Issue: Qualification/challenge to Notice of Improvement Needed; challenge to demotion; Ruling Date: June 1, 2006; Ruling #2006-1198, 2006-1301; Agency: Department of Forensic Science; Outcome: not qualified. **Appealed to Circuit Court of the City of Richmond, #CL06-2949; Decision: EDR affirmed.**

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Forensic Science
Ruling Nos. 2006-1198, 2006-1301
June 1, 2006

The grievant has requested a ruling on whether his challenge to a September 29, 2005 Notice of Improvement Needed/Substandard Performance, as raised in his September 29, 2005 grievance with the Department of Forensic Science (DFS or the agency), qualifies for a hearing. The September 29th grievance also asserts that the grievant's ability to set the office work schedule has been usurped by his immediate supervisor and that the grievant was assigned new duties not usually performed by someone in his position. The grievant has also requested qualification of his December 15, 2005 grievance, which challenges his November 17, 2005 demotion. For the reasons set forth below, these grievances are not qualified for hearing.

FACTS

The grievant is employed as a Forensic Evidence Specialist Supervisor. On September 6, 2005, the grievant was asked to provide information regarding a subordinate employee that the grievant's supervisor was considering disciplining. The grievant asserts that he informed his supervisors at the September 6th meeting that other employees were having similar problems. In contrast, his supervisor asserts that the grievant never informed her about others who had engaged in the same conduct. The grievant further asserts that he was never consulted about the Written Notice that was ultimately issued prior to its drafting.

On September 23, 2005, the grievant was asked to provide information at the second-step meeting of the above mentioned subordinate employee who grieved the Written Notice and suspension she had received. The grievant claims that he was told that as a result of his testimony (other employees had engaged in somewhat similar conduct) the discipline was reduced to a counseling memorandum.

The grievant asserts that three days later, on September 26, 2005, he was asked by his supervisor to provide further information regarding his statement at the second-step meeting. On September 29th, the grievant's supervisor issued the grievant a Notice of Improvement Needed/Substandard Performance. The Notice of Improvement Needed was apparently based, in part, on the grievant's purported failure to mention that other employees had engaged in conduct similar to that which led to the Group Notice issued to the subordinate. The grievant

also claims that he has been forced to assume functions that others in his position are not required to perform such as "evidence runs" and "console"[1] responsibilities.

The grievant challenged the Notice of Improvement Needed by initiating his September 29, 2005 grievance. He claims that the action was hostile, intended to undermine his authority and force him to resign. He also asserts in the September 29th grievance that his supervisor removed his authority to set the work schedule. As relief, the grievant seeks: (1) to have authority to direct and schedule daily activities, (2) a workplace free of hostility and retaliation, and (3) removal of the Notice of Improvement Needed.

On November 17, 2005, the grievant was demoted[2] from Forensic Evidence Specialist Supervisor to Forensic Evidence Specialist II. The agency asserts that the demotion was a reassignment which was part of a departmental reorganization. The grievant initiated a grievance on December 15, 2005, in which he asserts that the demotion was in retaliation for his participation in the above-mentioned grievance of his subordinate.

DISCUSSION

Retaliation

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[3] Thus, all claims relating to issues such as the methods, means, and personnel by which work activities 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 or applied unfairly.[4]

In this case, the grievant alleges that after he participated in the grievance of his subordinate, he was subjected to a course of retaliatory harassment. For a claim of retaliatory harassment to be qualified for hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his prior protected activity; (3) sufficiently severe or pervasive so as to alter his conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency.[5]

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[1] "Console" responsibilities include answering phones, observing monitors, and other reception activities.
[2] The agency asserts that the grievant was not demoted because his salary was not reduced. However, the grievant was stripped of all supervisory duties.
[3] Va. Code § 2.2-3004(B).
[4] Va. Code § 2.2-3004(A) and (C); *Grievance Procedure Manual* § 4.1(b) and (c).
[5] *See generally* Von Gunten v. State of Maryland, 243 F.3d 858, 865, 869-70 (4th Cir. 2001); Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791-92 (6th Cir. 2000); Ray v. Henderson, 217 F.3d 1234, 1245-46 (9th Cir. 2000); Gunnell v. Utah Valley State College, 152 F.3d, 1253, 1264 (10th Cir. 1998).

In this case, there is no question that the management actions were unwelcome: they form the basis of his two grievances. However, although participating in a second-step meeting is a protected activity, the grievant has not presented evidence linking the unwelcome conduct to his participation in his subordinate's grievance meeting. Here, the agency has provided evidence that it had begun discussions regarding the restructuring of the department, including the removal of the grievant's supervisory duties, in May of 2005, well prior to any grievance participation. The agency has provided a copy of a May 31, 2005 draft Employee Work Profile in which the grievant's position is listed as an Evidence Specialist and all supervisory functions have been removed. Because the agency had begun planning the restructuring prior to any protected activity, this Department cannot conclude that the grievant has provided sufficient evidence of causation warranting further factual exploration at a hearing as to whether the removal of his scheduling duties and his demotion were retaliatory.[6]

As to the remaining allegedly retaliatory acts of being assigned additional duties and a Notice of Improvement Needed/Substandard Performance, these actions do not rise the level of being sufficiently severe or pervasive so as to alter the grievant's conditions of employment and to create an abusive or hostile work environment harassment.[7] Accordingly, these grievances are not qualified 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

[6] *See* Duncan v. Washington Metropolitan Area Transit Authority, 2006 U.S. Dist. LEXIS 15335 (D.C. Cir. 2006)(Where the employer decided on a course of action before it could possibly have known about the employee's protected activities, no causation can be inferred.) *See also* Carter v. Greenspan, 304 F. Supp. 2d 13, 30 (D.D.C. 2004) ("Because his supervisors' ...intention to dismiss him predated his protected activity, his retaliatory discharge claim is illogical and must be dismissed."); and Trawick v. Hantman, 151 F. Supp. 2d 54, 63 (D.D.C. 2001) (noting that plaintiff could not establish causation where "the termination process had already been initiated" before his protected activities began"); Spadola v. New York City Transit Authority, 242 F. Supp. 2d 284, 294-95 (S.D.N.Y.)(2003) (same); Holmes v. Long Island R. R., 2001 U.S. Dist. LEXIS 10431 (E.D.N.Y.) (same). Other than the timing of the challenged management actions, the grievant has provided no evidence linking the actions to the protected activity of participating in the grievance process.

[7] *See generally* Von Gunten v. State of Maryland, 243 F.3d 858 (4th Cir. 2001). We note that despite the Notice of Improvement Needed, the grievant still received a "Contributor" rating on his annual performance evaluation.