Issue: Qualification/grievant claims that performance evaluation is retaliatory; Ruling Date: March 25, 2005; Ruling #2005-972; Agency: Virginia Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling Number 2005-972
March 25, 2005

The grievant has requested a ruling on whether her November 23, 2004 grievance with Virginia Department of Transportation (VDOT or the agency) qualifies for hearing. The grievant claims that her 2004 performance evaluation is arbitrary and retaliatory. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

The grievant is employed as an Architect/Engineer I. The grievant's 2004 performance evaluation reflects an overall rating of "Contributor," with a "Contributor" rating in five elements of the evaluation and a "Below Contributor" in the remaining element. Dissatisfied with her 2004 evaluation, the grievant initiated her November 23rd grievance challenging the performance evaluation as arbitrary and as retaliation for her complaints about the alleged pre-selection of a candidate for a Bridge Assistant's position.

DISCUSSION

Retaliation/ Performance Evaluation/Misapplication of Policy

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;[1] (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. Likewise, the General Assembly has limited other issues that may be qualified for a hearing (e.g., misapplication of policy and arbitrary and capricious

[1] *See Grievance Procedure Manual* §4.1(b)(4). 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

performance evaluation) to those that involve "adverse employment actions."[2] 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."[3]

Thus, for the grievant's claims of policy misapplication, retaliation, and arbitrary and capricious performance evaluation to qualify for hearing, the action taken against the grievant must result in an adverse effect *on the terms, conditions, or benefits* of her employment.[4] A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[5] In this case, although the grievant disagrees with one element of her 2004 performance evaluation and believes it to be arbitrary and retaliatory, the overall rating was generally positive. Most importantly, the grievant has presented no evidence that the 2004 performance evaluation has detrimentally altered the terms or conditions of her employment.[6] Accordingly, the issues of arbitrary and capricious performance evaluation and retaliation do not qualify for hearing.[7] We note, however, that should the 2004

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[2] Va. Code § 2.2-3004(A).

[3] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[4] 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)).

[5] *See* Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 2004 U.S. App. LEXIS 11366 (10th Cir. 2004)(unpublished opinion)(citing Meredith v. Beech Aircraft Corp., 18 F.3d 890, 896 (10th Cir. 1994)). *See also* James v. Booz-Allen & Hamilton, Inc., 368 F.3d 371 (4th Cir. 2004)(The court held that although the plaintiff's performance rating was lower than the previous yearly evaluation, there was no adverse employment action as the plaintiff failed to show that the evaluation was used as a basis to detrimentally alter the terms or conditions of his employment, the evaluation was generally positive, and he received both a pay-raise and a bonus for the year.) Brown v. Brody, 199 F.3d 446 (D.C. Cir 1999), "[A] thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions." Brown, 199 F.3d at 458 citing to Mattern v. Eastman Kodak Co., 104 F.3d 702, 708, 710 (5th Cir. 1997); Rabinovitz v. Pena, 89 F.3d 482, 486, 488-90 (7th Cir. 1996); Smart, 89 F.3d at 442-43; Kelecic v. Board of Regents, 1997 U.S. Dist. LEXIS 7991, No. 94 C 50381, 1997 WL 311540, at *9 (N.D. Ill. June 6, 1997); Lucas v. Cheney, 821 F. Supp. 374, 375-76 (D. Md. 1992); Nelson v. University of Me. Sys., 923 F. Supp. 275, 280-82 (D. Me. 1996); cf. Raley v. St. Mary's County Comm'rs, 752 F. Supp. 1272, 1278 (D. Md. 1990).

[6] The grievant has noted that she has suffered an adverse employment action because the "Below Contributor" in the one element could impact her future salary and promotional opportunities. However, "[d]ocumented reprimands alone, while possibly affecting future employment decisions, do not constitute an adverse employment action." Thompson v. Exxon Mobil Corp., 344 F. Supp. 2d 971, 981 (E.D. Tex 2004).

[7] Although this grievance does not qualify for an administrative hearing under the grievance process, the grievant may have additional rights under the Virginia Government Data Collection and Dissemination Practices Act (the Act). Under the Act, if the grievant gives notice that she wishes to challenge, correct or explain information contained in her personnel file, the agency shall conduct an investigation regarding the information challenged, and if the information in dispute is not corrected or purged or the dispute is otherwise not resolved, allow the grievant to file a statement of not more than 200 words setting forth her position regarding the information. Va. Code § 2.2-3806(A)(5). This "statement of dispute" shall accompany the disputed information in any subsequent dissemination or use of the information in question. Va. Code § 2.2-3806(A)(5).

performance evaluation somehow later serve to support an adverse employment action against the grievant, (e.g., demotion, termination, suspension and/or other discipline) the grievant may address the underlying merits of the evaluation through a subsequent grievance challenging any related adverse employment action.

We also note that although the grievance does not qualify for a hearing, mediation may be a viable option for the parties 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. For more information on this Department's Workplace Mediation program, call 804-786-7994.

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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William G. Anderson, Jr.
EDR Consultant