another witness stated that when the grievant goes into a meeting room, Mr. B's demeanor changes—his voice raises and he becomes aggravated. In addition, he alleged that Mr. B bypasses the grievant and goes directly to the inspectors. He also stated that while Mr. B is quick to anger and gives confusing instructions, he believed the grievant is "getting kicked while down" and that "[s]he does not deserve this treatment."

The agency denies that the grievant has been retaliated against and has articulated a legitimate, non-retaliatory reason for its actions—specifically, the grievant's performance. However, in light of the totality of the evidence, we find that the grievant has raised a sufficient question regarding retaliation to qualify for hearing. Certainly, while evidence of conflict between the grievant and her supervisors could be probative of a retaliatory intent, any conflict between them may also exist for a myriad of non-retaliatory reasons. We therefore believe that further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility. We note, however, this qualification ruling in no way determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper.

Alternative Theories

The grievant also claims the agency misapplied or unfairly applied policy and that her 2005 performance evaluation is arbitrary and capricious. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send these alternative theories for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

[6] The grievant states that she was, in effect, the engineer over the inspection program.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's November 10, 2005 grievance is qualified. 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 Farr
Director

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Gretchen M. White
EDR Consultant