Issue: Qualification/Performance/other; Ruling Date: October 3, 2003; Ruling #2003-051; Agency: Department of Health; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Health
Ruling No. 2003-051
October 3, 2003

The grievant has requested a ruling on whether his January 3, 2003 grievance with the Virginia Department of Health (VDH or agency) qualifies for a hearing. The grievance alleges unfair and/or misapplication of the performance planning and evaluation policy. For the reasons set forth below, this grievance does not qualify for a hearing.[1]

FACTS

The grievant is employed by VDH as an Environmental Health Specialist Senior. On December 9, 2002, the grievant received a new performance plan from his immediate supervisor for his review and signature.[2] The grievant asserts that the proposed performance plan was retroactive to September 16, 2002 and contained "numbers in each Core Responsibility section [that were] significantly higher and/or are newly mandated to be completed, compared to previous years."[3] The grievant told his supervisor that he had some concerns and subsequently wrote a December 12, 2002 memo to management addressing his key issues with the proposed performance plan.[4] Specifically, the grievant asserts that the increased workloads are not equitable and that his performance plan "leaves no room for anything but 'meets expectations'" on his annual performance evaluation.[5] Management responded that the agency was experiencing a growing workload and that it found "no other alternative for getting the work done" than to "equally" distribute the work.[6] Further, management contended that it was confident "that the achievers of the office will still manage to rate an *Extraordinary Contributor* through their diligent efforts."[7] The grievant filed his grievance on January 3, 2003 and for relief primarily asks that his numbers be prorated and reduced, and that workloads be dispersed more equitably.[8] The agency head denied qualification and the grievant requested that the Director of this Department qualify the grievance for hearing.

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[1] While this ruling does not discuss with particularity each argument advanced by the grievant in his January 3, 2003 grievance, each of those arguments has been reviewed and carefully considered.
[2] *See* Grievant's Form A Attachment of Issues Background.
[3] *See* Grievant's Form A Attachment of Issues Overview.
[4] *See* Correspondence from grievant to his immediate supervisor and manager dated December 12, 2002.
[5] *Id.*
[6] *See* Correspondence from grievant's immediate supervisor dated December 13, 2002.
[7] *Id.*
[8] *Id.*

DISCUSSION

Unfair Application or Misapplication of Policy

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government. Inherent in this authority is the responsibility to provide employees with notice of performance expectations. The Department of Human Resource Management (DHRM) has sanctioned the use of performance plans to "identif[y] the core responsibilities, special projects, and performance measures to indicate required achievement levels during and at the end of the performance cycle."[9] Under the grievance procedure, informal supervisory actions, including the establishment of a performance plan, generally do not qualify for a hearing.[10] Here, the grievant cites numerous objections to his performance plan including an allegation that he is required to perform more work than similarly situated co-workers and that management has increased the workload in each Core Responsibility area.

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[11] The threshold question then becomes whether or not the grievant has suffered an adverse employment action. 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."[12]

A misapplication of policy may constitute an adverse employment action if, but only if, the misapplication results in an adverse effect on the terms, conditions, or benefits of one's employment.[13] In this case, the grievant has presented no evidence that he has suffered an adverse employment action, because, standing alone, a performance plan has no significant detrimental effect on the grievant's employment status. A performance plan is defined as a "key portion of the evaluation instrument that identifies the core responsibilities, special projects, and performance measures to indicate required achievement levels during and at the end of the performance cycle." As such, a performance plan is a management tool used to inform an employee of performance expectations in the same manner as a counseling memorandum, interim evaluation, or a Notice of Improvement Needed/Substandard Performance Form, all of which this Department has held do *not* constitute adverse employment actions when

[9] DHRM Policy No. 1.40 page 3 of 16.
[10] *Grievance Procedure Manual* § 4.1(c), page 11.
[11] Va. Code § 2.2-3004(A).
[12] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[13] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

issued by management.[14] Disagreements about assigned responsibilities and performance measures set forth in a performance plan are not trivial matters, and, when grieved, may proceed through the management resolution steps. However, standing alone, the issuance of a performance plan does not rise to the level of an adverse employment action and, thus, cannot be qualified for hearing.[15]

While the issuance of a performance plan by itself does not have an adverse impact on the grievant's employment, it could potentially be used to support a subsequent adverse employment action against the grievant. For instance, the plan will later be used to support the grievant's annual performance evaluation rating. Should the grievant receive what he believes is an unfair, inaccurate, or otherwise arbitrary or capricious performance rating, he may challenge that evaluation through a subsequent grievance. Because the contested performance plan will be the benchmark by which the grievant's performance will be evaluated, he may present evidence at that time that his performance plan was inherently unfair or otherwise arbitrary and, thus, led to an arbitrary evaluation.

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 this determination to the circuit court, he 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 notifies the agency that he does not wish to proceed.

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Claudia Farr
Director

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Deborah M. Amatulli
EDR Consultant, Sr.

[14] *See* EDR Rulings 2002-007 and 2002-169.
[15] It should be noted that a number of courts have held that an increased workload alone does not constitute an adverse employment action. *See* Buttron v. Sheehan, 2003 U.S. Dist. LEXIS 13496 (N.D. Ill. 2003); Maclean v. City of St. Petersburg, 194 F. Supp 2d 1290 (M.D. Fla. 2002); Williamson v. Tom Thumb, 2001 U.S. Dist LEXIS 18811 (N.D. Tex. 2001).