Issues: Qualification – Performance (Arbitrary/Capricious Evaluation) and Retaliation (Grievance Activity Participation); Ruling Date: April 14, 2008; Ruling #2008-1997; Agency: Department of Environmental Quality; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Environmental Quality
Ruling No. 2008-1997
April 14, 2008

The grievant has requested qualification of his January 31, 2008 grievance with the Department of Environmental Quality (the agency). For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

In his January 31, 2008 grievance, the grievant is challenging his Career Path matrix for 2007. The Career Path rates an employee based on the employee's demonstrated competencies in various areas. There are twenty categories on the Career Path matrix. The grievant was rated at one of three levels (Entry, Senior, or Senior II) in each category. The grievant received an overall rating of Senior because he was rated Senior II on only 75% of the competencies. If the grievant were to receive a Senior II rating in at least 80% of the competencies, meaning attaining that level on just one more category, he will receive an overall rating of Senior II, which could carry a salary increase.

The grievant argues that he should have been rated Senior II on the Leadership competency under "Interpersonal/Communication Skills." The description for this competency at the Senior II level states: "Demonstrates the ability to conduct training for groups of staff within DEQ. Capable of being an effective and willing mentor." The grievant states that he conducted training regarding the Enforcement Database System (EDS) during the evaluation period. He further states that he was told by his former supervisor that this training would satisfy the Leadership competency.[1] The agency disputes his contention by asserting that he conducted the EDS training in one-on-one individual settings, not as a group. The agency has interpreted the language "conduct training for groups of staff" to mean that the training must be an instructor-led group training to a wide audience, not individual one-on-one instruction.

The grievant argues that the agency's determination was arbitrary and capricious. He also alleges that he has been retaliated against for filing previous grievances. Following denial of qualification by the agency head, the grievant now seeks a qualification ruling from this Department.

[1] This fact cannot be verified with the grievant's former supervisor because he has since passed away.

DISCUSSION

Arbitrary and/or Capricious Rating

The grievance statutes and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.[2] Accordingly, for the grievant's January 31, 2008 grievance to qualify for a hearing, there first must be facts raising a sufficient question as to whether the Career Path rating was "arbitrary or capricious."[3] "Arbitrary or capricious" means that management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious rating 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 rating is insufficient to qualify an arbitrary or capricious claim for a hearing when there is adequate documentation in the record to support the conclusion that the rating had a reasoned basis. However, if the grievance raises a sufficient question as to whether the rating 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.

The grievant disputes the agency's interpretation of what it means under the Leadership competency to demonstrate the ability to train "groups of staff." While an agency's interpretation of its own policies is generally afforded great deference, that deference is not without limitation. If the agency's interpretation is clearly erroneous or inconsistent with the express language of the policy, deference should not be given.[4] Further, even where an ambiguous policy is otherwise enforceable, a hearing officer may consider whether the absence of fair notice of the agency's interpretation of its policy should have a bearing on the outcome of a grievance.[5]

It cannot be said that the agency's interpretation of "groups of staff" is inconsistent with the language of the policy. Nor can it be said that there is any notice problem here. The language of this description does not appear to be ambiguous. Though the grievant's interpretation of the language might be consistent with the words of the description, it does not appear to follow a general understanding of what it would mean to train a group of individuals.[6] Therefore, this Department must defer to the agency's interpretation of the

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[2] *See* Va. Code § 2.2-3004(B) (reserving to management the exclusive right to manage the affairs and operations of state government).
[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).
[4] *See, e.g.*, EDR Ruling No. 2001-064 and EDR Ruling No. 2004-932.
[5] *Id.*
[6] The alleged statement of the grievant's former supervisor, i.e., that the EDS training would satisfy the Leadership competency, does not raise any question of multiple interpretations. There is no evidence that the grievant's former supervisor had indicated that conducting the EDS training on a one-on-one basis would satisfy this competency. Indeed, the grievant's former supervisor may have intended for the grievant to conduct a group

"groups of staff" language, i.e., training to a wide audience, not on a one-on-one basis. The grievant has presented no evidence that the agency is applying this language in any manner other than that originally contemplated when the Career Path was enacted. As such, there is no evidence that the agency's conclusion that the EDS training did not satisfy the requirements of this competency was arbitrary or capricious. Rather, the decision was consistent with the agency's reasonable application of the language of the description.

Further, even if the grievant's interpretation prevailed, and the EDS training demonstrated the grievant's ability to train "groups of staff," that is not the only factor of the Leadership competency. The grievant must also be considered "[c]apable of being an effective and willing mentor." The agency appears to have relied upon information about the grievant's performance that would question rating the grievant's abilities at a Senior II level in this Leadership competency. The grievant seems to rely only on the EDS training to establish both his abilities to train "groups of staff" and as a mentor. However, the grievant's argument is contradicted by the agency's assessment of the grievant's performance, which is supported by evidence submitted by the agency. The grievance procedure accords much deference to management's exercise of judgment, including management's assessment of employees in their respective roles. There is no indication that the agency's assessment disregarded the facts or lacked a reasoned basis. As such, the grievant has not raised a sufficient question that the agency was arbitrary or capricious in rating the grievant at a Senior level in the Leadership competency.

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;[7] (2) the employee suffered a materially adverse action;[8] and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially 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.[9] Evidence establishing a

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training. Unfortunately, there is no way to determine the meaning of the alleged comments of the grievant's former supervisor. As such, there is no basis to find that the agency indicated a different interpretation of "groups of staff" to the grievant.

[7] *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 Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b).

[8] Burlington N. & Santa Fe Ry. Co. v. White, 126 S. Ct. 2405, 2414-15 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633.

[9] *See, e.g.*, EEOC v. Navy Fed Credit Union, 424 F.3d 397, 405 (4th Cir. 2005).

causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[10]

Initiating and participating in a grievance is clearly protected activity.[11] However, even if it is assumed that the grievant has experienced a materially adverse action,[12] the grievant has presented no evidence that a causal link exists between the grievant's prior protected acts and the alleged adverse action at issue in this case. The grievant has not presented any evidence that the agency's assessment of the Leadership competency was motivated by improper factors. Rather, it appears that the determinations were based on an assessment of the grievant's performance and demonstrated abilities in light of the agency's application of the rating language. The grievant has not presented evidence that raises a sufficient question that the agency's stated rationale for placing the grievant at the Senior level in the Leadership competency was pretextual. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievant's claim does not qualify for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet. If the grievant wishes to appeal the qualification determination to the circuit court, the grievant should notify the human resources office, in writing, within five workdays of receipt of this ruling and appeal to the circuit court in the jurisdiction in which the grievance arose pursuant to Va. Code § 2.2-3004(E). If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr
Director

[10] *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

[11] *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

[12] In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting Rochon v. Gonzales, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).