Issue: Qualification/Management Actions/record disclosure/confidentiality; Ruling Date: May 5, 2006; Ruling #2006-1282; Agency: Department of Transportation; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Virginia Department of Transportation
Ruling Number 2006-1282
May 5, 2006

The grievant has requested qualification of his November 11, 2005 grievance with the Virginia Department of Transportation (VDOT or the agency). The grievant asserts that the agency has retaliated and discriminated against him because of his involvement in the grievance of a subordinate employee. For the reasons set forth below, this grievance is not qualified.

FACTS

The grievant, a Bridge Tunnel Patrol Supervisor, serves as the immediate supervisor to a Security Officer II (SO). The SO had been issued a Group I Written Notice by another member of management. The SO challenged the Written Notice via the grievance procedure. The grievant, who served as the first-step respondent in the SO's grievance, investigated the circumstances surrounding the Written Notice and concluded that the Written Notice was unwarranted. Accordingly, he recommended the removal of the Written Notice.

The grievant asserts that when he inquired as to how higher levels of management had resolved the SO's grievance, he was not given any information and was told that he was not entitled to know the outcome.[1] The grievant has pointed out that he is responsible for evaluating the SO's work performance and that management's withholding the ultimate disposition of disciplinary actions impedes his ability to train and evaluate employees under his supervision**.** Further, he claims that it is contrary to the agency's past practice.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the

[1] The grievant contends that all that management shared with him was its proposal to the SO that because of the agency's non-compliance with the grievance process (delay in responding), it was willing to drop the Written Notice. According to the grievant, the SO refused this offer because she would have been exonerated merely because of a technicality, not because of the lack of merit of the charge. The grievant contends that this is the last information that management shared with him.
[2] *See* Va. Code § 2.2-3004(B).

establishment or revision of compensation generally do not qualify for a 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 unfairly applied.[3] In this case, the grievant claims that the agency has retaliated against him for his previous grievance activity and has misapplied and/or unfairly applied policy.

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;[4] (2) the employee suffered an adverse employment action;[5] 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.[6] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[7]

Here, the grievant easily satisfies the first of these requirements. He has shown that he engaged in a protected activity when he responded to the SO's grievance. In addition, the grievant has provided evidence that could be viewed to support the position that the agency's stated reason for its action (refusal to provide him information) is pretextual.[8] However, the

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[3] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).

[4] *See Grievance Procedure Manual* §4.1(b)(4). 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 an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law."

[5] An adverse employment action is a retaliatory act which adversely affects the terms, conditions, or benefits of the plaintiff's employment. *See* Von Gunten v. Maryland, 243 F.3d 858, 865 (4th Cir. 2001).

[6] *See* Rowe v. Marley 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).

[7] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).

[8] Several layers of management relied on the Department of Human Resource Management (DHRM) Policy 6.05 to deny the grievant access to the final disposition of his subordinate's grievance challenge to the Written Notice. *See* E-mail from the Acting Facility Manager to grievant dated October 11, 2005; Second-Step Response dated November 23, 2005; Third-Step Response dated December 19, 2005. DHRM Policy 6.05 §§ III (A and B) prohibit an agency from disclosing to third parties personal information about its employees, other than an employee's (1) position title, (2) job classification, (3) dates of employment and (4) annual salary (if over $10,000). Policy 6.05 §§ III (B)(5) and (6) expressly prohibit disclosure to third parties (i) records of discipline issued under the Standards of Conduct, and (ii) grievance records. The agency has taken the position that immediate supervisors are third parties and thus not entitled to information regarding the disposition of subordinates' grievances. While it is far from clear that immediate supervisors are "third parties," assuming they are, Policy 6.05 expressly states that an employee's supervisor "may have access to employee records without

grievant has not presented evidence that he has suffered an adverse employment action. Here, the grievant has been denied information which would appear to make his task of accurately assessing the work performance of the SO difficult, if not impossible.[9] Nevertheless, despite any difficulties encountered by the grievant in reaching his assessment of the SO's work, he has presented no evidence that he has been adversely impacted by the denial of information, such as receiving a poor performance evaluation based on inaccurate performance assessment of his subordinates. Accordingly, this grievance is not qualified for hearing. We note, however, that while the grievant has not suffered an adverse employment action as a result of being denied information on the final disposition of the SO's grievance, if the grievant's own employment is negatively impacted in the future by the denials, the grievant is not precluded from challenging any such subsequent action through the grievance procedure.

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, he should notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify the 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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Claudia T. Farr
Director

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William G. Anderson, Jr.
EDR Consultant, Sr.

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the consent of the subject employee." Thus, the repeated assertion that DHRM policy precludes the agency from sharing this information with the grievant is, on its face, baseless.

[9] The Facility Manager notes that because the grievant was unable to find any deficiencies or lapses in the SO's performance, "clearly shows that you [grievant], as her supervisor, have already resolved that there were no performance issues surrounding the incident in question. As such, there are no remaining actions required of you relative to performance evaluation." Inexplicably, this statement appears to imply that when evaluating annual performance, immediate supervisors are free to ignore the findings of subsequent step respondents and/or hearing officers.