

Issues: Management Actions (Assignment of Duties) and Retaliation (Grievance Activity Participation); Hearing Date: 05/22/07; Decision Issued: 08/28/07; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8589, 8591; Outcome: Partial Relief – Management Actions – Full Relief, Retaliation – No Relief.



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 8589 / 8591**

Hearing Date: May 22, 2007  
Decision Issued: August 28, 2007

**PROCEDURAL HISTORY**

On June 1, 2006, Grievant timely filed a grievance to challenge the Agency's decision to "slot" her as an Intermediate level employee instead of an Expert level employee. She filed a second grievance alleging retaliation on June 30, 2006. The outcomes of the Third Resolution Step were not satisfactory to the Grievant and she requested a hearing. On April 19, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 22, 2007, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency Advocate  
Witnesses

**ISSUES**

1. Whether the Agency failed to comply with State policy?
2. Whether the Agency retaliated against Grievant?

### **BURDEN OF PROOF**

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employs Grievant as a Senior Systems Analyst. She began working for the Agency on July 12, 2004. At the time of her hire, the Agency was in the process of transitioning from using contractors for certain information systems positions. Five individuals were working as contractors. Grievant and these five individuals applied to become full-time classified employees of the Agency and were selected. When the Agency compared Grievant with these five individuals, Grievant was ranked number one by the Agency with respect to her level of education. She was ranked second of all the applicants by the Agency with respect to technical skills.

Grievant reported to Ms. R when she started with Agency. Mr. B became her supervisor when he was hired in December 2005. Mr. B reports to Mr. H who is the Manager.

Grievant is well educated in information systems. In 1991, Grievant received her Bachelor of Science with a major in Computer Science. In 1997, Grievant received a Master's of Business Administration with a concentration in Information Systems Management.

Grievant has at least 15 year of experience working for Fortune 500 companies. She worked for one large company where she used Adapt programming. Grievant also has specialized training in Oracle software and SQL programming.

Grievant received a Contributor rating on her Probationary Progress Review given to her on November 19, 2004. She received a Contributor rating on her October 12, 2005 performance evaluation. Grievant received a Contributor rating for each of the four core responsibilities discussed in her evaluation.

As part of a workforce planning process, the Agency decided to redefine the positions held by employees in its information technology division. This process is best described by an Executive Summary as follows:

The Virginia Department of Social Services (VDSS) has undertaken steps to address workforce planning and compensation within the Division of Information Systems (DIS). September 2000 VDSS implemented changes to its classification/compensation system. While it has proved beneficial relative to its flexibility with broad Roles, this broadness has resulted in inconsistencies in classification from agency to agency. Further, DIS employees are unsure relative to career progression.

DIS in collaboration with the [Department] of Human Resource Management (DHRM) has undertaken a strategic Human Capital Management (HCM) effort to build career paths to keep pace with a dynamic industry requiring a constant retooling of personnel to keep up with best practices and new technologies. The variance between solid and outstanding performers can be as high as twenty-fold in some key information technology positions. DIS will need to bring in new personnel and hire outside contractors at premium rates as new competencies emerge from the development of new technologies. Clearly defining roles, responsibilities and competencies, and by developing an equitable incentive plan to reward performance will assist HCM efforts in guiding employee performance.

[HR Consultant], a leading HR consultant for the IT industry, began assisting with the HCM project in late 2004. Initial stages in the process concentrated on identifying core business activities and sunsets/critical skills. This established a foundation for job family and role design, ensuring that role classifications would align with existing organization structure and IT business strategy.

With [HR Consultant's] assistance, DIS positions were classified using benchmark positions within the IT Industry. VDSS obtained relevant salary data through collection of salary data from comparable size state agencies, local government, [HR Consultant] and [W Company] sources. The results of the study have validated both the slotting of individuals into the more clearly defined positions, and the suggested salary structures.<sup>1</sup>

Part of the Human Capital Management Plan involved "slotting" employees into various levels, which are described as Entry, Intermediate, Advanced, and Expert. The slot determines such things as an employee's job roles, responsibilities, salary, and training opportunities. For instance, an employee who is slotted at a higher level is

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<sup>1</sup> Agency Exhibit 5.

more likely to have supervision of employees, a higher salary, and access to more advanced training.

