

Issue: Qualification – Compensation (involuntary demotion); Ruling Date: July 13, 2017; Ruling No. 2017-4564; Agency: Virginia Department of Transportation; Outcome: Not Qualified.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Equal Employment and Dispute Resolution¹

QUALIFICATION RULING

In the matter of the Virginia Department of Transportation
Ruling Number 2017-4564
July 13, 2017

This ruling addresses the partial qualification of the grievant's April 11, 2017 grievance with the Virginia Department of Transportation (the "agency"). In his grievance, the grievant challenges a Group II Written Notice, and demotion with a five percent reduction in pay. The agency head qualified the grievant's challenge to the Group II Written Notice, but determined that his claims regarding the demotion did not qualify for a hearing.² The grievant has now appealed the agency head's partial qualification of his grievance to the Office of Equal Employment and Dispute Resolution ("EEDR") at the Department of Human Resource Management ("DHRM").

FACTS

The grievant was employed by the agency as a Maintenance Operator III, Inmate Crew Leader. On January 30, 2017, he was provided with a due process letter, which indicated that the agency was considering formal disciplinary action following an incident report generated by the Superintendent of Correctional Unit H (a facility of the Virginia Department of Corrections, or "DOC") on or about January 19, 2017, where the grievant had been supervising inmate road crews. On April 10, 2017, the grievant was issued a letter advising him that his Inmate Crew Leader in-service certification card was being revoked, due to various performance concerns conveyed about the grievant by the DOC Superintendent. The letter further indicated that, since the requirements of the grievant's position including possessing this certification, he would be removed from the role pursuant to DHRM Policy 1.60, *Standards of Conduct*. Stating that no equivalent position into which the grievant could be transferred exists, the agency demoted the grievant to a Maintenance Operator II and reassigned him to a different office. The grievant also received a Group II Written Notice regarding the incident of January 19, 2017.

¹ Effective January 1, 2017, the Office of Employment Dispute Resolution merged with another office area within the Department of Human Resource Management, the Office of Equal Employment Services. The *Grievance Procedure Manual* has now been updated to reflect this Office's name post-merger as the Office of Equal Employment and Dispute Resolution.

² During the management resolution steps, the grievant's salary was reinstated to its previous level. Thus, this issue is now moot and will not be further addressed in this ruling.

The grievant initiated a grievance to challenge the agency's actions on April 11, 2017. After the grievance advanced through the single management resolution step,³ the agency head partially qualified the grievance for a hearing, stating that only the Group II Written Notice qualifies for a hearing. The grievant now appeals that determination to EEDR.

DISCUSSION

The grievance statutes and procedure reserve to management the exclusive right to manage the affairs and operations of state government.⁴ Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out and the reassignment or transfer of employees within the agency 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.⁵

For state employees subject to the Virginia Personnel Act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the policies and procedures promulgated by DHRM.⁶ For example, when a disciplinary action is taken against an employee, certain policy provisions must be followed.⁷ These safeguards are in place to ensure that disciplinary actions are appropriate and warranted.

Where an agency has taken informal disciplinary action against an employee, a hearing cannot be avoided for the sole reason that a Written Notice did not accompany the disciplinary action. Rather, even in the absence of a Written Notice, a hearing is required where the grieved management action resulted in an adverse employment action⁸ against the grievant and the primary intent of the management action was disciplinary (i.e., taken primarily to correct or punish perceived poor performance).⁹ In this instance, the grievant did receive a Written Notice based upon the events allegedly occurring on January 19, 2017. However, the agency states that the demotion was based upon the grievant's inability to meet working conditions, as contemplated by DHRM Policy 1.60, due to DOC's determination that he was no longer eligible to supervise inmate work crews and the revocation of his Inmate Crew Leader in-service certification card. EEDR has thoroughly reviewed all documentation provided and, while the grievant's perception that the transfer appears to be disciplinary in nature is understandable, we

³ Due to the loss of pay, the matter was handled as an expedited grievance.

⁴ See Va. Code § 2.2-3004(B).

⁵ Va. Code § 2.2-3004(A); *Grievance Procedure Manual* §§ 4.1(b), (c).

⁶ Va. Code § 2.2-2900 *et seq.*

⁷ See DHRM Policy 1.60, *Standards of Conduct*.

⁸ The grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions." See *Grievance Procedure Manual* § 4.1(b). For purposes of this ruling only, we will assume that the grievant's demotion from a Maintenance Operator III to a Maintenance Operator II constitutes an adverse employment action.

⁹ See, e.g., EDR Ruling Nos. 2007-1516, 2007-1517; EDR Ruling Nos. 2002-227, 2002-230; see also Va. Code § 2.2-3004(A) (stating that grievances involving "transfers and assignments . . . resulting from formal discipline or unsatisfactory job performance" qualify for a hearing).

have not reviewed any documentation that shows the agency's stated purpose in reassigning him to be untrue or pretextual.

Rather, we must examine the question of whether the grievant's demotion constitutes a misapplication or unfair application of state policy. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. The primary policy implicated in this grievance is DHRM Policy 1.60, *Standards of Conduct*, which provides that an employee "unable to meet the working conditions of his or her employment due to circumstances such as . . . loss of license or certification required for the job" may be removed from employment.¹⁰ This policy further provides, however, that agencies may opt to "demote or transfer and reduce the employee's duties . . . or transfer them to an equivalent position without a reduction in salary as an alternative to termination."¹¹ In this instance, it appears that the agency could have removed the grievant from employment altogether, nevertheless, management decided to provide him with the opportunity to remain employed with the agency, in a new position. EEDR has found no mandatory policy provision that the agency has violated by reassigning the grievant in this manner, even given that the new position appears to be a demotion in role title. After reviewing the documentation provided with this grievance, we cannot conclude that sufficient evidence exists supporting a theory that the grievant's demotion was based upon any improper motivation, such as discrimination or retaliation. As such, because EEDR cannot find that the agency has misapplied or unfairly applied policy, the grievance does not qualify for hearing as to the grievant's demotion.

If it has not already done so, within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear those claims qualified for hearing using the Grievance Form B. EEDR's qualification rulings are final and nonappealable.¹²



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¹⁰ DHRM Policy 1.60, *Standards of Conduct*, § (H)(1).

¹¹ *Id.*

¹² Va. Code § 2.2-1202.1(5).