Issue: Qualification/grievant claims that management (1) issued an arbitrary and retaliatory annual performance evaluation; (2) breached the confidentiality of personnel records; and; (3) exposed grievant to a hostile work environment; Ruling Date: June 2, 2004; Ruling #2003-456; Agency: Virginia 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. 2003-456
June 2, 2004

The grievant has requested a ruling on whether her August 21, 2003 grievance with the Department of Health (VDH or the agency), qualifies for hearing. The grievant claims that management (1) issued an arbitrary and retaliatory annual performance evaluation;[1] (2) breached the confidentiality of her personnel records; and; (3) exposed her to a hostile work environment. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Public Health Nurse Supervisor with VDH. On August 5, 2003, the grievant was presented a performance evaluation dated July 30, 2003 from her supervisor, who retired effective July 31, 2003. The grievant was rated an overall "Contributor," but received a "Below Contributor" rating in the core responsibility of "Performance Management/Leadership." On August 21, 2003, the grievant initiated a grievance challenging the performance evaluation's content, as well as the manner in which it was administered. Thereafter, on August 28, 2003, the grievant was informed by the first step-respondent that the performance evaluation dated July 30, 2003, although initially marked a final evaluation, was an interim evaluation[2] and that a final evaluation would be completed before October 15, 2003. The grievant received her final 2003 performance evaluation on October 14, 2003. The grievant did

[1] The performance evaluation is dated July 30, 2003, but was not received by the grievant until August 5, 2003.

[2] The July 30, 2003 performance evaluation was marked a final performance evaluation. However, upon learning that an annual performance evaluation cannot be issued prior to August 10th under DHRM Policy 1.40, VDH informed the grievant that the July 30, 2003 performance evaluation was considered an interim evaluation only and that a final evaluation would be issued in October 2003. The grievant admits that she received her "final performance review" on October 14, 2003 and attempts, it appears, to challenge the October 14, 2003 evaluation through the existing August 21, 2003 grievance. Under the grievance procedure, additional claims may not be added to an existing pending grievance. *Grievance Procedure Manual* § 2.4, page 6. Accordingly, this ruling does not address the October 2003 annual performance evaluation or to what extent the interim evaluation may have contributed to the annual performance rating. This ruling will address only the July 30, 2003 interim evaluation.

not initiate a separate grievance challenging the October 14, 2003 performance evaluation.

DISCUSSION

Interim Performance Evaluation

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 her employment.[3] An interim evaluation, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[4] Moreover, the General Assembly has limited issues that may be qualified for a hearing to those that involve adverse employment actions.[5] 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 or a "Below Contributor" annual performance rating, the grievant may offer evidence as to the merits of that interim evaluation through a subsequent grievance challenging the adverse employment action.[6]

The grievant further alleges that her supervisor failed to alert her of problems with her performance until her receipt of the evaluation on August 5, 2003. Although management generally should advise employees on their performance during the performance cycle, state policy does not mandate that practice.[7] In addition, any failure by management to advise the grievant about performance issues throughout the cycle does not lead to the conclusion that the evaluation was arbitrary or capricious.

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[3] *Grievance Procedure Manual* § 4.1, pages 10-11. *See also* EDR Rulings #2002-007 and #2002-069. 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)).

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

[5] Va. Code § 2.2-3004(A).

[6] *See e.g.* EDR Ruling Nos. 2002-220 and 2003-175.

[7] DHRM policy states that "supervisors *should* document employees' performance and provide feedback to them periodically throughout the performance cycle." (emphasis added). DHRM Policy 1.40, page 4 of 16.

Misapplication of Policy/Breach of Confidentiality

The grievant alleges that the retired supervisor's access to the grievant's personnel file was a breach of confidentiality and that her supervisor's July 31, 2003 retirement rendered her supervisor ineligible under state policy to conduct the August 5, 2003 meeting and evaluation.