Slotting decisions were based upon a review of each employee's Employee Work Profile, answers to questions, and a skills inventory completed by the employee. The answers to questions were collected during an interview with the Manager. During the one-on-one interviews, employees were asked four questions as follows:

1. Describe the deliverables/documents that you produce in an average 40 hour week.
2. How much time do you spend per week creating/developing these deliverables/documents? (Percentage)
3. What other activities or tasks are you responsible for during the work week?
4. Describe the tools and/or technical skills utilized during the typical work week.<sup>2</sup>

The skills inventory was a survey in which each employee responded to questions regarding his or her skills. Employees were required to self-evaluate within each area based upon their skills (limited, basic, intermediate, advanced, or master) and provide how much experience they had in those areas. These skills inventories were then reviewed by Agency managers before final decisions were made. The skills survey was the main item used by the Agency to slot Grievant and the other employees.<sup>3</sup>

Agency managers relied upon Scope Variants to define the "level within a given job that allows for differentiation based on experience and expertise (for example, Learner/Entry Level through Expert/Lead Level)."<sup>4</sup> Under the Scope Variants, an employee may be assigned a Level of Learner, Intermediate, Advanced, or Expert. An Intermediate level has the following characteristics:

- **Education** - Bachelor's Degree in a relevant field of work or equivalent work experience.
- **Experience** - Requires technical knowledge, training and understanding of a job's requirements. Typically possesses 2 to 5 years of relevant work experience.
- **Work Complexity** - Performs professional level work. Develops solutions requiring analysis and research. Responsible for critical work and/or complex projects performed within a broader technical and business context.

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<sup>2</sup> Agency Exhibit 5.

<sup>3</sup> See Grievance Exhibit 15.

<sup>4</sup> Agency Exhibit 5.

An Advanced level has the following characteristics:

- **Education** - Bachelor's or Master's Degree in a relevant field of work or equivalent work experience.
- **Experience** - Requires technical and business knowledge in multiple disciplines/processes. Typically possesses 5 to 7 years of relevant work experience.
- **Work Complexity** - Performs work that is complex and varied in nature. Defines and discerns key aspects of a problem and develops an integrated solution within a broad technical and business context of significant impact. May provide guidance/training to more junior staff.

The persons responsible for deciding how to slot employees included the Manager, Mr. W, Ms. M, Ms. R, and Ms. C.<sup>5</sup> They did not vote; they achieved a group consensus to determine the appropriate slot for each employee. In the early part of 2005, Grievant was slotted as Intermediate. According to the Manager, this decision was made in large part because of "overall deliverables". The Manager defined a deliverable as a document describing a process, a piece of code, etc. In other words, a deliverable is a task one has completed. Although the Manager described the process the Agency followed, he could not produce any documents showing the criteria or measures used by the group or the decision-making process of the group.

Prior to the slotting process, Grievant had the same core responsibilities as her coworkers. She served as project lead and had completed technical designs. Four of the five former contractors were later slotted as Advanced. The remaining employee was slotted as Intermediate.

One of the effects of slotting Grievant as an Intermediate (instead of Advanced or Expert) was that she was not considered qualified to serve as a technical lead or perform technical design even though she performed these duties prior to the slotting process. Although Grievant was not supposed to serve as a technical lead, she was nevertheless assigned responsibility as the technical lead on an Oracle-based project. As of June 23, 2006, Grievant had completed the Technical Design Document, migration tracking document, and perform other functions consistent with an employee who would be slotted as at least Advanced. On June 23, 2006, Grievant filed a grievance in which she described the issues as, in part:

I am being required to complete assignments that are outside of my [Employee Work Profile] roles and responsibilities. Management refuses to the knowledge these assignments or give me credit for the work. On June 21, 2006, I was told to complete the Technical Design Document (TDD) for a project. When I requested to have the assignment and

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<sup>5</sup> The decision to slot Grievant as Intermediate was made prior to the Supervisor's joining the Agency in December 2005.

writing (since it was outside of my EWP) [the Supervisor] stated, "That's not going to happen." This type of management response substantiates the fact the Eligibility Services management is unwilling to confirm that I'm currently doing the job of an Advanced/Expert developer. \*\*\*

Grievant sought relief as follows:

I want to receive the appropriate credit and compensation for the work I am being required to complete. It is unethical and deceitful for management to take advantage of my talents without giving me the appropriate credit or compensation.<sup>6</sup>

On June 23, 2006, shortly after Grievant filed her grievance, Grievant's Supervisor removed Grievant's Advanced level duties. Grievant was no longer a technical lead for the project. Another employee was assigned responsibility for completing the project as technical lead.

### **CONCLUSIONS OF POLICY**

Upon qualification of this matter for hearing, the EDR Director set forth the standard for review as follows:

The General Assembly has recognized that the Commonwealth's system of personnel administration shall be "based on merit principles and objective methods of appointment, promotion, transfer, layoff, removal, discipline, and other incidents of state employment." In addition, state hiring policy is designed to ascertain which candidate is best suited for the position, not just to determine who might be qualified to perform the duties of the position. These authorities evince a policy that would require the agency to make decisions in how to "slot" employees based on merit and objective decision-making. However, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of employees in their respective roles. Thus, a grievance that challenges an agency's decision such as those grieved in this case does not qualify for a hearing, unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions by the agency or that the assessment was otherwise arbitrary or capricious.<sup>7</sup>

Grievant earned a BA in computer science and an MBA in information systems. Based on her level of education she should be slotted at least as Advanced.

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<sup>6</sup> Grievant Exhibit 19.

