Issue: Qualification/Performance/Interim Evaluation; Ruling Date: December 17, 2002; Ruling #2002-220; Agency: Department of Health; Outcome: Not qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Health/ No. 2002-220
December 17, 2002

The grievant has requested a ruling on whether his challenge to an interim performance evaluation, which he raised in his August 22, 2002 grievance with the Virginia Department of Health (VDH), qualifies for a hearing. The agency has already qualified for hearing the first issue contained in that grievance, a Group II Written Notice with termination. For the following reasons, the issue of his interim evaluation does not qualify for a hearing as a separate claim for which relief may be granted.[1] However, to the extent his interim evaluation or the contents thereof have any bearing on the merits of his Group II Written Notice or termination, the parties may offer evidence regarding that evaluation.

FACTS

The grievant was an Assistant Chief Medical Examiner with VDH until his termination on July 23, 2002. On that date, he received a Group II Written Notice for substandard performance with removal from employment.[2] The grievant filed a grievance on August 22, challenging the disciplinary action and the resulting termination.

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[1] The agency does not claim that the grievant failed to initiate his grievance challenging the interim performance evaluation in a timely manner. However, this Department notes that the date of the evaluation is June 1 and the grievant did not initiate this grievance until August 22. Under the grievance procedure, an "employee's grievance must . . . be present to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance." *Grievance Procedure Manual* § 2.4(1), page 6. The *Grievance Procedure Manual* further states that "management may allow a grievance to proceed through the resolution steps" even if not filed within 30 days of the event forming the basis of the grievance, but may deny qualification for a hearing on those grounds. *Grievance Procedure Manual* § 2.4, page 7.

[2] The Written Notice specifically noted the grievant's alleged (1) failure to follow supervisor's instructions; (2) failure to perform work in a timely manner; (3) unacceptable number of pending cases; and (4) the Commonwealth Attorney's lack of faith in the grievant's court performance. *See* Group II Written Notice, dated July 23, 2002. This was the grievant's second active Group II Written Notice, which can support removal under the Standards of Conduct. *See* Department of Human Resource Management (DHRM) Policy 1.60, Standards of Conduct.

In addition, the grievant challenged an interim performance evaluation dated June 1, 2002.[3]

The Commissioner of VDH qualified the discipline/termination issue for hearing, noting that, under the grievance procedure, formal discipline is an action that automatically qualifies for hearing.[4] However, the agency did not qualify for hearing the grievant's second issue, his negative interim performance evaluation. The agency asserts that interim performance evaluations are not adverse employment actions and thus, do not qualify under the grievance procedure.

DISCUSSION

Under the grievance procedure, interim performance evaluations do not qualify for hearing unless there is evidence raising a sufficient question as to whether, through the issuance of the evaluation, management took an "adverse employment action" against the grievant affecting the terms, conditions, or benefits of his employment.[5] An interim evaluation, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[6] Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.[7] In this case, the interim evaluation did not, by itself, constitute an adverse employment action. Therefore, the evaluation cannot qualify for a hearing as separate claim for which relief can be granted.

This Department has long held, however, that should an interim evaluation later serve to support an adverse employment action against the grievant, such as a formal Written Notice, the grievant may offer evidence as to the merits of that evaluation through a subsequent grievance challenging the adverse employment action.[8] Here, the grievant received a Group II Written Notice, based on his alleged unsatisfactory performance, which resulted in his termination. The grievant challenged these adverse employment actions through his August 22 grievance, and claims that the interim

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[3] The June 1, 2002 interim evaluation noted several perceived performance deficiencies, including sleeping on the job and problems with time management. The grievant received an overall rating of "Below Contributor" on the interim evaluation. While the grievant contends that the June 1, 2002 evaluation was not "interim," the facts do not support this position. Formal, annual performance evaluations under DHRM Policy 1.40 cannot be completed prior to August 10 each year. The June 1, 2002 evaluation therefore could not be an annual evaluation, but was rather an interim one. *See* DHRM Policy 1.40, page 11 of 16.

[4] *Grievance Procedure Manual* § 4.1(a), page 10.

[5] *Grievance Procedure Manual* § 4.1, pages 10-11. *See also* EDR Rulings #2002-007 and #2001-069. 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[6] *See* Boone v. Golden, 178 F.3d 253 (4th Cir. 1999).

[7] Va. Code § 2.2-3004(A).

[8] *See* EDR Ruling #2002-069.

evaluation was used to support his termination. Thus, while the interim evaluation itself does not qualify for a hearing as a separate claim for which relief can be granted, the grievant may present evidence at hearing regarding the interim evaluation if the hearing officer determines that it has some bearing on the issue of whether the Group II Written Notice and termination were warranted and appropriate.

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. 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

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