

Issue: Qualification/Demotion; Ruling Date: August 1, 2003; Ruling #2003-119;  
Agency: Department of Taxation; Outcome: qualified



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Taxation  
Ruling Number 2003-119  
August 1, 2003

The grievant has requested a ruling on whether his May 8, 2003 grievance with the Department of Taxation (the agency) qualifies for a hearing. The grievant claims that his demotion and related 15% reduction in salary was unwarranted. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

The grievant was formerly employed as a Senior Programmer Analyst with the Department of Taxation. On December 16, 2002 the grievant was issued a Notice of Improvement Needed/Substandard Performance accompanied by an improvement plan for a period of three months. To assist the grievant in performance enhancement, the Notice of Needs Improvement/Substandard Performance stated that the grievant would be "evaluated and coached by his immediate supervisor" and "[r]eviews and advice will be given to him at all steps of the assigned projects." Also on December 16, 2002, the grievant received an overall "Below Contributor" rating on his 2002 Performance Evaluation. Upon completion of the three-month improvement period, the grievant received another "Below Contributor" rating for failing to perform work assignments at a senior level. Consequently, the agency demoted the grievant to a Programmer Analyst and reduced his salary by 15%.

DISCUSSION

The grievant claims that management's failure to advise and coach him on his performance during the three-month improvement period and his satisfactory work performance during such time, and prior thereto, render his demotion and related cut in pay unwarranted.

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>1</sup> Therefore, although not specifically cited in his May 8, 2003 grievance, the grievant's allegations may be construed as a misapplication of policy claim because the grievance in essence challenges his demotion and the surrounding circumstances.

### *Misapplication of Policy*

Applicable statutes and policies recognize management's authority to demote an employee for disciplinary and performance purposes as well as to meet other legitimate operational needs of the agency.<sup>2</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 – Policy 1.60

When an employee is demoted as a disciplinary measure, certain policy provisions must be followed.<sup>3</sup> Under the Standards of Conduct, a Written Notice *must* accompany a disciplinary demotion.<sup>4</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.

In this case, it is undisputed that the grievant's demotion was to address perceived performance problems, and thus, could be viewed as disciplinary. However, the grievant's demotion with salary reduction was not accompanied by a Written Notice.<sup>5</sup> Therefore, it appears that the grievant's demotion may not have been properly effectuated under Policy 1.60.

#### Performance Planning and Evaluation – Policy 1.40

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

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<sup>1</sup> Va. Code § 2.2-2900, *et seq.*

<sup>2</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>3</sup> DHRM Policy 1.60 (VII).

<sup>4</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).

<sup>5</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 he is receiving his 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. See DHRM Policy 1.60 VII(D).

capricious. Under this policy, an employee may be transferred or demoted for performance reasons.<sup>6</sup> However, there are specific procedures that must be followed before a demotion based on performance can be executed. Specifically, Policy 1.40 defines Performance Demotion as an “[a]ction 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>7</sup> Further, policy mandates that an employee receive at least one Notice of Needs Improvement/Substandard Performance *within the performance cycle*<sup>8</sup> before that employee can receive an overall rating of “Below Contributor” on his annual evaluation.<sup>9</sup> An employee who receives a rating of “Below Contributor” on his annual performance evaluation must have a performance re-evaluation plan developed and be re-evaluated for up to a three-month period.<sup>10</sup> If the employee’s performance during the re-evaluation period is documented as not improving, he may be demoted, reassigned, or terminated.<sup>11</sup> In other words, management may initiate a demotion after the employee is presented with an unfavorable performance evaluation and subsequently receives an unfavorable follow-up evaluation.

State policy further provides that management can issue a Notice of Needs Improvement/Substandard Performance at any point during the performance cycle.<sup>12</sup> If such a notice is issued, it must include an improvement plan, with an improvement period of no less than 30 days or more than 180 days.<sup>13</sup> If performance does not improve by the end of the designated period, management may discipline the employee in accordance with the Standards of Conduct.<sup>14</sup> As stated above, such discipline may include a demotion if justified and effectuated under the Standards of Conduct.

In the present case, the grievant received an overall rating of “Below Contributor” on his 2002 annual performance evaluation. On that same day, the grievant received a Notice of Needs Improvement/Substandard Performance with an accompanying improvement plan. Because the grievant received no other Notice of Needs Improvement/Substandard Performance during the 2002 performance cycle, it appears that the December 16, 2002 Notice of Needs Improvement/Substandard Performance was intended to support the 2002 “Below Contributor” annual rating. However, the Notice of Needs Improvement/Substandard Performance was not presented during the 2002 performance cycle and, thus could not have been utilized to support the overall “Below Contributor” rating. As such, it appears that policy may have been misapplied in

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<sup>6</sup> DHRM Policy 1.40, page 14 of 16.

<sup>7</sup> DHRM Policy 1.40, page 2 of 16.

<sup>8</sup> A performance evaluation cycle begins October 25<sup>th</sup> of each year and runs through October 24<sup>th</sup> of the following year. *See* DHRM Policy 1.40, page 11 of 16. During the course of this Department’s investigation, the agency confirmed that it operates under the policy designated performance evaluation cycle period.

<sup>9</sup> *See* DHRM Policy 1.40, page 1 of 16 (emphasis added). *See also*, DHRM Policy 1.40 page 7 of 16.

<sup>10</sup> *See* DHRM Policy 1.40, page 13 of 16.

<sup>11</sup> *See* DHRM Policy 1.40, page 14 of 16.

<sup>12</sup> *See* DHRM Policy 1.40, page 6 of 6.

<sup>13</sup> *See* DHRM Policy 1.40, page 6 of 16.

<sup>14</sup> *Id.* *See also* DHRM Policy 1.60.

executing the grievant's "Below Contributor" rating. Consequently, any adverse actions resulting from the "Below Contributor" performance evaluation, including the "Below Contributor" re-evaluation and accompanying demotion and reduction in salary could be a misapplication of the performance planning and evaluation policy as well.

Moreover, it should be noted that failure to improve upon completion of an improvement plan developed in conjunction with a Notice of Needs Improvement/Substandard Performance would not support a demotion, unless the demotion is implemented as a result of disciplinary action for poor performance and complies with the Standards of Conduct.<sup>15</sup> As such, it appears that the agency would not be able to justify the grievant's demotion and resulting reduction in salary through the issuance of the December 16, 2002 Notice of Needs Improvement/Substandard Performance and failure to improve upon completion of the three-month improvement plan.

In sum, because the grievant's demotion did not result from a Written Notice, and because a failure to improve job performance upon completion of a Notice of Needs Improvement/Substandard Performance improvement plan cannot, by itself, justify a demotion, this grievance raises a sufficient question as to whether the agency misapplied policy. Accordingly, this grievance is qualified for hearing.

#### CONCLUSION

For the reasons discussed above, this Department qualifies the May 8, 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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Director

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<sup>15</sup> During the course of this Department's investigation, DHRM confirmed this interpretation of Policy 1.40.