

Issue: Qualification/Retaliation/Grievance Activity; Ruling Date: April 18, 2003; Ruling #2003-065; Agency: Department of Minority Business Enterprise; Outcome: qualified.



*COMMONWEALTH of VIRGINIA*  
*Department of Employment Dispute Resolution*

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Minority Business Enterprise/No. 2003-065  
April 18, 2003

The grievant has requested a ruling on whether her March 3, 2003 grievance with the Department of Minority Business Enterprise (agency or DMBE) qualifies for a hearing. The grievant claims that the agency misapplied policy when it reduced her salary 36% following a demotion. She further claims that the agency's pay action was disciplinary and a form of harassment and retaliation based on the grievant's prior grievance activity.<sup>1</sup> For the following reasons, this grievance qualifies for a hearing.

FACTS

The grievant was a Policy and Planning Specialist II (Pay Band 5) with DMBE until February 20, 2003. On February 20, the Director presented a memorandum to the grievant, demoting her to Program Administration Specialist I (Pay Band 4). As a result of this demotion, the grievant received a 36% reduction in salary.<sup>2</sup>

In the February 20 memo, the Director raised concerns about the grievant's performance. He cited the grievant's alleged "apparent poor work ethic and poor attendance" and noted that there were several errors in the grievant's quarterly report which was submitted for the Governor's consideration. The Director further noted that the grievant was not performing the duties expected of a lead analyst. The grievant disputes several of the comments made in the February 20 memorandum. During this Department's investigation, the grievant stated that past directors have not had problems with the grievant's work performance. She acknowledges that the Director has authority to reassign employees, but claims that the demotion was a misapplication of policy and was a form of discipline and retaliation. She further claims that the only change in her duties following her demotion was the removal of her supervisory responsibilities.<sup>3</sup>

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<sup>1</sup> The grievant successfully challenged a December 16, 2002 Group II Written Notice for leaving the worksite during work hours without permission. *See* Decision of Hearing Officer, Case No. 5667, March 27, 2003.

<sup>2</sup> Her new salary was set within the parameters of Pay Band 4 (\$26,722-54,842).

<sup>3</sup> During this Department's investigation, the grievant noted that *all* employees were relieved of their supervisory duties, because the Director wanted all employees to report directly to him.

Moreover, she notes that the Director has openly criticized several staff members of DMBE, creating low morale.

### DISCUSSION

The grievant claims that the agency misapplied state policy when it demoted her and reduced her salary by 36%. Specifically, she claims that it was improper to demote her without a new Employee Work Profile or performance plan<sup>4</sup> and that the decrease in pay is unfair because it does not adequately represent the responsibilities that were taken away from her.<sup>5</sup> The grievant further claims that the salary reduction was the result of harassment and retaliation for previously challenging a disciplinary action through the grievance procedure.

#### *Misapplication of Policy/Disciplinary Transfer*

For state employees subject to the Virginia Personnel Act, a demotion 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).<sup>6</sup> Applicable statutes and policies recognize management's authority to transfer or demote an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.<sup>7</sup> According to state policies, it appears that an employee may receive a performance-based demotion in one of two ways: either under the Standards of Conduct or under DHRM's Performance Planning and Evaluation policy. These policies are discussed in turn below.

#### Standards of Conduct

When an employee is demoted as a disciplinary measure, certain policy provisions must be followed.<sup>8</sup> Under the Standards of Conduct, a Written Notice *must* accompany a disciplinary demotion.<sup>9</sup> These policy and procedural safeguards are designed to ensure that an involuntary disciplinary transfer or demotion is merited. A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the agency action.

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<sup>4</sup> The grievant did not receive a new Employee Work Profile until March 6, 2003.

<sup>5</sup> During this Department's investigation, the grievant reported that she is more concerned with the reduction in pay than she is with the demotion. However, because the salary decrease is a result of the demotion, this ruling also discusses whether the demotion itself may have been a misapplication of policy or the result of harassment, retaliation, or discipline.

<sup>6</sup> Va. Code § 2.2-2900, *et seq.*

<sup>7</sup> Va. Code §§ 2.2-3004 (A) and (C); DHRM Policy No. 3.05, Compensation; DHRM Policy 1.40, Performance Planning and Evaluation; DHRM Policy 1.60, Standards of Conduct.

<sup>8</sup> DHRM Policy 1.60 (VII).

<sup>9</sup> DHRM Policy 1.60 (VII)(E)(5). This section, discussing procedures related to disciplinary suspensions, demotions, transfers, and terminations states that "a Written Notice form . . . *shall* be provided." (emphasis added).

In this case, it is undisputed that the grievant's demotion was to address perceived performance problems, and thus, could be viewed as disciplinary.<sup>10</sup> However, the grievant's demotion with salary reduction was not accompanied by a Written Notice.<sup>11</sup> Therefore, it appears that the grievant's demotion may not have been properly effectuated under Policy 1.60.

#### Performance Planning and Evaluation

Similarly, the policy and procedural safeguards in DHRM's Policy 1.40 are designed to ensure that an involuntary performance-based transfer, demotion, or termination is rationally based, and is not discriminatory, retaliatory, arbitrary or capricious. Under this policy, an employee may be transferred or demoted for performance reasons.<sup>12</sup> However, management initiates such transfers or demotions after the employee is presented with an unfavorable performance evaluation and subsequently receives an unfavorable follow-up evaluation. Moreover, this policy defines Performance Demotion as an "action taken to an employee who received an overall performance evaluation of 'Below Contributor' and whose performance during the re-evaluation period has not improved."<sup>13</sup> In this case, the grievant did not receive an unfavorable performance evaluation.

In sum, because the grievant's demotion was not accompanied by either a Written Notice or a "Below Contributor" performance rating, this grievance raises a sufficient question as to whether the demotion was a misapplication of policy, and this issue is qualified for hearing.

#### *Additional Theories for Grievant's Demotion*

The grievant has advanced alternative theories related to the agency's decision to demote her, including allegations of retaliation and harassment based on the grievant's prior grievance activity. Because the issue of misapplication of policy qualifies for a hearing, this Department deems it appropriate to send these ancillary issues for adjudication by a hearing officer as well, to help assure a full exploration of what could be interrelated facts and claims.

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<sup>10</sup> See Memorandum, dated February 20, 2003, to the grievant from the Director.

<sup>11</sup> It should be noted that even if the grievant had received a Written Notice for poor performance, it may have been insufficient to justify a demotion. Under the Standards of Conduct, an employee may not be demoted unless she is receiving her fourth Group I Written Notice, second Group II Written Notice, first Group II following three Group I Written Notices, or first Group III Written Notice. In this case, at the time of demotion, the grievant had only one active Group I Written Notice and one active Group II Written Notice, which was subsequently overturned.

<sup>12</sup> DHRM Policy 1.40, page 14 of 16.

<sup>13</sup> DHRM Policy 1.40 "Definitions," page 2 of 16.

CONCLUSION

For the reasons discussed above, this Department qualifies the March 3, 2003 grievance for a hearing. This qualification ruling in no way determines that the agency's decision to demote the grievant was a misapplication of policy or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate.

For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Claudia T. Farr  
Director

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