Issue: Qualification/discipline-failure to follow instruction; discrimination/race; performance evaluation/notice of improvement needed; retaliation/other protected right; Ruling Date: April 26, 2006; Ruling #2006-1242; Agency: Virginia Department of Transportation; Outcome: all issues non-qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Transportation
Ruling Number 2006-1242
April 26, 2006

The grievant has requested a ruling on whether his October 7, 2005 grievance with the Department of Transportation (DOT or the agency), qualifies for a hearing. For the reasons set forth below, this grievance does not qualify for a hearing.

FACTS

At the time the grievant initiated his grievance, he was employed by the agency as Manager for the X Program.[1] On September 23, 2005, the grievant received a Group II Written Notice for allegedly failing to follow his supervisor's instruction. That same day, he also received a Notice of Improvement Needed/Substandard Performance for alleged performance problems. On October 7, 2005, the grievant initiated a grievance challenging the Written Notice and Notice of Improvement Needed, which he asserts "represent a predisposed continuous pattern of distortion and a callous assault upon [his] excellent professional reputation."[2]

[1] On November 25, 2005, the grievant accepted another position within his department.

[2] In her November 22, 2005 letter denying qualification, the agency head's designee characterized the issue of the grievance as "the agency's decision not to select you for the position of Contract Monitor," although she also addressed the Group II Written Notice and the Notice of Improvement Needed. The grievant, however, states that the position for which he applied was that of "Section Manager," and on his Grievance Form A, he indicated that he did not understand the reference to the "Contract Monitor" position. Further, when asked during the course of our investigation, whether his non-selection for that position was part of his October 7, 2005 grievance, the grievant stated that the non-selection "is part of [his] grievance based on the [] contention that Mr. [L's] complicit support of Ms. [C's] actions toward [the grievant] was retaliatory since [he] pointed out reasons which [he] believe[s] were unfounded in making the decision." In light of this statement by the grievant, we understand that his grievance challenges only that conduct which he alleges is retaliation for his questioning of the selection decision, rather than the selection decision itself. Moreover, in any event, as the October 7, 2005 grievance was initiated more than 30 days after the selection decision (which occurred in February 2005, any claim relating to the selection decision is time-barred. *See* footnote 4 below.

During the course of the management resolution steps, the agency agreed to remove the Group II Written Notice and replace it with a counseling memorandum.[3] The remainder of the relief sought by the grievant was not provided by the agency, and the grievant requested qualification of his grievance for hearing. The agency head's designee denied the grievant's request for qualification, and the grievant has appealed to this Department.

DISCUSSION

In his October 7, 2005 grievance, the grievant alleges that the agency engaged in the following conduct: (1) promoting unfair application and misapplication of state agency personnel policies, procedures, rules and regulations; (2) "[p]athological behavior with a negative predisposition tantamount to 'racial profiling' for purposes of building a false paper trail, character defamation, and intent to deliberately mislead"; (3) "[r]etaliatory practices for reporting gross mismanagement"; (4) "[a]rbitrary and capricious management decisions related to Program functions"; and "[i]nformal disciplinary action." In support of these arguments, the grievant points to the Notice of Improvement Needed and the Group II Written Notice. He also suggests that the agency has engaged in a pattern of retaliatory and/or racial harassment during the period from July 7, 2004 to September 23, 2005.[4] These claims will be addressed below.[5]

Notice of Improvement Needed

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[6] Therefore, claims relating to a Notice of Improvement Needed/Substandard Performance generally do not qualify for hearing, unless the grievant presents evidence raising a sufficient question as to whether discrimination or retaliation may have improperly influenced management's

[3] This relief was apparently not conditioned on an agreement by the grievant to close his grievance, as the agency stated in the qualification decision and subsequently stated to this Department that the Group II Written Notice had been "rescinded" by the third-step respondent.

[4] During the course of this Department's investigation, the grievant also identified conduct occurring after the date of his grievance. Under the grievance procedure, however, additional claims may not be added to a grievance once it has been initiated. *Grievance Procedure Manual* § 2.4. Accordingly, conduct occurring after October 7, 2005 will not be considered in this ruling.

