Issue: Qualification/grievant alleges retaliation f or previous protected activity/compensation policy; Ruling Date: March 24, 2006; Ruling #2006-1284; Agency: Department of Medical Assistance Services; Outcome: qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Medical Assistance Services
Ruling Number 2006-1284
March 24, 2006

The grievant has requested a ruling on whether his November 8, 2005 grievance[1] with the Department of Medical Assistance Services (DMAS or the agency) qualifies for a hearing. The grievant alleges that the agency has retaliated against him for previous protected activity and misapplied and/or unfairly applied compensation policy. For the reasons set forth below, this grievance qualifies for a hearing.

FACTS

The grievant is a Hearing Officer with DMAS. In early June 2005, the grievant asked his supervisor to recommend him for an in-band adjustment for the purposes of internal alignment. The supervisor states that after consultation with human resources, she initially agreed to make the recommendation. However, on June 30, 2005, the grievant failed to adequately perform his duties as a hearing officer and was issued a Group II Written Notice with suspension on July 22, 2005.[2] The supervisor states that when she advised the grievant of her intent to issue the Written Notice, she also advised him that she would not recommend him for an in-band adjustment. The grievant denies that the supervisor informed him that she had reconsidered her earlier decision to recommend him for an adjustment.

A grievance hearing was held on the Group II Written Notice on September 26, 2005.[3] On September 27, 2005, the hearing officer issued a decision reducing the Group

[1] Although the grievant signed and dated the grievance November 4, 2005, both parties apparently agree that the grievance was not initiated with the first-step respondent until November 8, 2005. EDR Ruling No. 2006-1195, at n. 1.
[2] EDR Hearing Decision in Case No. 8171 (Hearing Decision). The Group II Written Notice apparently charged the grievant with disregarding procedures, willfully neglecting responsibilities, failing to act in a manner that promotes confidence in the integrity and efficiency of the hearing process and failing to report for work or request leave. *Id.* at 1.
[3] *Id.* at 1.

II Written Notice to a Group I for unsatisfactory work performance and directing the agency to reimburse the grievance for the five-day suspension.[4] During the grievance hearing, an issue apparently arose regarding a note that the supervisor had written and placed on a document relating to the June 30th DMAS hearing. The supervisor acknowledges that she subsequently was required to "explain the meaning of the note" to the agency head and the assistant attorney general assigned to the matter heard on June 30th. The agency states that no disciplinary action was subsequently taken against the supervisor or her supervisor.

On September 28 and 29, 2005, the supervisor recommended four hearing officers—not including grievant—for in-band adjustments on the basis of internal alignment.[5] At the same time, on September 29, 2005, the supervisor issued the grievant a Notice of Improvement Needed/Substandard Performance, citing the June 30th incident for which the grievant had previously received the Group II Written Notice.

In October 2005, the supervisor gave each of the four hearing officers recommended for internal adjustments ratings of "contributor and exceeds expectations" in their annual performance evaluation.[6] In contrast, on October 17, 2005, the supervisor gave the grievant a "contributor" rating, citing the Notice of Improvement Needed for the June 30th incident.

On October 28, 2005, the grievant asked his supervisor to "revisit" the possibility of an in-band adjustment for him. The grievant states that on or about November 3, 2005, his supervisor informed him that she would not submit a request for an in-band adjustment for him because of the June 30, 2005 incident. On November 8, 2005, the grievant initiated a grievance challenging the agency's failure to consider him for an in-band adjustment.[7] After the parties failed to resolve the grievance during the management resolution steps, the grievant requested qualification of the grievance for hearing. The agency head denied the grievant's request, and the grievant has appealed to this Department.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.[8] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out

[4] *Id.* at 1, 8. A copy of the ruling was sent to the agency and its representative by e-mail on September 27, 2005.
[5] One of the four hearing officers recommended by the supervisor was ultimately not approved for an in-band adjustment because he had previously received a 10% adjustment in January 2005, he was not out of alignment, and had less total experience than the majority of incumbents in the position.
[6] In addition, on October 11-12, 2005, the supervisor completed Acknowledgements of Extraordinary Contribution for the four recommended employees.
[7] EDR Ruling No. 2006-1195, at n 1. The agency initially rejected the grievance as untimely. This Department subsequently ruled that the grievance was timely filed. EDR Ruling No. 2006-1195.
[8] *See* Va. Code § 2.2-3004(B).

and the 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.[9] 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;[10] (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.[11] Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.[12]

Here, the grievant easily satisfies the first and second of these requirements. He has shown that he engaged in a protected activity when he grieved the Group II Written Notice issued to him on July 22, 2005, and that he was not recommended for an in-band adjustment, which constitutes an adverse employment action.[13] At issue, then, is whether there is sufficient evidence that management denied his October 2005 request for an in-band adjustment in retaliation for his prior grievance activity.

