Issues: Qualification/Performance Evaluation/Arbitrary & Capricious Evaluation and Misapplication of Policy; Compliance/Grievance Procedure/Resolution Steps and 5-day Rule; Ruling Date: April 2, 2007; Ruling #2007-1553; Agency: Department of Corrections; Outcome: Not qualified for hearing; Grievant not in compliance.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION AND COMPLIANCE RULING OF DIRECTOR

In the matter of the Department of Corrections
Ruling Number 2007-1553
April 2, 2007

The grievant has requested a ruling on whether her November 19, 2006 grievance with the Department of Corrections (DOC or the agency) qualifies for hearing. In her grievance, the grievant claims that her 2006 performance evaluation is arbitrary and capricious and that the agency misapplied policy. In addition, the grievant claims that (1) the second step respondent failed to address the issues presented in the grievance; and (2) the agency head failed to comply with the time limits set forth in the grievance process.

FACTS

Prior to her demotion,[1] the grievant was employed as an Institution Superintendent with DOC. The grievant's 2006 performance evaluation reflects an overall rating of "Contributor," with an "Exceeds Contributor" in two elements of the evaluation, a "Contributor" rating in four elements of the evaluation, and a "Below Contributor" in the remaining element. Dissatisfied with her 2006 evaluation, the grievant initiated her November 19th grievance challenging the performance evaluation as arbitrary and capricious and in violation of policy. In particular, the grievant claims that the "Below Contributor" rating in element J of her performance evaluation is arbitrary and capricious because it lacks supporting documentation and that the agency misapplied policy because it did not give her a Notice of Improvement Needed/Substandard Performance during the performance cycle and allow her an opportunity to improve in the area in which she was rated "Below Contributor."

[1] On November 13, 2006, the grievant was informed that as a result of an internal affairs investigation concerning sexual misconduct cases at her facility, she was being removed from her position as Institution Superintendent. The grievant was given the option of requesting a voluntary demotion to a lower pay band with the same salary or to receive a Group III Written Notice with demotion. The grievant requested the demotion. The grievant is currently challenging her demotion through the grievance process, asserting that the demotion was involuntary and that the agency misapplied policy, unfairly applied policy and retaliated against her. These issues will be addressed by this Department in a separate qualification ruling.

DISCUSSION

Compliance

In this case, the grievant alleges the following procedural violations: (1) the second step respondent failed to address the issues presented in the grievance; and (2) the agency head failed to comply with the time limits set forth in the grievance process.

The grievance procedure requires both parties to address procedural noncompliance through a specific process.[2] That process assures that the parties first communicate with each other about the noncompliance, and resolve any compliance problems voluntarily, without this Department's (EDR's) involvement. Specifically, the party claiming noncompliance must notify the other party in writing and allow five workdays for the opposing party to correct any noncompliance.[3] If the opposing party fails to correct the noncompliance within this five-day period, the party claiming noncompliance may seek a compliance ruling from the EDR Director, who may in turn order the party to correct the noncompliance or, in cases of substantial noncompliance, render a decision against the noncomplying party on any qualifiable issue.[4] Importantly, all claims of party noncompliance must be raised immediately. For example, if Party A proceeds with the grievance after becoming aware of Party B's procedural violation, Party A may waive the right to challenge the noncompliance.[5]

With regard to the grievant's assertion that the second step-respondent failed to address the issues presented, this Department concludes that the grievant advanced her grievance to the agency head for qualification without first formally contesting the second step response through the noncompliance process set forth above (notifying the agency head of the non-compliance and allowing 5-workdays to correct it). By proceeding to the next step, the grievant effectively waived her right to contest the agency's alleged second step noncompliance.

Additionally, a ruling on the issue of whether the agency head responded within the mandated 5 workdays is premature because the grievant has not notified the agency in writing of the alleged procedural violation, as required by the grievance procedure. Moreover, the agency has corrected any noncompliance by providing the grievant with a

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[2] *Grievance Procedure Manual*, § 6.3.
[3] *Id*.
[4] While in cases of substantial noncompliance with procedural rules the grievance statutes grant the EDR Director the authority to render a decision on a qualifiable issue against a noncompliant party, this Department favors having grievances decided on the merits rather than procedural violations. Thus, the EDR Director will *typically* order noncompliance corrected before rendering a decision against a noncompliant party. However, where a party's noncompliance appears driven by bad faith or a gross disregard of the grievance procedure, this Department will exercise its authority to rule against the party without first ordering the noncompliance to be corrected.
[5] *Grievance Procedure Manual*, § 6.3.

qualification decision on February 14, 2007, thus rendering the issue of any purported noncompliance moot.

This Department's rulings on matters of compliance are final and nonappealable.[6]

Qualification

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[7] An adverse employment action is defined as a "tangible employment action [that] constitutes 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."[8] Thus, for the grievant's claim of arbitrary and capricious performance evaluation and/or misapplication of policy 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.[9]

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[10] In this case, although the grievant disagrees with one element of her 2006 performance evaluation and believes it to be arbitrary, the overall rating was generally positive. Most importantly, the grievant has presented no evidence that the 2006 performance evaluation has detrimentally altered the terms or conditions of her employment. And in any event, policy does not require that the grievant receive a Notice of Improvement Needed/Substandard Performance and/or be provided an opportunity to improve her performance before being rated a "Below Contributor" in one element of the performance

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[6] *See* Va. Code § 2.2-1001(5).
[7] Va. Code § 2.2-3004(A).
[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[9] 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)). *See also* EDR Ruling #2006-1265; EDR Ruling #2006-1254; EDR Ruling #2005-970; and EDR Ruling #2005-1003.
[10] *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); Rabinovitz v. Pena, 89 F.3d 482, 486, 488-90 (7th Cir. 1996); Smart v. Ball State Univ., 89 F.3d at 437, 442-43 (7th Cir. 1996); 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)(unpublished opinion); 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).

evaluation. Such a Notice is required only for an overall performance rating of "Below Contributor." In this case, the grievant's overall rating was not "Below Contributor."[11]

Accordingly, the issues of arbitrary and capricious performance evaluation and misapplication of policy do not qualify for hearing.[12] We note, however, that should the 2006 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.[13]

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.

Claudia T. Farr
Director

[11] *See* Department of Human Resource Management (DHRM) Policy 1.40.

[12] 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).

[13] Although the grievant was demoted shortly after her 2006 performance evaluation, it does not appear that the performance evaluation was used as a basis for the demotion. Rather, as stated above, it appears the grievant was demoted as the result of an internal affairs investigation concerning sexual misconduct cases at the facility where she served as Institution Superintendent.