

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS**

In the Matter of

Theresa Van Hoomissen,

Employee,

vs.

**ORDER GRANTING MOTION FOR
SUMMARY DISPOSITION**

Minnesota Department of Economic
Security,

Employer.

The above-entitled matter came before Administrative Law Judge Steve M. Mihalchick for argument on Employer's Motion for Summary Disposition at the Office of Administrative Hearings on July 9, 1999. The record on the Motion was closed at the end of the hearing.

Employee, Theresa Van Hoomissen, 1331 Portland Avenue, St. Paul, Minnesota 55104, appeared on her own behalf. Melissa L. Wright, Assistant Attorney General, 445 Minnesota Street, Suite 1100, St. Paul, Minnesota 55101-2128, appeared on behalf of the Minnesota Department of Economic Security (Employer or DES).

Based upon the arguments and memoranda submitted by the parties, all of the filings in this case, and for the reasons set forth in the following Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that

1. Employer's Motion for Summary Disposition is GRANTED.
2. Employee's appeal of her alleged demotion is DISMISSED.
3. Employee's appeal of her alleged termination is DISMISSED.

Dated: July 14, 1999

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

Summary Disposition

Employer has moved for summary disposition on three grounds. It asserts that under undisputed facts the Office of Administrative Hearings has no jurisdiction because the Commissioner of the Department of Employee Relations has made a final determination that Employee was not demoted, that Employee is not entitled to a just cause hearing because she resigned and was not discharged, and that, in the alternative, Employee's refusal to report for work at her new assignment constitutes just cause for discharge. Employee disputes many of Employer's asserted facts and disagrees with its legal arguments.

An Administrative Law Judge may recommend or grant summary disposition of a case where there is no genuine issue as to any material fact. Minn. R. 1400.5500 K. Summary disposition is the administrative equivalent of summary judgment in district court because summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.^[1] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts when considering motions for summary disposition in contested cases.^[2]

On a motion for summary disposition, the facts must be construed in the light most favorable to the nonmoving party. But to defeat a motion for summary judgment successfully, the nonmoving party must show that specific facts are in dispute that have a bearing on the outcome of the case.^[3] The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden.^[4] Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. *Id.* To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. *Id.*

Factual Background

Construing the asserted facts most favorably to Employee for purposes of this motion, it appears that the following occurred.

Employee was a classified manager for DES covered under the Managerial Plan. During 1998 and early 1999, her assignment was as Research and Evaluation Planning Director, also known as Research Director. In that position, she had significant managerial and supervisory responsibilities. But there had also been a period of significant discord in Research involving Employee.^[5]

At some point in early 1999, the idea of assigning Employee to a position as performance Measurements Project Leader arose. In February, she indicated that she was not interested in the position.^[6] Some further discussion was held, but Employee was only interested in the project if she could also remain as Research Director.^[7] On May 3, 1999, Employee wrote a memo to Howard Glad, a DES manager, outlining some of her views of the project and her possible role.^[8] Late that same day, Deputy Commissioner Al St. Martin handed Employee a memo stating:

Subject: Assignment to MDES/WorkForce Center Measurements Project Leadership

There is confusion regarding your assignment to the Measurements project. It is my intention to eliminate further delays in this important activity by informing you that your full-time assignment effective May 10, 1999 is working for Howard Glad in the primary role as Measurements Projects Leader. This assignment is at the same classification and compensation which you currently hold. As of May 10, you are to end all activities related to your current assignment in the Research and Publications Office[.] Discretionary use of your available time during the project period is under the direction of Howard Glad.

Howard has informed me there is an immediate, funded, opportunity for measurements to explore. It is my hope that this possibility will make up for the time we have lost getting on with this effort^[9].

The Measurements Project position duties were still not well defined. Employee felt that what had been made known to her indicated that the position would have duties, skill requirements, responsibilities, authority, and working conditions substantially lower than her Research Director position and that the assignment represented a demotion. She also felt that DES's real intent was to remove her from the Research position.^[10]

On the morning of May 4, 1999, Employee met with St. Martin and repeated her position that she was not interested in the Measurements Project Leader position. Assuming that she would be terminated immediately for the refusal, as she had been told in February would happen, she asked if the relationship could be ended amicably. St. Martin generally agreed, saying the separation was not performance related (obviously except for her refusal to take the new assignment). He agreed that she could

use her accumulated personal leave before separation, but asked her to discuss the issue with Human Resources Director Vonnie Mulcahy. He then asked her to leave the building immediately.^[11] Employee then confirmed the conversation in an email to Glad stating that St. Martin had agreed to ending her employment relationship amicably, that she would take vacation leave immediately, that she would not complete her current projects, and that she would be cleaning out her office.^[12]

