Issue: Qualification/Transfer-non-disciplinary; Ruling Date: March 11, 2004; Ruling #2003-475; Agency: Department of Social Services; Outcome: not qualified

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALFICATION RULING OF DIRECTOR

In the matter of Department of Social Services
Ruling Number 2003-475
March 11, 2004

The grievant has requested a qualification ruling on whether her June 16, 2003 grievance with the Department of Social Services (DSS or the agency), qualifies for hearing. The grievant claims that (1) she was reassigned based on false or inaccurate accusations and complaints regarding her behavior in the workplace, which she should have been given the opportunity to refute prior to her reassignment; and (2) the agency should have implemented a remedial action plan and observed her in the workplace prior to her reassignment. The grievant further claims that she was not allowed to view her personnel file upon request and that her supervisor failed to inform her that she kept a supervisory file for her employees. For the reasons discussed below, this grievance does not qualify for hearing.

FACTS

The grievant is employed as a Support Enforcement Specialist with DSS.[1] On May 26, 2003, the grievant was reassigned from her position as a Court Specialist to an Interstate Establishment Specialist.

DISCUSSION

Reassignment

By statute and under the grievance procedure, management reserves the exclusive right to manage the affairs and operations of state government.[2] Thus, claims relating to issues such as the methods, means and personnel by which work activities are to be carried out 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

[1] Support Enforcement Specialists locate noncustodial parents, gather evidence for establishment of paternity, determine child support and medical coverage, execute enforcement actions and provide testimony in court proceedings when required.
[2] Va. Code § 2.2-3004(B).

misapplied.[3] Accordingly, the transfer or reassignment of an employee generally does not qualify for a hearing unless there is evidence raising a sufficient question as to whether it resulted from a misapplication of policy, discrimination, retaliation, or discipline.

In this case, it appears that the grievant is challenging her reassignment as a misapplication or unfair application of Department of Human Resource Management (DHRM) Policies 1.60 and 1.40. 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.

Misapplication or Unfair Application of Policy 1.60

The grievant's claim that she should have been permitted to refute the allegations against her prior to her reassignment can be viewed as an alleged violation of DHRM Policy 1.60 and its due process provisions. However, under this Standards of Conduct policy, an agency is not required to give employees notice and the opportunity to respond when the transfer or other agency action does not involve removal or a reduction in salary.[4] Similarly, any failure to grant such employees rights to notice and the opportunity to respond does not appear so unfair as to amount to a disregard of the underlying intent of Policy 1.60.[5] Accordingly, this issue does not qualify for a hearing.

Additionally, although unaccompanied by a Written Notice, there is some evidence that the grievant's reassignment could have been disciplinary in nature.[6] As such, it should be noted that when an employee is reassigned or transferred as a disciplinary measure, certain policy provisions must be followed.[7] All formal disciplinary actions (Written Notices) automatically qualify for a hearing if challenged through the grievance procedure.[8] In the absence of an accompanying Written Notice, a challenged reassignment qualifies for a hearing only if there is a sufficient question as to whether the reassignment 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.[9] A hearing cannot be avoided for the sole reason that a Written Notice did not accompany the reassignment, where there is a sufficient question as to whether the reassignment was an "adverse

[3] Va. Code §2.2-3004(A) and (C); Grievance Procedure Manual § 4.1 (c), page 11.
[4] *See* DHRM Policy 1.60 (VII(E)).
[5] *See* DHRM Policy 1.60.
[6] During the management resolution steps, DSS stated that behavior such as that exhibited by the grievant is usually addressed under the Standards of Conduct policy and could lead to termination.
[7] DHRM Policy 1.60 (VII).
[8] Va. Code § 2.2-3004(A) and (C); DHRM Policy 1.60 (IX); *Grievance Procedure Manual* § 4.1(a), page 10.
[9] 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).

employment action" and was in effect disciplinary in nature, i.e., taken primarily to correct or punish perceived poor performance.[10]

An adverse employment action is defined as a "tangible employment act constituting a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[11] As a matter of law, adverse employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.[12] Thus, a reassignment may constitute an adverse employment action if a grievant can show that it had some significant detrimental effect on the terms, conditions, or benefits of her employment.[13]