[5] The agency correctly notes that some of the conduct challenged by the grievant occurred more than 30 days prior to the initiation of the grievance. Under the grievance procedure, a grievance must be initiated within 30 days of the underlying conduct. *Grievance Procedure Manual* § 2.4. Where, however, a grievant alleges that an agency has engaged in a continuing pattern of harassment, the 30-day period starts to run from the last alleged act. See EDR Ruling No. 2003-098, 2003-112, at 4 n.9 (". . . for a charge to be timely, the employee need only file a charge within the statutory period of any act that is part of the hostile work environment.") Therefore, to the extent the grievant cites conduct occurring prior to the 30-day period in support of his claims of harassment, these claims are timely. However, to the extent the grievant challenges discrete acts occurring prior to September 7, 2005, his claims regarding any such acts are untimely and will not be addressed in this ruling.

[6] Va. Code § 2.2-3004(B).

decision or agency policy may have been misapplied or unfairly applied, and that the agency's conduct has resulted in an "adverse employment action."[7]

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."[8] Thus, for a grievance to qualify for a hearing, the actions taken against the grievant must result in an adverse effect on the terms, conditions, or benefits of one's employment.[9]

In this case, the Notice of Improvement Needed/Substandard Performance does not constitute an adverse employment action, because such a notice, in and of itself, does not have a significant detrimental effect on the terms, conditions, or benefits of employment.[10] For this reason, the grievant's claim relating to the Notice of Improvement Needed/Substandard Performance does not qualify for a hearing.

We note, however, that while a Notice of Improvement Needed/Substandard Performance does not have an adverse impact on the grievant's employment, it could be used later to support an adverse employment action against the grievant. According to DHRM Policy 1.60, Standards of Conduct, repeated misconduct may result in *formal* disciplinary action, which would have a detrimental effect on the grievant's employment and automatically qualifies for a hearing under the grievance procedure.[11] Moreover, according to DHRM Policy 1.40, Performance Planning and Evaluation, a supervisor may consider informal documentation of perceived performance problems when completing an employee's performance evaluation.[12] This ruling does not prevent the grievant from initiating a grievance challenging a subsequent performance evaluation or disciplinary action.[13]

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[7] Va. Code § 2.2-3004(A).
[8] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).
[9] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)). *See also* EDR Ruling 2004-596, 2004-597.
[10] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).
[11] *See generally* DHRM Policy 1.60, Standards of Conduct; *see also Grievance Procedure Manual* § 4.1(a).
[12] DHRM Policy 1.40, Performance Planning and Evaluation, "Documentation During the Performance Cycle," page 4 of 16.
[13] 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 he wishes to challenge, correct or explain information contained in his 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 his 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).

Group II Written Notice

While formal written discipline generally constitutes an adverse employment action, the Group II Written Notice challenged by the grievant was rescinded by the agency. A written notice that has been rescinded cannot be considered an adverse employment action.[14] Accordingly, the grievant's claim regarding his Written Notice does not qualify for hearing.

Harassment

The grievant further asserts that he has been subjected to retaliatory harassment because he questioned the selection of Ms. C as the Section Manager. In particular, he asserts that Mr. L, who apparently acted as hiring manager in the selection process for the Section Manager position, has given Ms. C his "complicit support" in her "continued pathological confabulations" and other alleged wrongful conduct because the grievant questioned the selection of Ms. C.[15] He also asserts, in effect, that he has been subjected to a course of racial harassment.[16] For a claim of hostile work environment or harassment to qualify for a hearing, the grievant must present evidence raising a sufficient question as to whether the conduct at issue was (1) unwelcome; (2) based on his protected status or 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.[17]

Here, even if we were to assume that the grievant were able to satisfy the first, third, and fourth elements, his grievance would nevertheless not qualify for hearing because he has not presented sufficient evidence that the conduct of which he complains was based on—in other words, caused by—any protected activity. To the contrary, by the grievant's own admission, the alleged difficulties between him and Ms. C, as well as Mr. L's alleged "complicit support" of Ms. C's purported conduct, long predate his questioning of the selection procedure.