Employee left the office that morning and was contacted later that day by Mulcahy by email, then by phone. In the email, Mulcahy stated:

Before we can give you an answer on this request we need to know if your intent is to resign after you use the vacation. That was Al's impression. Please let me know ASAP.^[13]

In their phone conversation, Mulcahy asked Employee for a written statement of her intent to resign so that her old position could be filled and so that she could process the request for use of remaining leave. About midday, Employee sent a reply to Mulcahy's email, stating, in part, "My intention is to resign after I use the vacation."^[14]

Employee used her vacation from May 4 to May 24, 1999. She has not reported for work since May 4, 1999.^[15]

Despite having just agreed to resolve the matter amicably by resigning after using up her vacation, Employee still felt that she was being treated unfairly. On May 7, 1999, Employee spoke with Mulcahy about means of grieving the situation. Mulcahy directed her to the dispute resolution procedures at pages 27-28 of the Managerial Plan.^[16] Following that advice, on May 10, 1999, Employee wrote a Step 1 grievance letter to her supervisor, St. Martin. In the letter, she outlined the history of her position and performance, the events outlined above, argued that removing her was unjust, and requested immediate reappointment as Research Director.^[17]

On May 12, 1999, St. Martin responded to Employee's May 10, 1999, letter. He stated that he found no violation of the Managerial Plan, that the issues had been discussed with her for several months, that the assignment had been made because DES had an urgent need to get the work done and she had the skills and ability to do it. He also noted that on May 4, 1999, she had indicated that she wished to resign, that she had followed that up with an email, that the resignation would be effective May 25, 1999, that she would be on vacation until that date, and that her resignation had been accepted. Finally, he noted that her letter made it appear that she wanted to rescind her resignation and that if that was the case, she could return to work by May 20 and would be assigned to the Measurements Project.^[18]

Employee claims she had not actually intended to resign on May 4.^[19] But St. Martin's letter made it clear that DES interpreted the events as a resignation. So, on May 14, 1999, she wrote St. Martin again, stating that she would appeal his determination under the Managerial Plan dispute resolution process. She stated that

she was baffled by his question as to whether she intended to retract her resignation, and went on:

. . . In you May 3rd memo, you directed me to take a new assignment, and on Tuesday morning, May 4th, I declined to take that assignment. It was my assumption that you intended to terminate me as a consequence. Expecting this, I requested an “amicable” separation, asking to use up my vacation before separation. You agreed. Later that day, Vonnie Mulcahy asked for a written statement of intent to resign. I supplied this only because I understood it was a formality necessary to allow me to use up my vacation before separation. It is absolutely my understanding that my “resignation” was forced. Since to my knowledge nothing has changed (i.e., you still do not intend to negotiate a mutually satisfactory position assignment for me and you intend to fire me for not accepting the measures position), “retracting my resignation” would only mean termination without being allowed to use up my vacation first. Hence I do not intend to “retract” my “resignation.”

If my assumption that you intended to fire me for declining the measures position was wrong, then there truly has been a huge misunderstanding and I would appreciate your clarification at the soonest possible time. I have always been willing to negotiate a resolution to this conflict and remain willing.

My initiation of the dispute resolution process was at Vonnie Mulcahy’s suggestion. As I understand it, there is a possibility that this process will end with a resolution in my favor.^[20]

Employee also wrote DES Commissioner Earl Wilson on May 14, 1999, appealing the denial of her Step 1 grievance by St. Martin.^[21]

On May 17, 1999, Mulcahy called Employee and asked whether she intended to return to work as the Measurements Project Leader. Employee told Mulcahy “No,” and Mulcahy said that meant she was resigning. Employee asked what would happen if she returned to work in her Research position and Mulcahy said she would be asked to leave the building and that it would be considered a resignation.^[22] On May 20, 1999, Mulcahy wrote Employee, stating that, as previously discussed, DES had accepted Employee’s resignation effective May 25, 1999, and that she would have to return all state property by the end of that day.^[23]