In this case, it appears that on September 29, 2005, two days after the EDR hearing officer's decision reducing the Group II Written Notice issued to the grievant for the June 30th incident, the grievant's supervisor issued him a Notice of Improvement Needed/Substandard Performance based on that same incident. In addition, on September 28 and 29th, the supervisor made written recommendations for four other DMAS hearing officers to receive in-band adjustments on the basis of internal alignments. Approximately 2 weeks later, on October 11-12, 2005, the supervisor issued

[9] Va. Code § 2.2-3004(A); *Grievance Procedure Manual*, § 4.1(c).
[10] *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."
[11] *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).
[12] *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255, n. 10, 101 S. Ct. 1089 (Title VII discrimination case).
[13] *See* Farrell v. Butler University, 421 F.3d 609, 614 (7th Cir. 2005).

Acknowledgements of Extraordinary Contributor for those hearing officers recommended for in-band adjustments. Subsequently, the supervisor gave the four recommended hearing officers evaluations "Contributor and Exceeds Expectations," while giving the grievant an evaluation of "Contributor."

The grievant asserts that this chain of events, culminating in the supervisor's announcement in November 2005 that she would not "revisit" her decision to recommend the grievant for an in-band adjustment, was retaliation for his grievance regarding the Group II Written Notice; the subsequent decision reducing the Group II Written Notice to a Group I; and the "note" issue that arose during his grievance hearing in relation to the June 30th DMAS hearing, which resulted in the supervisor's apparently having to explain the meaning of the note to the agency head and an assistant attorney general. In contrast, the supervisor states that she had advised the grievant of her intent not to recommend the grievant for an in-band adjustment at the time she informed him of her intent to issue the July 22, 2005 Written Notice, before he initiated his grievance, and thus her intent could not be retaliation. The supervisor further asserts that she was merely delayed in completing paperwork on any in-band adjustment until September[14] and that her decision was based on the grievant's performance--in particular, the June 30th incident--and not on his grievance activity.

In this case, the agency has clearly stated a nonretaliatory business reason for the decision not to recommend the grievant for an in-band adjustment—the grievant's conduct on June 30, 2005. Further, because a hearing officer has upheld a Group I Written Notice for unsatisfactory work performance for the June 30th conduct, the grievant cannot dispute the validity of the agency's assertions regarding his performance. This does not mean, however, that the grievant cannot nevertheless demonstrate that his performance was not in fact the true reason for the agency's actions, but rather only a pretext for retaliation: in other words, simply because the grievant's performance was unquestionably unsatisfactory on June 30th does not in itself establish that the agency in fact acted for that reason in denying him the in-band adjustment.[15]

Therefore, although it is a close question, this Department concludes, based on the totality of the circumstances, that there is sufficient evidence for the grievant's claim of

[14] Although the grievant apparently admits that he asked his supervisor to "revisit" the possibility of an internal adjustment in his October 28, 2005 e-mail, he claims that he was not advised by his supervisor that she would not recommend him for an in-band adjustment until November 1, 2005, several weeks after the grievance hearing and decision.

[15] *See, e.g.*, Wissart v. Gill Hotels Co., 2003 U.S. Dist. LEXIS 17609, at **2-4 (S.D. Fla. Sept. 30, 2003) (plaintiff who had been discharged for theft presented evidence of pretext where another employee who had also stolen from the employer was not discharged); Bennett v. Progressive Corp. *et al.*, 225 F. Supp. 2d 190, 212-13 (N.D.N.Y. 2002) (finding sufficient question of pretext where the employer failed to terminate the plaintiff immediately upon learning that she had violated its alcohol policy justifying mandatory termination); Cifra v. General Electric Co., 2002 U.S. Dist. LEXIS 12602, at **13-16 (N.D.N.Y. 2002) (finding employer's explanation pretextual where the employer considered the plaintiff's performance to be poor, but other evidence suggested actual motivation for termination was retaliation, rather than performance).

retaliation to qualify for hearing. In reaching this determination, we note, in particular, the close proximity in time between the grievance hearing decision and the supervisor's written recommendations for in-band adjustments, her issuance to the grievant of a Notice of Improvement Needed (approximately 3 months after the underlying conduct), her completion of performance evaluations, and her decision not to "revisit" her decision with respect to an in-band adjustment for the grievant.[16] While this evidence could be probative of retaliatory intent, the chain of events questioned by the grievant could also be explained by a myriad of non-retaliatory reasons. It is for this reason that we believe that further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility. This qualification ruling in no way, however, determines that the agency's actions with respect to the grievant were retaliatory or otherwise improper.

Alternative Theory for Denial of In-Band Adjustment

The grievant also claims the agency misapplied or unfairly applied policy in failing to recommend or award him an in-band adjustment. Because the issue of retaliation qualifies for a hearing, this Department deems it appropriate to send this alternative theory for adjudication by a hearing officer to help assure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons discussed above, this Department concludes that the grievant's November 8, 2005 grievance is qualified. By copy of this ruling, the grievant and the agency are advised that the agency has five workdays from receipt of this ruling to request the appointment of a hearing officer.

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Claudia T. Farr
Director

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Gretchen M. White
EDR Consultant

[16] *See* Tinsley v. First Union National Bank, 155 F.3d 435, 443 (4th Cir. 1998) (mere temporal proximity is sufficient to "make a prima facie case of causality"); Hockaday v. Brownlee, 370 F. Supp. 2d 416, 425 (E.D.Va. 2004) (same).