A claim of unfair application or misapplication of policy may qualify for a hearing only where there is evidence raising a sufficient question as to whether management violated a mandatory policy provision, or that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy.

Department of Human Resource Management (DHRM) Policy 6.05 generally prohibits disclosure of an employee's personal information -- such as performance evaluations, disciplinary and investigative records, or records regarding grievances or complaints -- without the written consent of the subject employee.[8] Importantly, however, that policy also provides a non-inclusive list of exceptions to the general rule, one of which would allow disclosure of an employee's records to that employee's supervisor.[9] Therefore, disclosure of information to the grievant's supervisor prior to the supervisor's retirement regarding the grievant's performance would appear to be consistent with policy. Additionally, it appears that the only document in question regarding the grievant's breach of confidentiality claim is the July 30, 2003 performance evaluation. This performance evaluation was prepared by the grievant's supervisor. As such, the grievant's supervisor was aware of the contents of evaluation and thus there could be no breach of confidentiality.

Moreover, under DHRM Policy 1.40, "[i]f the employee's supervisor leaves his/her position during an employee's performance cycle, the departing supervisor should complete an interim evaluation of the employee's performance."[10] State policy is silent as to the appropriateness of meeting with the employee regarding the interim evaluation after the effective date of the departing supervisor's retirement. In the present case, the agency maintains that the grievant's former supervisor prepared an evaluation for the grievant on July 30, 2003 and attempted to meet with the grievant prior to her July 31, 2003 retirement, but was unsuccessful. As such, the grievant's supervisor was forced to meet with the grievant after her effective date of retirement.

In light of the above, this Department concludes that there has been neither a misapplication nor unfair application of policy by allowing the grievant's former supervisor (1) access to the July 30, 2003 performance evaluation; or (2) to meet with the

[8] *See* DHRM Policy No. 6.05(III)(B) (effective 9/16/93).
[9] *See* DHRM Policy No. 6.05(III)(C)(1).
[10] DHRM Policy 1.40, page 7 of 16.

grievant to complete an evaluation of the grievant's performance after the supervisor's effective date of retirement. Accordingly, this issue does not qualify for hearing.

Retaliation

The grievant claims that her unfavorable interim evaluation results from her refusal to submit alleged fraudulent documentation.

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) 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's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation.[11] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[12]

In this case, assuming for purposes of this ruling only that the grievant had engaged in a protected activity by refusing to submit alleged fraudulent documentation, as stated above, the interim evaluation challenged by this grievance is not an adverse employment action.[13] As such, the issue of retaliation does not qualify for hearing.

Hostile Work Environment

Although all complaints initiated in compliance with the grievance process may proceed through the three resolution steps set forth in the grievance statute, thereby allowing employees to bring their concerns to management's attention, only certain issues qualify for a hearing. For example, while grievable through the management resolution steps, claims of hostile work environment and harassment qualify for a hearing only if an employee presents sufficient evidence showing that the challenged actions are based on race, color, national origin, age, sex, religion, political affiliation, disability, marital status or pregnancy.[14] Here, the grievant has not alleged that management's actions were based on any of these factors. Rather, the facts cited in support of the

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

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

[13] 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).

[14] *Grievance Procedure Manual* § 4.1(b)(2), page 10; *see also* DHRM Policy 2.30 Workplace Harassment (effective 05/01/02).

grievant's claim can best be summarized as describing significant conflict between the grievant and other VDH employees. Such claims of conflict are not among the issues identified by the General Assembly that may qualify for a hearing.[15]

We wish to note that mediation may be a viable option to pursue. EDR's mediation program is a voluntary and confidential process in which one or more mediators, neutrals from outside the grievant's agency, help the parties in conflict to identify specific areas of conflict and work out possible solutions that are acceptable to each of the parties. Mediation has the potential to effect positive, long-term changes of great benefit to the parties and work unit involved.

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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Jennifer S.C. Alger
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[15] *See* Va. Code § 2.2-3004 (A).