<sup>7</sup> See page 5 of EDR Director Ruling 2007-1511, 2007-1548. Footnotes are omitted.

Grievant has worked in the information technology profession for over 15 years. She has been involved in the application and systems project planning, development and support using various methodologies including working for both nonprofit and for-profit corporations. In particular she was employed by Unisys for five years where she worked on the company's internal systems and received MAPPER technical training directly from the company. Based on Grievant's work experience she should have been slotted at least as Advanced.

Grievant was hired by the Agency as a Senior Programmer/Analyst. The purpose of her position was:

to develop and maintain computer programs for the Department of Social Services. Currently this position is for maintenance, development and production support, which requires writing programs using functional/end user specifications, changing programs or determining if and how Tables or data should be changed. This position requires verbal interaction between the programmer/analyst in the various functional/end users to get these tasks completed.

Two of her core responsibilities included:

- Assist in the development of resolutions of new business requirements including system enhancements.
- Develop resolutions to production problems.<sup>8</sup>

Grievant was given responsibility for working on an Oracle database. She wrote embedded SQL code and performed database administrator tasks such as creating and updating tables.

Even after Grievant was slotted as an Intermediate, she was given "Advanced duties" such as serving as the technical lead for an Oracle database project.

Based on Grievant's actual work experience for the Agency, it is clear that she has performed work that is complex and varied in the nature. She has defined and discerned key aspects of a problem and developed an integrated solution within a broad technical and business contexts. If the terms of the Scope Variance are applied to Grievant, it is clear that she should be slotted as the least as Advanced.

All of the factors used by the Agency to slot Grievant show she should be slotted at least as Advanced with one exception – management's opinion of the quality of her deliverables. Agency managers believed Grievant's deliverables were inadequate, but the Agency has not presented sufficient evidence to substantiate this opinion. The Agency has not presented any documents used to measure and justify this opinion.

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<sup>8</sup> Grievant Exhibit 3.



There is no basis for the Hearing Officer to determine whether the Agency's opinion was founded based on a reasonable assessment of Grievant's work performance. The Agency continues to believe Grievant was appropriately slotted because her programming skills are "average at best." Grievant's evaluations, however, do not reflect marginal programming skills. Agency managers could not locate any documents analyzing or discussing the quality or quantity of Grievant's deliverables and programming skills during its decision-making process. The Agency has not presented any documentation showing a comparison of Grievant's skills with the skills of other employees who were selected as Intermediate and Advanced.

The Hearing Officer is usually reluctant to interfere with an agency's assessment of an employee's performance because that assessment is based on manager's opinion of an employee's performance. When managers perform annual evaluations, there is some basis upon which to measure the employee's work performance. That measure is found in the employee's employee work profile. In Grievant's case, there is nothing similar to the measures usually found in an employee's work profile.

It is difficult for the Hearing Officer to accurately assess an employee's work performance without having the opportunity to observe on a daily basis that employee's work performance. In this case, it appears that the Agency has significantly discounted Grievant's education, experience, and work complexity and instead focused on its opinion of her deliverables. Agency managers have not adequately demonstrated how Grievant's deliverables were lacking or how her programming skills remain "average at best" following the slotting process. This absent of objective criteria and measures to determine Grievant's performance level renders the Agency's slotting decision arbitrary. The Agency has not been able to confirm its slotting decision based on Grievant's work performance following the slotting process. The Agency must repeat the slotting process with respect to Grievant.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;<sup>9</sup> (2) suffered a materially adverse action<sup>10</sup>; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated

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<sup>9</sup> See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

<sup>10</sup> On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.<sup>11</sup>

Grievant engaged in a protected activity because she filed a grievance on June 23, 2006. Grievant suffered a materially adverse action because she was removed as the technical lead of a project for which he was assigned but not yet completed. Grievant's Supervisor removed duties from Grievant because she filed a grievance, a protected activity. Grievant's duties were removed, however, because the Supervisor realized the duties assigned to Grievant were in fact the duties of someone holding an Advanced position. Since Grievant was in an Intermediate position, the Supervisor realized Grievant should not have been serving as the technical lead on the project. In essence, the Agency granted relief to Grievant by removing duties that should not have been assigned to her. Although this was not the relief Grievant sought, the Agency's action was not intended to retaliate against Grievant, it was intended to correct an Agency mistake identified by Grievant.<sup>12</sup> The Agency did not retaliate against Grievant.

## DECISION

The Agency is ordered to re-evaluate whether Grievant should be slotted as Intermediate, Advanced, or Expert. The Agency's re-assessment should be transparent, documented, and based on objective criteria.

Grievant's request for relief from retaliation is denied.

## APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

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<sup>11</sup> This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

<sup>12</sup> After the Supervisor realized that some employees may be performing tasks outside of their assigned level, he sent emails to Grievant and her coworkers asking them whether they wished to perform duties outside of their assigned level.

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>13</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

*S/Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.