Issue: Qualification: Performance Evaluation – Arbitrary/Capricious; Ruling Date: April 16, 2007; Ruling #2007-1612; 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
Ruling Number 2007-1612
April 16, 2007

The grievant has requested a ruling on whether her January 12, 2007 grievance with the Department of Health (the agency) qualifies for hearing. For the reasons discussed below, this grievance does not qualify for a hearing.

FACTS

On October 31, 2006, the grievant received her initial 2006 performance evaluation. This evaluation reflected an overall rating of "Contributor." The grievant appealed this performance evaluation within the agency and received a revised evaluation on November 17, 2006. This revised evaluation also reflects an overall rating of "Contributor," with "Extraordinary Contributor" ratings in two of the seven factors. After expressing her disapproval with this evaluation, the agency invited the grievant to submit additional comments regarding the revised performance evaluation. Because the grievant did not receive any further feedback from the agency following her submission of additional comments, she initiated this grievance on January 12, 2007, alleging that the agency failed to evaluate her performance properly[1]. The grievant asserts that the agency did not take into account certain aspects of her performance during 2006, including the fact that she served as acting budget director during most of the evaluation period and was required to perform the jobs of at least three employees because of departures. Failing to reach resolution during the management steps, the grievant now seeks qualification for hearing from this Department.

DISCUSSION

Procedural Status

[1] The grievant states that a response from the agency was sent after close of business on January 11, 2007, which the grievant reportedly did not receive until January 16, 2007.

As an initial matter, the agency appears to contend that the grievant failed to initiate her grievance in a timely manner. However, for the reasons set forth below this argument fails.

This Department has previously held that when an employee has initiated a timely appeal of a performance evaluation under state policy, that appeal essentially renders the initial evaluation a preliminary rather than a final decision. Thus, when an employee timely appeals an evaluation under agency policy, the 30-day period to initiate a grievance is extended until the agency has taken final action on the appeal.[2] Accordingly, if an agency fails to take action on the grievant's appeal, the 30-day period to challenge the agency's final action may be stayed indefinitely, until the agency chooses to act. However, where there is no indication that the agency action would be forthcoming, an employee may initiate a timely grievance to challenge the performance evaluation without waiting indefinitely for the agency's action.[3] Therefore, the 30-day clock does not begin running until the performance evaluation is final and the employee is aware that it is final.

In this case, the grievant initially received her performance evaluation on October 31, 2006, and appealed within the agency under DHRM Policy No. 1.40 on November 13, 2006. The agency provided a revised evaluation on November 17, 2006. After the grievant responded that this revised evaluation was also unacceptable, the agency invited the grievant to submit additional information. The grievant provided the agency with additional information on December 13, 2006. After following up on January 8, 2007, the grievant had yet to receive a response to her December 13th submission and decided to initiate this grievance on January 12, 2007.

Because the grievant had been given the opportunity to submit additional information in response to her revised performance evaluation, any objective observer would conclude that the performance evaluation was not final yet. If the agency's review of the grievant's performance was final, it would not have invited additional input from the grievant. Consequently, because the agency's decision was not final, and because the grievant in such a situation need not wait indefinitely for a final decision, her grievance was timely. Indeed, the 30-day clock had not yet begun until the agency, in the January 11, 2007 e-mail, which the grievant did not receive until January 16, 2007, provided the grievant with sufficient indication that the November 17, 2006 performance evaluation was final.[4]

Arbitrary and Capricious Performance Evaluation

The General Assembly has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[5] An adverse employment action is defined as a "tangible employment action constitut[ing] a significant change in employment status, such as hiring,

[2] EDR Ruling No. 2007-1512; EDR Ruling No. 2004-920.
[3] Alternatively, the employee may grieve independently an agency's failure to follow its policies with respect to the appeal process.
[4] In this e-mail, the agency stated, "After careful consideration of the information, I will submit your email to OHR for attachment to your evaluation, but will not change the latest evaluation."
[5] Va. Code § 2.2-3004(A).

firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[6] 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.[7]

A satisfactory performance evaluation is not an adverse employment action where the employee presents no evidence of an adverse action relating to the evaluation.[8] In this case, although the grievant disagrees with several aspects of her 2006 performance evaluation, the overall rating was "Contributor" and generally satisfactory. Most importantly, the grievant has presented no evidence that the 2006 performance evaluation has detrimentally altered the terms or conditions of her employment.[9] Accordingly, this grievance does not qualify for hearing.[10] 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.

To the extent that the grievant also alleges certain violations of EWP policies and procedures in that her EWP included some errors in such items as the date, role title, and pay band, these claims do not qualify for hearing because the grievant has presented no evidence of an adverse employment action. As the agency stated in the second step response, these errors were typographical in nature. While it certainly appears that the agency had admitted that this

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[6] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761 (1998).

[7] Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997).

[8] *See* Rennard v. Woodworker's Supply, Inc., 101 Fed. Appx. 296, 307 (10th Cir. 2004) (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, 377-378 (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.). "[A] similarly thick body of precedent . . . refutes the notion that formal criticism or poor performance evaluations are necessarily adverse actions." Brown v. Brody, 199 F.3d 446, 458 (D.C. Cir. 1999).

[9] The grievant claims that she has experienced an adverse effect from this performance evaluation, including a loss of respect from her new supervisor. However, in this case, the grievant has not presented evidence that would raise a sufficient question she suffered any tangible harm as a result of the performance evaluation that was significant enough to qualify as an adverse employment action. In addition, to the extent that the grievant argues that the evaluation of her performance was the result of retaliation, there has been no evidence presented that the grievant had engaged in any protected activity such as participating in the grievance procedure, reporting a violation of law to a governmental authority, making a report of fraud, abuse, or gross mismanagement, or exercising a right otherwise protected by law. *See* Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b).

[10] 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).

information was incorrect, and, therefore, should be fixed by the agency, there is no evidence that the grievant experienced any detrimental effect because of the errors.[11] As the grievant has not alleged any evidence of an adverse employment action, the grievant's January 12, 2007 grievance does not qualify for hearing.

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

[11] The grievant also asserts that the agency failed to have her sign the version of her performance plan she received when evaluated. DHRM Policy No. 1.40 requires that an employee sign his or her performance plan once it is approved by the employee's supervisor and reviewer. *See* DHRM Policy 1.40, *Performance Planning and Evaluation*, p. 3 of 16. The grievant states that the agency never gave her the opportunity to sign her performance plan. Indeed, the agency's performance plan form has no line for an employee's signature. This agency practice appears to violate DHRM Policy 1.40. However, as with her other claims, the grievant has not alleged any evidence of an adverse employment action to qualify for hearing.