

Issue: Misapplication of policy (transfer and demotion); Hearing Date: 09/15/05;
Decision Issued: 09/26/05; Agency: DCE; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8084



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8084

Hearing Date: September 15, 2005
Decision Issued: September 26 2005

PROCEDURAL HISTORY

Grievant was demoted from Regional Principal to an Assistant Principal and transferred to another Facility. On April 9, 2005, Grievant filed a grievance to challenge his demotion and transfer. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On August 3, 2005, the EDR Director issued Ruling No. 2005-1045 qualifying certain issues for hearing. On August 9, 2005, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 15, 2005, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUE

Whether Grievant's demotion and transfer was voluntary and consistent with DHRM policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Correctional Education employed Grievant as a Regional Principal. The purpose of his position was to:

[p]rovide educational leadership, supervision, and guidance to facilitate cost effective quality educational programs in compliance with the standards of the Department of Correctional Education's policies and procedures.¹

Agency managers had numerous concerns about his work performance. Annual evaluations were conducted of the schools and programs under Grievant's control. Grievant's Supervisor had discussed her concerns with Grievant on several occasions. On December 22, 2003, Grievant received a Group I Written Notice for inadequate work performance.²

Grievant's Supervisor discovered that Grievant had not implemented a college level program at one of the region's facilities. She had instructed him to do so and the Agency had allocated funds to enable him to establish such a program. Grievant did not timely advise her that the funds would not be spent so that she could utilize the monies at another Facility. This event caused the Supervisor to conclude that Grievant should be demoted and transferred to another Facility as she did not believe he was capable of serving as a Regional Principal.

On Friday, March 11, 2005, the Supervisor and Grievant met. The Supervisor expressed several complaints she had with Grievant's performance. Grievant responded that some of the fault should be directed at one of his subordinates. The

¹ Agency Exhibit 12.

² Agency Exhibit 9.

Supervisor concluded that the “bottom line was that [Grievant] was not carrying his share of the load. He was not supervising [his subordinate] to make sure things were getting done. And he was not doing the portion of the work that a supervisor is responsible for.”³ The Supervisor told Grievant she was going to reorganize the his region and that he had two options: (1) he could take a voluntary demotion to regional assistant principal; or (2) he would received a Group II under the Standards of Conduct and would be demoted and would lose 5% salary.” Grievant asked if he had to make a decision right away or could he have until Monday morning. The Supervisor said he needed to call her very early Monday or she would proceed without him.

By 10 a.m. on Monday, March 14, 2005, Grievant had not called the Supervisor. She called him at 11 a.m. Grievant said he needed more time to think about what he wanted to do. The Supervisor said “no” because that was the purpose of giving him the weekend. She added that she would go ahead with her decision to issue him a Group II Written Notice. Grievant said that he would accept the voluntary demotion option.

Based on the Supervisor’s and Grievant’s conversation, the Agency demoted and transferred Grievant.

CONCLUSIONS OF POLICY

DHRM Policy 3.05 defines voluntary demotion as: “Employee initiated movement to a different position in a lower Pay Band. This move may result from a competitive (recruitment) or non-competitive (employee request) process.” DHRM Policy 3.05 describes voluntary transfer as:

This personnel action occurs when an employee moves to a different position within the same or different Role within the same Pay Band. Voluntary Transfers may be accomplished through a Competitive or Non-competitive Process.

The Agency admitted that it did not demote or transfer Grievant pursuant to DHRM Policy 1.60. The Agency admitted it did not demote or transfer Grievant pursuant to DHRM Policy 1.40. The sole question to be addresses is whether Grievant’s demotion and transfer was voluntary.

Grievant did not voluntary accept a demotion and transfer. The Supervisor described one of Grievant’s options as receiving a Group II Written Notice with demotion, transfer and salary reduction. It is not possible under DHRM Policy 1.60, Standards of Conduct, for an employee to be demoted and transferred with a salary reduction upon the issuance of a Group II Written Notice. Only if the employee has sufficient prior active disciplinary notices could the employee be demoted or transferred. Grievant’s only prior active disciplinary action was a Group I Written Notice. An active

³ Agency Exhibit 15.

Group I along with a Group II Written Notice is not a sufficient accumulation of disciplinary action to justify demotion or transfer. In short, the option the Supervisor presented to Grievant was not an option at all.

The Supervisor's statements to Grievant amounted to a material misrepresentation of fact. She incorrectly informed Grievant that he could be demoted and transferred with a pay reduction pursuant to a Group II Written Notice. Grievant relied upon her statements and believed the Agency could demote, transfer, and reduce his pay if the Supervisor issued to him a Group II Written Notice. Grievant wanted more time to make the decision, but the Supervisor refused his request. Grievant testified he wanted time to speak with an attorney during the attorney's regular office hours beginning on Monday. Grievant could not have chosen the option of receiving a Written Notice with demotion and transfer because no such option existed. If Grievant had known that an accurate expression of the option would have been merely a Group II Written Notice with the maximum discipline possible under the Group II Written Notice, Grievant may have selected that option since it would not have involved demotion or transfer.

DHRM Policy 3.05 requires a voluntary decision prior to implementation of a voluntary demotion and voluntary transfer. Since Grievant's decision was not voluntary. The Agency failed to comply with this policy because it implemented a voluntary demotion and transfer when no such demotion and transfer was permitted.

DECISION

For the reasons stated herein, the Agency failed to comply with DHRM Policy 3.05. The Agency is ordered to comply with DHRM Policies regarding Grievant's transfer and demotion. Because no basis existed to demote and transfer Grievant, his demotion and transfer must be reversed. The Agency is ordered to re-instate Grievant to his former position, or if occupied, to an objectively similar position.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].