During this Department's investigation, the grievant admitted that the reassignment to an Interstate Specialist did not result in a reduction in pay or change in job classification. Moreover, the grievant said the reassignment had not yet affected her promotional opportunities. However, according to the grievant, an Interstate Specialist position is less prestigious than a Court Specialist position and the surrounding allegations and resulting reassignment damaged her reputation. Nevertheless, there is no evidence that the grievant's reassignment to another position resulted in a substantive effect on her employment. Regardless of the grievant's perception of the two positions, there was no change in the grievant's level of responsibility, compensation, benefits, or opportunity for promotion. Therefore, although the reassignment may be disappointing to the grievant, it cannot be viewed by any reasonable fact finder as an adverse employment action because it had no significant detrimental effect on the grievant's employment status. Thus, the issues surrounding the grievant's reassignment as a disciplinary action or violation of the Standards of Conduct cannot qualify for a hearing due to the absence of an adverse employment action.

Misapplication or Unfair Application of DHRM Policy 1.40

The grievant's assertion that the agency should have implemented a remedial action plan and observed her in the workplace prior to her reassignment can be considered as a claim that the agency misapplied or unfairly applied DHRM Policy 1.40.[14] Although management generally should advise employees about their performance during the performance cycle, policy does not mandate that practice.[15]

---

[10] Likewise, the policy and procedural safeguards in DHRM's Policy 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 1.40.

[11] Burlington Industries, Inc. v. Ellerth, 118 S. Ct. 2257, 2268 (1998).

[12] Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997)).

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

[14] DHRM Policy 1.40 (effective April 1, 2001, Rev. August 1, 2001).

[15] DHRM policy states that "supervisors *should* document employees' performance and provide feedback to them periodically throughout the performance cycle." (emphasis added).

Further, it appears that the grievant had been previously warned about her alleged inappropriate behavior and advised of the agency expectations for Court Specialists. Moreover, as stated previously, the grievant's reassignment did not result in an adverse employment action.[16] Accordingly, this issue does not qualify for a hearing.

Misapplication or Unfair Application of Personnel Records Policies

The grievant further asserts that she was not permitted to view her personnel file upon request and that her supervisor failed to inform her that she kept a supervisory file. The grievant appears to assert that her lack of knowledge of the supervisory file unfairly contributed to her reassignment.

Under DHRM Policy No. 6.05, "[e]mployees have access to information retained in all personnel files of which they are the subject, in accordance with law."[17] In addition, employees may review supervisors' files of which they are the subject.[18] According to policy: "[e]mployees should make arrangements with their supervisors to review these files" and "[t]he supervisor or a designee normally should be present during the review."[19] There is no policy requirement of supervisors to notify employees that a supervisory file exists.

In this case, the grievant allegedly requested to view her personnel file and was told by her supervisor that she could not view the file at that moment because the administrative secretary was out of the office. According to the agency, the executive secretary or district manager must approve access to personnel files. Both were out of the office the day the grievant asked to access her file. Significantly, during this Department's investigation, the grievant stated that she was allowed to view both her personnel and supervisory files within a week of her initial request. These facts do not support a charge that policy was unfairly or improperly applied. Moreover, the supervisor's failure to provide the grievant with access to her personnel and supervisory files immediately upon request does not constitute an adverse employment action. In sum, this issue cannot be qualified for hearing.

APPEAL RIGHTS AND OTHER INFORMATION

For 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 the qualification determination to the circuit court, the grievant should notify the human

[16] The General Assembly has limited issues that may qualify for hearing to those that involve "adverse employment actions." Va. Code § 2.2-3004(A).
[17] Department of Human Resources Management (DHRM) Policy 6.05 VI (A). There are two exceptions to this general rule: (1) When employees' physicians have requested in writing that employees' medical and/or mental health records remain confidential, their request shall be honored and employees will be denied access to those records; and (2) Letters of reference and recommendation are confidential in nature and, therefore, employees are not required to have access to them.
[18] (DHRM) Policy 6.05 VI (C).
[19] Id.

resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant wishes to conclude the grievance and notifies the agency of that desire.

_____
Claudia T. Farr
Director

_____
Jennifer S.C. Alger
EDR Consultant