In the course of this Department's investigation, the grievant provided a chronology of the conflict between him, Ms. C, and Mr. L. In that document, the grievant identifies July 7, 2004 as the first date he complained by e-mail to his then-supervisor, Mr. A, about Ms. C's "continued unprofessional behavior." He notes that prior to sending this e-mail, he had discussed his dissatisfaction with Ms. C and with Mr. A on "numerous occasions" and had participated in "personal meetings with Ms. [C]

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[14] *See* EDR Ruling No. 2004-750.

[15] In the course of this investigation, the grievant stated that he believes "Environmental Management retaliatory actions began when [he] first questioned Mr. [L] about the selection process," as described in the grievant's letter to Mr. L of March 7, 2005.

[16] In an attachment to his grievance, the grievant describes the challenged conduct as "racial profiling" for the alleged purpose of "building a false paper trail, character defamation, and intent to deliberately mislead."

[17] *See generally* White v. BFI Waste Services, LLC, 375 F.3d 288, 296-97 (4th Cir. 2004); *see also* EDR Ruling No. 2004-750.

informing her [he] was not pleased with her giving erroneous and misleading information regarding [his]Program and [his]efforts and to[his]staff to upper level management." The grievant's date summary further states that on July 7, 2004, the grievant spoke with Mr. L for his advice on "how to approach this unprofessional situation," but that Mr. L "offered no advice except, 'what are you going to do about it?'" The grievant alleges that from that date, Ms. C continued "to behave unprofessionally and Environmental Management appears complicit."[18]

The selection decision challenged by the grievant did not take place until February 2005, however.[19] Even more importantly, the conduct which the grievant asserts is the basis for the retaliation—his questioning of the selection decision, as described in his March 7, 2005 letter to Mr. L—occurred approximately seven months after the grievant first complained to Mr. L about Ms. C's "unprofessional" conduct and concluded that Environmental Management was "complicit" in that conduct. Because the grievant's alleged difficulties with Ms. C and Mr. L began well before he complained about the selection process for the Section Manager position, he has failed to present adequate evidence of a causal relationship between the alleged harassment and any protected activity.[20]

The grievant has also failed to present evidence raising a sufficient question of racial harassment. To qualify such a grievance for hearing, there must be more than a mere allegation of a discriminatory motive—there must be facts that raise a sufficient question as to whether the actions described within the grievance were based on a protected status.[21] Here, the grievant has failed to provide any evidence of racial harassment other than his own speculation and assumptions.[22]

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[18] In his chronology, the grievant also claims that at a meeting on December 22, 2004, Mr. L and Ms. C sat quietly and left him "holding the bag."

[19] The grievant's chronology indicates that he interviewed for the Section Manager position on January 5, 2005, and that he was informed he did not receive the position on February 14, 2005.

[20] *See, e.g.,* Ghirardo v. University of Southern California, 156 Fed. Appx. 914, 915 (9th Cir. 2005) (plaintiff failed to establish prima facie case of retaliation where allegedly retaliatory conduct had also occurred prior to protected activity); Kasper v. Federated Mutual Insurance Co., 425 F.3d 496, 503 (8th Cir. 2005) (criticism of plaintiff's performance prior to protected activity "weakens any inference of causation").

[21] *See generally* 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)).

[22] In the course of this Department's investigation, the grievant was asked to identify and describe the reasons he believes the grieved conduct was racially discriminatory. The grievant responded, in part, "In connection with racial discrimination, only Ms. [C], Mr. [L] and other Environmental Division management, past and present, can truly provide answer. What I can say is the actions I have faced are stereotypical for African Americans, especially male. We constantly hear things like 'why are you so angry', 'you need additional training', 'you're insubordinate', 'you're weaker', 'you're unprofessional', 'you're really (surprisingly) intelligent', 'you're under qualified', 'you're overqualified', etc. We are constantly ignored when providing input or needing issues addressed such as I have stated . . . . For some reason, we can't get the support and fair treatment when we are just trying to accomplish the requisite tasks. While, I don't think Environmental Division management overtly practices racism, I do believe they process their decision making through inherent racial prisms."

Accordingly, the grievant's claims of harassment do 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

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Gretchen M. White
EDR Consultant