Issues: Qualification – Management Actions: Transfer (non-disciplinary), Misapplication of Policy, Discrimination, Harassment; Decision Date: May 14, 2002; Agency: Department of Juvenile Justice; Outcome: Transfer and Discrimination/ Harassment Qualified; Misapplication of Policy Not Qualified.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of the Department of Juvenile Justice/ No. 2001-108
May 14, 2002

The grievant, through her attorney, has requested a ruling on whether her November 15, 2000, grievance with the Department of Juvenile Justice (DJJ) qualifies for hearing. The grievant claims that her transfer to a position at another facility effectively resulted in a demotion by stripping her of her management and supervisory responsibilities, constituted an unfair or misapplication of state policy, and was part of a pattern of discrimination and harassment. For the reasons discussed below, this grievance qualifies for hearing on the disputed material facts.

FACTS

The grievant, a female, was formerly employed as a Corrections Treatment Program Supervisor (TPS). As a TPS, the grievant was responsible for the administration and management of client treatment services, and the supervision of a staff.

Under compensation reform, the Commonwealth eliminated its former classification system and pay grade structure. Effective September 25, 2000, all existing classifications were assigned to a more limited number of broader "Roles." The existing twenty-one pay grades were eliminated, and instead, each Role was assigned to one of nine broad "Pay Bands" with minimum and maximum pay ranges.

Prior to the September 25, 2000 reform of the Commonwealth's compensation system, TPS positions like the grievant's were classified at the grade 11 level. On September 25th, the TPS classification was grouped with other similar classifications at grade levels 9, 10, and 11 to comprise the new, broader Role of Counselor II, which, along with other designated Roles, were contained in the new Pay Band 4.

On October 11, 2000, the grievant received her annual performance evaluation with an overall rating of **Fair But Needs Improvement**. As a result of a separate grievance challenge, her rating was upgraded in April 2001 to **Meets Expectations**. The agency stated that it revised her evaluation because it concluded that the agency did not have adequate documentation to support the initial **Fair But Needs Improvement** rating.

Effective November 1, 2000, the grievant was involuntarily transferred to another Counselor II position in Pay Band 4, that of Clinical Social Worker, at another facility. In the Clinical Social Worker position, the grievant retains her prior salary as a TPS, but exercises no management or supervisory responsibilities. Prior to September 25, 2000, the Clinical Social Worker position had been classified at the grade 10 level.

DISCUSSION

By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.[1] 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 influenced management's decision, or whether state policy may have been misapplied.[2] In this case, the grievant contends that management effectually demoted her and misapplied or unfairly applied policy in doing so. Additionally, her grievance Form A alleges that the transfer was part of a pattern of discrimination and harassment. These issues are discussed in turn below.

Issue: Application of DHRM Policy No. 3.05

For a claim of policy misapplication or unfair application of policy to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy provision, or evidence that management's actions, in their totality, are so unfair as to amount to a disregard of the intent of the applicable policy.

Under the Department of Human Resources Management (DHRM) Policy 3.05, management may reassign an employee from one position to another position of the same or different Role, within the same Pay Band, without a change in base salary.[3] This policy states that such reassignments are available to management when "agency business (staffing or operational) needs . . . require the movement of staff." Such an action is known as a reassignment within the pay band.[4]

Policy 3.05 contains another provision that allows management to assign an employee to the same or different position, within the same Pay Band, but with less job responsibilities. This option is available if the employee is performing poorly in her original position. Under this provision, the agency must redefine the duties of the

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[1] *See* Va. Code § 2.2-3004(B).
[2] Va. Code §2.2-3004(A) and (C); Grievance Procedure Manual § 4.1 (c), page 11.
[3] DHRM Policy 3.05, *Reassignment Within the Pay Band*, pages 4, 17-18.
[4] The term for such an action prior to the September 25, 2000 reform of the Commonwealth's Compensation System was "lateral transfer."

employee to reflect a decrease in level of responsibility and must reduce the employee's salary by at least 5%. Such an action is known as a demotion for disciplinary or performance reasons.[5]

Because of the elimination of the grade structure, there were no assigned "grades" subsequent to September 25, 2000. Therefore, the grievant was not transferred to a lower "graded" position as claimed, because the transfer occurred after September 25, 2000. Nor was she transferred to a lower pay band. Further, under Policy 3.05, transfer to a position in the same pay band *must* be accompanied by a salary reduction of at least 5%.[6] In this case, the grievant suffered no actual loss of pay. Accordingly, we cannot conclude that the evidence before us raises a sufficient question as to whether the grievant's transfer, with no change in salary, constituted a demotion for purposes of Policy 3.05. Accordingly, this issue does not qualify for a hearing.

