Issue: Qualification/Performance-Interim Evaluation, Retaliation-Grievance Activity, Work Conditions-Supervisory Conflict; Ruling Date: March 12, 2002; Ruling #2002-007; Agency: 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 No. 2002-007
March 12, 2002

The grievant has requested a ruling on whether his grievance of September 18, 2001 with the Department of Transportation (agency) qualifies for a hearing. The grievance challenges the contents of a Notice of Improvement Needed/Substandard Performance he received and asserts that the agency violated policy by giving the grievant both a Disciplinary Group Notice under the Standards of Conduct and a Notice of Improvement Needed for the same alleged conduct. The grievance also alleges retaliatory behavior by his immediate supervisor and his supervisor's supervisor due to the grievant's past use of the grievance procedure. For the reasons set forth below, this grievance does not qualify for a hearing.[1]

FACTS

The grievant is an Engineering Technician III for the Department of Transportation. On May 4 and June 21, 2001, the grievant received two Group II Written Notices related to Job Performance. He did not challenge either Group Notice. On August 23, 2001, the grievant received a Notice of Improvement Needed/Substandard Performance for conduct also mentioned in the May 4th disciplinary Group II Notice. The grievant wrote a rebuttal to the Notice of Improvement Needed and initiated a grievance on September 18, 2001, which sought relief in the form of removal of the Notice of Improvement Needed from his record and an end to disparate treatment by his supervisors. During the grievance resolution steps, management modified the actions of the grievant's supervisors.[2] The agency head denied qualification of the September 18,

[1] While this ruling does not discuss with particularity each argument advanced by the grievant in his September 18, 2001 grievance, each of those arguments has been reviewed and carefully considered.
[2] Management ordered that: (1) the Notice be reissued with a reference to a dispute over parking removed, (2) the grievant's computer be replaced, and (3) the supervisors "handle future coaching and mentoring actions or statements so as to ensure these measures are confidential only to you [the grievant]." See Third Step Response to Grievant dated December 6, 2001.

2001 grievance, and the grievant subsequently requested that the Director of this Department qualify the grievance for hearing.

DISCUSSION

Unfair Application of Policy

The grievant asserts that his supervisor's issuance of the Notice of Improvement Needed/Substandard Performance (Notice) addresses issues previously addressed in a disciplinary action (Group II Written Notice). He also does not agree with the contents of the Notice of Improvement Needed, including its mention of a parking issue and possible computer problems that he alleges are the cause of some of his purported problems.

The applicable policy is Department of Human Resource Management (DHRM) Policy No. 1.40, Performance Planning and Evaluation.[3] DHRM has sanctioned the issuance of Notices of Improvement Needed/Substandard Performance as a formal means of communicating management's assessment of deficiencies in performance. Indeed, such Notices are akin to interim evaluations. This Department has long held that interim evaluations generally cannot be qualified for hearing. Likewise, Notices of Improvement Needed generally cannot be qualified for a hearing because they do not constitute an "adverse employment action" affecting the terms and conditions of employment.[4] Furthermore, contrary to the grievant's contention that the agency's issuance of both a disciplinary Written Group Notice under the Standards of Conduct and a Notice of Improvement Needed is improper, DHRM Policy expressly allows for the issuance of both types of notices even when both are based on the same conduct.[5] Accordingly, this issue does not qualify for a hearing.

Retaliation

The grievant claims that the behavior of his supervisors, including the issuance of the Notice of Improvement Needed, was in retaliation for his prior grievance activity.

[3] See DHRM Policy No. 1.40, (revised 08/01/01).
[4] 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." Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998). Furthermore, a Notice of Improvement is to be maintained in the supervisor's file and only becomes part of the employee's personnel file if the employee is presented with a overall rating of "Below Contributor" during the annual performance evaluation. DHRM Policy 1.40, pages 6 and 15. On the other hand, an overall rating of "Below Contributor" is typically considered an adverse employment action and, if grieved, could be qualified for hearing if the facts, taken as a whole, raise a sufficient question as to whether the evaluation was arbitrary or capricious. *Grievance Procedure Manual*, § 4.1(b), page 10.
[5] DHRM Policy 1.40, page 6.

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 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]

It is undisputed that the grievant engaged in a protected activity by filing a grievance in 1999. Furthermore, the issuance of formal disciplinary actions, Group II Written Notices dated May 4th and June 21st 2001, could be viewed as adverse employment actions. Thus, the only question remaining is whether a causal link exists between the filing of the 1999 grievance and management's issuance of disciplinary actions.

The record shows that the prior grievance activity concluded in March of 2000. There is no close proximity in time between the grievant's grievance activities up through March 2000 and the disciplinary actions issued in May and June, 2001. Moreover, the agency asserts that both supervisors alleged by the grievant to be retaliatory, had been hired by the residency after the March 2000 conclusion of the previous grievance. Furthermore, the agency has offered a legitimate business reason for issuing the Group II Notices: to warn the grievant that job performance was an issue that needed to be addressed. The grievant offers no evidence that management's stated reasons for its actions were only a pretext for retaliation for his previous use of the grievance procedure. Accordingly, this issue does not qualify for a hearing.

In conclusion, the facts cited in support of the grievant's claim can best be summarized as describing significant conflict between the grievant and his supervisors concerning management's decisions and actions surrounding his work performance. Such claims of supervisory conflict, while grievable through the management steps, are not among the issues identified by the General Assembly that may qualify for a hearing. Accordingly, this grievance does not qualify for a hearing.

Additionally, the grievance record reflects significant interpersonal conflict between the grievant and his supervisors. Mediation may help resolve this conflict.

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[6] *See* the *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."

[7] *See* Rowe v. Marely Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

EDR's mediation program is a voluntary and confidential process in which two 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 units involved. EDR also offers interactive training sessions on conflict resolution that may benefit both parties.

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.

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Director

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