Employee was still considering attempting to return to work in her Research position, but her attorney advised her on May 19, 1999, “not to play games with the Department,” by doing so. Instead, she decided to write to St. Martin again, which she did on May 21, 1999.^[24] In that letter she stated that she was refusing the reassignment as Measurements Project Leader because it represented a demotion without just cause, that she was not voluntarily resigning and that that was her intent from the beginning, that she would not return to the office because Mulcahy had told her that returning to work in her Research position would be interpreted as a resignation, and that since her

vacation would be exhausted May 24, she understood that her employment would be terminated at that time and that she would interpret it as a discharge.^[25]

On May 21, 1999, Employee also wrote a Step 3a grievance letter to the Commissioner of the Department of Employee Relations (DOER). She again argued that the reassignment represented a demotion and set forth her reasons supporting that argument.^[26] Also on that day, Employee wrote a letter to the Chief Administrative Law Judge under Minn. Stat. § 43A.33, subd. 3, appealing her demotion and discharge as with out just cause.^[27]

By letter of May 25, 1999, DES Commission Wilson notified Employee that he did not find there to have been any violation of the Managerial Plan.^[28] By letter of June 2, 1999, DOER Commissioner Carpenter notified employee that reassignment did not constitute a demotion under the Managerial Plan, stating, in part:

Upon review of your letter and the attachments, I find no indication that the Department of Economic Security either has or intends to change the classification of the position you occupy to a lower classification. Therefore, the work assignment you have been given does not constitute a demotion as that word is defined in the glossary in the Managerial Plan (page 66). I have concluded that the Department of Economic Security has not misinterpreted the Managerial Plan.^[29]

CONCLUSIONS

Employee Was Not Demoted

DES argues that Employee's appeal of her demotion under Minn. Stat. § 43A.33 should be dismissed because the Commissioner of DOER has the authority under the Managerial Plan to determine whether a demotion has occurred, not the Office of Administrative Hearings.^[30]

Under the Managerial Plan, "demotion" is defined as the downward movement of a manager to a different class which has a maximum salary that is two or more salary steps below the maximum of the current class. Further, the Managerial Plan provides a dispute resolution process for determining interpretations and applications of the Plan. The final step of that process is a Step 3a appeal to the Commissioner of DOER, whose decision shall be final.

Under the Managerial Plan, permanent managers may appeal suspensions, demotions, and discharges under Minn. Stat. § 43A.33, subds. 3(a) and 4. Under Minn. Stat. § 43A.33, subd. 4, the ALJ hears the appeal and makes the final administrative decision. which may be appealed to the Court of Appeals. The ALJ concludes that he has the authority to determine whether a demotion has occurred. Such a determination is a necessary part of determining whether a disciplinary action has occurred. The dispute resolution process of the Managerial Plan is explicitly for disputes not involving disciplinary actions. It is a separate process which the Managerial Plan encourages managers to follow even while pursuing § 43A.33 appeals.

The ALJ concludes that the reassignment as Measurements Project Leader was not a demotion. First, the definition of demotion in the Managerial Plan should apply because the Managerial Plan establishes the terms and conditions of Employee's employment with the State. The reassignment was not a demotion under that definition. Second, under any reasonable definition, Employee was not demoted. Her pay was the same and her job class was the same. Demotions have been found where there is a substantial decrease in responsibilities and authorities, but that has not been shown to be the case here. The Employer considered the job important and to require the high level skill and abilities Employee possess. The job was not yet well-defined, but Employees impressions were mostly speculative. Third, this is a dispute between the Employer and Employee about the nature of a position and about who should fill it. St. Martin, Employee's supervisor did not necessarily agree with Employee's views on the matter. Employee seeks to contest the appropriateness of the classification given to the position, but job classification and allocation is the responsibility of agency management in consultation with DOER. It is not something an employee can appeal. Since Employee was not demoted, her appeal of her demotion must be dismissed.

Employee's Actions Constituted a Resignation

DES argues that the agreement reached with St. Martin on May 4, 1999, constituted a resignation, particularly when coupled with her subsequent specific refusals to return to work in the new position. The ALJ agrees.

On May 4, after receiving the notice of reassignment, Employee told St. Martin that she would not accept to assignment and asked if the matter could be resolved amicably. They reached an agreement that she could resign, and then, at her request, added that she could use her vacation first. Agreeing to resign in lieu of being fired is a common agreement. It provides the benefit to the employee of not having a disciplinary action record. St. Martin indicated that is was not his desire to hamper her ability to find another job. It was certainly reasonable for DES to interpret the discussion as an agreement to resign. She confirmed it in an email stating that she intended to resign after using her vacation. A few days later she said she meant something else, that she did not intend to resign. Again, she took the position that she hadn't resigned, but that she would not accept the new assignment.