Issue: Unwarranted Disciplinary Transfer

For state employees subject to the Virginia Personnel Act, a transfer must be either voluntary, or, if involuntary, must be based on objective methods and must adhere to all applicable statutes and to the policies and procedures promulgated by the Department of Human Resource Management (DHRM).[7] Applicable statutes and policies recognize management's authority to transfer an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.[8]

For example, when an employee is transferred as a disciplinary measure, certain policy provisions must be followed.[9] All transfers accompanied by a Written Notice automatically qualify for a hearing if challenged through the grievance procedure.[10] In the absence of an accompanying Written Notice, a challenged transfer qualifies for a hearing only if there is a sufficient question as to whether the transfer was an "adverse employment action" and that management's primary motivating factor was to correct or punish behavior, or to establish the professional or personal standards for the conduct of an employee.[11] These policy and procedural safeguards are designed to ensure that an involuntary disciplinary transfer is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the involuntary transfer, where there is a

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[5] DHRM Policy 3.05, *Demotion*, pages 2, 8-9.
[6] *See* DHRM Policy 3.05, *Demotion*, pages *8-9.*
[7] Va. Code § 2.2-2900, *et seq.*
[8] Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, DHRM Policy No. 1.60, Standards of Conduct (VII)(E).
[9] DHRM Policy No. 1.60, Standards of Conduct (VII).
[10] Va. Code § 2.2-3004 (A); DHRM Policy No. 1.60, Standards of Conduct (IX); *Grievance Procedure Manual* § 4.1(a), page 10.
[11] Va. Code §§ 2.2-3004 (A) and (C); *Grievance Procedure Manual* § 4.1 (b)(5) and (c)(4), pages 10-11 (a claim of disciplinary transfer, assignment, demotion, suspension, or other action similarly affecting the employment status of an employee may qualify for a hearing if there are sufficient supporting facts).

sufficient question as to whether the transfer was an "adverse employment action" that was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor performance. [12] The issues of whether the grievant's transfer constituted an adverse employment action and was disciplinary in nature are discussed below.

Adverse Employment Action: An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment.[13] Thus, a transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions or benefits of her employment.[14] In this case, the agency maintains that the transfer to the Clinical Social Worker position did not adversely impact the grievant's employment status because the grievant was not demoted and her salary remained unchanged.[15] However, the grievant contends that the transfer is in essence a functional demotion through which she was stripped of her management and supervisory responsibilities. Significantly, a transfer with appreciably different responsibilities or one providing reduced opportunities for promotion can constitute an adverse employment action.[16] In this case, reassigning a manager/supervisor to a non-management, non-supervisory position could reasonably be viewed, depending on all the facts and circumstances, as a blemish on her work record that could negatively impact her promotional opportunities, even though the grievant was not technically demoted.

Disciplinary Basis: Neither management's October 30, 2000 transfer notification letter to the grievant nor its step responses to the written grievance provided a reason for the transfer. However, during the investigation of this matter, two members of management stated that the reason for the transfer, in part, was to address perceived performance and personality-related problems.

The grievant's original performance evaluation for the year 2000 cycle (**Fair But Needs Improvement**) could possibly support a finding that management's action may have been primarily for performance-related reasons. Although her rating was upgraded in April 2001 to **Meets Expectations,** as a result of an earlier, separate grievance, there is evidence that could support a finding that the upgrade was primarily the result of inadequate documentation to support the initial **Fair But Needs Improvement** rating.

One of the inferences that could be drawn from the claims and evidence in this case is that the grievant's transfer to a different position at another facility was to

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[12] Likewise, the policy and procedural safeguards in DHRM's Policy No. 1.40, Performance Planning and Evaluation, are designed to ensure that an involuntary performance-based transfer, demotion or termination are rationally based, and are not discriminatory, retaliatory, arbitrary or capricious. See DHRM Policy No. 1.40.

[13] Von Gunten v. Maryland Department of the Environment, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001)(citing Munday v. Waste Mgmt. Of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

[14] Boone v. Golden, 178 F.3d 253 (4th Cir. 1999).

[15] *See* Management Second and Third Step responses and the agency head's Qualification Determination.

[16] *See* Boone v. Goldin, 178 F.3d 253 (4th Cir. 1999).

"correct" her alleged unsatisfactory performance, and thus, was disciplinary in nature. Moreover, due to the agency's upward revision of the grievant's performance rating, there remains a question as to whether the transfer, if indeed disciplinary, was warranted. Whether at the time of the transfer management viewed the grievant's performance as the primary factor or merely secondary to other nonperformance-based business needs is a factual determination best left to a hearing officer.[17]

In sum, this grievance raises a sufficient question as to whether the transfer was an unwarranted, adverse employment action that was disciplinary in nature. Thus, the issue of disciplinary transfer is qualified for a hearing.[18]

Issue: Discrimination/Harassment

Grievances that may be qualified for a hearing include actions related to discrimination on the basis of sex.[19] As a female, the grievant is a member of a protected class.[20] To qualify her grievance for a hearing, there must be more than a mere allegation of discrimination -- there must be facts that raise a sufficient question as to whether the grievant suffered an adverse employment action as the result of discrimination based on her sex. If the agency provides a nondiscriminatory business reason for the alleged disparity in treatment, the grievance should not be qualified for hearing, unless there is sufficient evidence that the agency's professed business reason is a pretext or excuse for discrimination.[21]

