Issue: Qualification – Performance (Employee Work Profile); Ruling Date: April 11, 2011; Ruling No. 2011-2891; Agency: Department of Social Services; Outcome: Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Social Services
Ruling No. 2011-2891
April 11, 2011

The grievant has requested a ruling on whether his November 17, 2010 grievance with the Virginia Department of Social Services (DSS 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.

FACTS

The grievant is employed by DSS as a Support Enforcement Specialist (SES). On or about November 15, 2010 the grievant received a new performance plan from his immediate supervisor for his review and signature. The grievant asserts that the proposed performance plan contained what he appears to contend are "irrational" and "unfair" performance goals.

The Deputy Commissioner had set performance goals for the district office in which the grievant worked in two areas of enforcement. The goals for the office were 64.40% and 65.93% in two categories of collection. The grievant's personal goals were set slightly higher at 66.27% and 67.77%, respectively, in the same categories. Management has explained that it believes that the expectations set forth for the grievant are achievable goals as they represent last year's average percentages for the grievant's team. Furthermore, management has pointed out that all members on the grievant's team have the same performance goals, by percentages, as does the grievant.

The grievant filed his grievance on November 17, 2010, and for relief primarily asks that his percentage goals be lowered to the same level as the collection goals for the District Office as set by the Deputy Commissioner. The agency head denied qualification and the grievant requested that the Director of this Department qualify the grievance for hearing.

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."[1] Here, the grievant objects to his performance plan on the basis that his individual performance goal is set higher than the percentage goals of the district office.

The General Assembly, however, has limited issues that may be qualified for a hearing to those that involve "adverse employment actions."[2] The threshold question then becomes whether or not the grievant has suffered an adverse employment action through the agency's establishment of the performance goals in his performance plan. An adverse employment action is defined as a "tangible employment action constitute[ing] 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]

In this case, the grievant has presented no evidence that he has suffered an adverse employment action, because, standing alone, a performance plan (including the performance goals therein) 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 issued by management.[4] 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.[5]

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[1] DHRM Policy No. 1.40.

[2] Va. Code § 2.2-3004(A).

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

[4] *See, e.g.,* EDR Ruling Nos. 2001-209, 2001-216, & 2002-025; 2005-293; and 2006-1116. *See also Grievance Procedure Manual* § 4.1(c).

[5] A number of courts have held that that an increase in workload alone does not constitute an adverse employment action. *See* Lyle v. County of Fairfax, No. 05-1134 U.S. App. LEXIS 6025, at *18 (4th Cir. March 10, 2006)(unpublished decision) ("even if we are to assume that the plaintiffs had heavier caseloads, this allegation does not constitute an adverse employment action because there is simply no evidence that the plaintiffs suffered a decrease in compensation, job title, level of responsibility, or opportunity for promotion"). *See also* Leach v. Baylor College of Medicine, No. H-07-0921, 2009 U.S. Dist. LEXIS 11845 at *54-55 (S.D. Tex. Feb. 17, 2009) (citing Hart v. Life Care Ctr. of Plano, 243 F. App'x 816, 818 (5th Cir. 2007) (plaintiff who was assigned more difficult tasks than Hispanic co-workers did not suffer an adverse employment action); Benningfield v. City of Houston, 157 F.3d 369, 376-77 (5th Cir. 1998) (holding that being assigned an unusually heavy work load is merely an administrative matter and not an adverse employment action); Wesley v. Yellow Transp., Inc., No. 3:05-CV-2266-D, 2008 U.S. Dist. LEXIS 101476, 2008 WL 5220562, at *2 (N.D. Tex. Dec. 12, 2008); Grimsley v. Marshalls of MA, Inc., 284 F. App'x 604, 609 (11th Cir. 2008) (employee did not suffer adverse employment action when supervisor increased workload, assigned him additional tasks and denied him breaks while allowing employees outside of protected class to take breaks); Fane v. Locke Reynolds, LLP, 480 F.3d 534, 539 (7th Cir.

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 in an effort to show 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.

Claudia Farr
Director

2007) ("the mere fact that an employee . . . had a heavier workload than her co-workers does not amount to an adverse employment action")). A materially adverse employment action must be more disruptive than a mere inconvenience or an alteration of job responsibilities. *See* Geer v. Marco Warehousing, Inc., 179 F. Supp. 2d 1332, 1341 (M.D. Ala. 2001). Moreover, of those courts who suggest that under certain circumstances an increased workload could potentially constitute an adverse employment action (e.g., Jones v. Barnhart, 349 F.3d 1260, 1269-70 (10th Cir. 2003)), this Department has found no decision that could support an adverse employment action finding under facts such as those here, where the grievant's goal merely reflects the team's average performance from last year and each employee within the grievant's workgroup has been given the same performance goal.