It is arguable that the language in the email indicated a future intent to resign. It is even possible that Employee really didn't understand that she was resigning. But, Employee subsequently refused to return to work at the new assignment, thus confirming her resignation. Employee is trying to have it two ways: settle the matter by resigning, but maintain her dispute about the job classification. She can't do that. In totality, her actions amount to a resignation.

The Refusal to Accept the Job Assignment Constitutes Just Cause

Clearly the Employer had informed Employee that she would be discharged if she did not accept the new job assignment. She made that unnecessary by agreeing to resign. If her actions are not considered a resignation, then the Employer's actions

constitute a discharge. The question would then become whether there was just cause for the discharge.

Minn. Stat. § 43A.33, subd. 2, defines just cause to include “consistent failure to perform assigned duties.” Employee’s consistent and deliberate refusal to perform the Measurements Project Leader job falls squarely within that definition. Moreover, discharge appears fully justified. Employee claims that she has always been willing to negotiate this matter, but it is clear that she will only take a position that is acceptable to her with duties and responsibilities that are acceptable to her. She thinks that DES management has made erroneous judgments about how the Research and Measurement projects should be organized and staffed. Even if they are wrong, that is not her decision to make. DES does not have to design her job to her specifications. The tasks DES management wish to assign to her appear to be reasonably related to her skill and abilities and will not change her pay or benefits. She has no legal basis for refusing to perform them.

S.M.M.

^[1] Sauter v. Sauter, 70 N.W. 2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63,66 (Minn. App. 1985); Minn. R. Civ.P. 56.03.

^[2] See Minn. R. 1400.6600

^[3] *Hunt v. IBM Mid America Employees Federal Credit Union*, 384 N.W.2d 853, 855 (Minn. 1986).

^[4] *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

^[5] Van Hoomissen Aff’t, Ex. D, Mulcahy Aff’t, Ex. F-1.

^[6] Van Hoomissen Aff’t, ¶ 3.

^[7] Van Hoomissen Aff’t, Ex. D, Mulcahy Aff’t, Ex. F-1.

^[8] Mulcahy Aff’t, Ex. C.

^[9] Mulcahy Aff’t, Ex. D, Van Hoomissen Aff’t ¶2.

^[10] Van Hoomissen Aff’t, Ex. D, Mulcahy Aff’t, Ex. F.

^[11] Van Hoomissen Aff’t, ¶ 3.

^[12] Van Hoomissen Aff’t, Ex. B, Mulcahy Aff’t, Ex. E.

^[13] Van Hoomissen Aff’t, Ex. C, Mulcahy Aff’t, Ex. F.

^[14] *Id.*

^[15] Employee’s Memorandum, ¶ 6, Mulcahy Aff’t, ¶ 4.

^[16] Van Hoomissen Aff’t, ¶ 5, Mulcahy Aff’t, Ex. A.

- [\[17\]](#) Van Hoomissen Aff't, ¶ 6, Ex. D; Mulcahy Aff't, Ex. F-1.
- [\[18\]](#) Van Hoomissen Aff't, Ex. E, Mulcahy Aff't, Ex. G.
- [\[19\]](#) Van Hoomissen Aff't, ¶¶ 5-7.
- [\[20\]](#) Van Hoomissen Aff't, Ex. F, Mulcahy Aff't, Ex. H.
- [\[21\]](#) Van Hoomissen Aff't, Ex. G, Mulcahy Aff't, Ex. I.
- [\[22\]](#) Van Hoomissen Aff't, ¶ 8.
- [\[23\]](#) Van Hoomissen Aff't, Ex. I, Mulcahy Aff't, Ex. J.
- [\[24\]](#) Van Hoomissen Aff't, ¶ 9.
- [\[25\]](#) Van Hoomissen Aff't, Ex. H, Mulcahy Aff't, Ex. K.
- [\[26\]](#) Van Hoomissen Aff't, Ex. J, Mulcahy Aff't, Ex. L.
- [\[27\]](#) Mulcahy Aff't, Ex. M.
- [\[28\]](#) Van Hoomissen Aff't, Ex. K, Mulcahy Aff't, Ex. N.
- [\[29\]](#) Van Hoomissen Aff't, Ex. L, Mulcahy Aff't, Ex. O.
- [\[30\]](#) Employer's Memorandum at 4.