Issue: Qualification-Discrimination-Race, Other (national origin, color, creed, religion, veteran, political affiliation), Retaliation-Grievance Activity, Whistleblowing, Other protected right; Ruling Date: February 8, 2002; Ruling #2001-235; Agency: Department of Juvenile Justice; Outcome: not qualified. Appealed to Culpeper Circuit Court; File Date: February 19, 2002; Case #02-L-44; EDR Decision affirmed and entered on March 20, 2002.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Juvenile Justice/No.2001-235
February 8, 2002

The grievant has requested a ruling on whether the grievance he initiated on October 15, 2001 with the Department of Juvenile Justice qualifies for a hearing. The grievant claims that management's conduct towards him on October 11, 2001 was discriminatory and retaliatory.[1] For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed at the Department of Juvenile Justice (agency) as a Counselor. He is an African-American male. On October 9, 2001, the grievant offered his written report and testimony in court during the judicial review of a cadet under his care. At the conclusion of the judicial review, management received several complaints from court spectators about the content of the grievant's report and testimony. On October 11, 2001, the grievant was verbally reprimanded by management about the poor condition of the cadet's file, and the assessments and recommendations that he made in court. During this meeting, the Superintendent threatened the grievant, and made inappropriate hostile remarks, for which he later apologized.[2] The Superintendent did not issue a Written Group Notice to the grievant.

The grievant asserts that he was the victim of racial discrimination.[3] He further asserts that management's verbal reprimand was initiated only to retaliate against him for

---

[1] The grievant also raised other issues on his Form A and attachments including but not limited to false allegations, ridicule, unprofessional conduct, defamation of character and capricious acts. *See* grievant's memo dated 10/14/01 and letter dated 12/18/01. Although all complaints may proceed through the 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 such as false allegations, ridicule, unprofessional conduct, defamation and capricious acts (harassment) are not among the issues identified by the General Assembly as qualifying for a grievance hearing. Va. Code § 2.1-116.06; *Grievance Procedure Manual* § 4.1 (a)(b)(c), pages 10 and 11.

[2] *See* second step response.

[3] Although the grievant listed in his 10/14/01 memo that he may have also been the victim of gender discrimination, when he was contacted by this Department during the investigation of this ruling, he made

his having filed prior grievances in July 2000 and October 2000. He also maintains that he is being retaliated against because he has continuously complained to management about alleged inhumane treatment of cadets since the year 2000. The grievant has requested no relief through this grievance.

DISCUSSION

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[4] Thus, all claims relating to issues such as the means, methods, and personnel by which work activities and assignments are to be carried out generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination, retaliation or discipline may have improperly influenced management's decision, or whether state policy may have been misapplied.[5] In this case, the grievant claims that management retaliated and discriminated against him by subjecting him to a hostile verbal reprimand on October 11, 2001.

Retaliation

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;[6](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 any of these three elements are not met, the grievance may not qualify for hearing. Further, if the agency presents a nonretaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[7]

The grievant clearly engaged in a protected activity when he filed his July 2000 and October 2000 grievances.[8] Further, we will assume without deciding that his continuous complaints to management about the treatment of cadets since the year 2000 were protected activities. However, the grievant has not established that he has suffered an adverse employment action. By definition, adverse employment actions must be

---

clear that he is claiming that management discriminated against him based on his race. Therefore, gender discrimination will not be addressed in this ruling.

[4] Va. Code § 2.1-116.06(B).

[5] Va. Code § 2.1-116.06(A) and (C); *Grievance Procedure Manual* §4.1(c), page 11.

[6] *Grievance Procedure Manual* §4.1(b)(4), page 10.

[7] See Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998).

[8] *Grievance Procedure Manual* §4.1(b)(4), page 10. 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."

actions having a significant detrimental effect on the terms and conditions of the grievant's employment—for example, hiring, firing, decreased compensation; changes in job title; level of responsibility; or decreased opportunities for promotion.[9] Further, the grievant has not established a sufficient causal link between his prior grievances or complaints to management and any adverse employment action.

While the grievant may understandably view the October 11, 2001 verbal reprimand as adverse, such oral counseling, though unpleasant, is not formal discipline, nor did it result in an adverse employment action such as a firing, demotion, decreased compensation, or any other significant detriment to the terms and conditions of his employment. Although the Superintendent may have communicated to the grievant in an abrasive manner, claims of supervisory hostility alone, absent a clear impact on the terms of the grievant's employment, do not present grounds for a qualifiable retaliation claim. Accordingly, this issue does not qualify for a hearing.

Discrimination

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.[10] To qualify such a grievance for hearing, there must be more than a mere allegation of discrimination – there must be facts that raise a sufficient question as to whether the grievant suffered an adverse employment action due to prohibited discrimination based on his race. If, however, the agency provides a legitimate, nondiscriminatory business reason for its action, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.[11]

In this case, it is undisputed that as an African American, the grievant is a member of a protected class. As evidence of discrimination, the grievant asserts that on October 9, 2001, two Caucasian employees offered testimony that was consistent with his assessments and recommendations, but unlike the grievant, neither was verbally reprimanded. The agency has advised this Department that neither Caucasian employee was reprimanded because management had not received complaints about their in court testimony. Moreover, the grievant's report and testimony ultimately represented the agency stance, unlike that of the Caucasian employees. To this end, the Caucasian employees were not "similarly-situated" to the grievant. Further, as discussed previously in the Retaliation section, counseling an employee about his work performance, without more, does not constitute an "adverse employment action."[12] Therefore, this issue does not qualify for a hearing.

---

[9] Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[10] *Grievance Procedure Manual* §4.1(b), page 10.
[11] Hutchinson v. INOVA Health System, Inc., 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
[12] Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

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.

_____
Neil A.G. McPhie, Esquire
Director

_____
Felicia H. Johnson
Employment Relations Consultant