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[17] A major concern prompting the recent reform of the Commonwealth's employee compensation plan was that agencies had limited ability to efficiently transfer personnel, reassign duties, and adjust to changing demands. See generally, *Final Report: Reform of the Classified Compensation Plan, January 14, 2000*. To remedy this situation, the policies relating to compensation and hiring have been significantly altered to allow management to make personnel changes without having to engage in overly burdensome procedures. Under the Commonwealth's new compensation plan, an agency may freely consider the strengths and weaknesses of particular employees as it assigns duties and structures its workforce. See DHRM Policy 3.05. Accordingly, only in cases like this one where the evidence raises a sufficient question as to whether an employee has suffered an adverse action which was *primarily* intended to discipline (that is, to correct or punish,) will this Department qualify a grievance alleging that a transfer or reassignment was unwarranted, informal discipline. Here, there is a sufficient question as to whether the reassignment was made *primarily* to correct or punish poor performance rather than to restructure the department.

[18] It should be noted that under DHRM Policy 1.40, an employee also may be transferred for performance reasons. However, management initiates such transfers after the employee is presented with an unfavorable performance evaluation (currently non-contributor rating) and subsequently receives an unfavorable follow-up evaluation. As discussed above, in this case the grievant's evaluation was changed to a **Meets Expectations**, therefore the transfer does not appear to have been effectuated under Policy 1.40.

[19] *See Grievance Procedure Manual*, § 4.1(b), page 10.

[20] The attachment to the Form A does not state the specific basis of the alleged discrimination, and the issue was not addressed during the resolution steps. However, the claim was clarified as "sex discrimination" during this Department's investigation of this matter.

[21] 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)).

As evidence of discrimination, the grievant cites a history of alleged hostile treatment by her former female supervisor, to which she claims her male counterpart was not subjected. She lists a series of verbal confrontations with her supervisor, which she views as unwarranted, and as instigated for the sole purpose of humiliating her, undermining her status as TPS, and "setting her up" to fail, all of which allegedly culminated in her transfer.

For reasons related to the qualification of the disciplinary transfer issue, the issue of discrimination warrants further exploration of the facts by a hearing officer. For example, there is some evidence (e.g., the original performance rating of **Fair But Needs Improvement**) to suggest that management transferred the grievant due to the nondiscriminatory business reason of perceived poor performance. Other evidence, however, (e.g., the revised performance rating of **Meets Expectations**), depending on all the facts and circumstances, could refute a performance-based reason as pretextual. Still other evidence could suggest that the transfer arose primarily from legitimate staffing or operational needs not primarily related to performance. All in all, the issue of whether the grievant's transfer was primarily based on perceived poor performance, nonperformance-based business needs, or based upon unlawful discrimination involves interrelated factual determinations best left to a hearing officer.

APPEAL RIGHTS AND OTHER INFORMATION

For the reasons discussed above, the issue of misapplication of policy does not qualify for a hearing. For additional 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 this determination to the circuit court, she must 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 should notify them that she does not want to proceed.

The issues of disciplinary transfer and sex discrimination qualify for hearing. Please note that in qualifying these issues, this Department has in no way determined that the grievant's transfer was disciplinary, unwarranted, or discriminatory. Rather, this ruling simply reflects that there is a sufficient question as to these issues, and that further review by a hearing officer is justified.

Regarding the disciplinary transfer issue, at the hearing, the grievant will have the burden of proving that the transfer was disciplinary. If the hearing officer finds that it was disciplinary, the agency will have the burden of proving that the transfer, though disciplinary, was warranted.

Should a hearing officer find that the transfer was disciplinary and unwarranted, he or she may rescind that transfer, thus effecting reinstatement to the original facility

and position, just as he or she may rescind any formal disciplinary action, such as termination, by ordering reinstatement to a previously held position.[22] On the other hand, it is important for the grievant to note that if a hearing officer finds that her transfer (i) was not an adverse employment action, (ii) was not disciplinary or discriminatory in nature, or, (iii) if adverse and disciplinary, was warranted, the agency may need to determine whether it would be obligated to treat the transfer consistently with those findings and applicable DHRM policy. For instance, if the hearing officer finds that the transfer was warranted because it resulted from the grievant's poor performance, and that her job responsibilities were lessened, it may be possible that applicable policy would allow or even require the agency to reduce her salary.

Finally, we wish to reiterate that the agency had and continues to have the authority to transfer any employee if, in management's judgment, that would further the agency's legitimate operational needs and the transfer is not retaliatory, discriminatory, unwarranted discipline, or a misapplication of policy.

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Claudia T. Farr
Director

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June M. Foy
Employee Relations Consultant

[22] *Grievance Procedure Manual* § 5.9(a) and (b), pages 15-16. We wish to clarify that under the grievance procedure, a hearing officer typically may not order a transfer. However, the grievance procedure has long empowered a hearing officer to rescind an unwarranted disciplinary action. In cases where the unwarranted disciplinary action itself is a transfer, that action, like all other unwarranted disciplinary actions, may be rescinded by the hearing officer, with the result that grievant is returned to the status quo prior to the disciplinary transfer. *See Rules for Conducting Grievance Hearings, §* VI (A), page 10.