Issue: Qualification-Retaliation/Grievance Activity; Ruling Date: December 21, 2001; Ruling #2001-097 and 2001-107; Agency: Department of Environmental Quality; Outcome: Not qualified.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

QUALIFICATION RULINGS OF DIRECTOR

In the matter of Det(me(t ofEnviron(me(al Q(u)1-0.4alitm)-12.6oy)92.6/i)-2.6(No. #2001-097u)1-(&)74

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After DEQ refused to return the grievant to his former position, he filed a pleading titled "Bill of Complaint" against DEQ in circuit court in which he sought implementation of the hearing officer's recommendation. The grievant noted that the hearing officer recommended reinstatement to his former position and asserted that DEQ improperly had refused to implement the hearing officer's decision. Alleging that the assignment to the new position was a "functional demotion," the grievant contended that DEQ's refusal to reinstate him violated the Virginia Code provision that allows either party to petition circuit court "for an order requiring implementation of the hearing officer's decision."

The circuit court ultimately decided in the grievant's favor and ordered that the grievant be "forthwith reinstate[d]" to his "former position of Waste Management Supervisor." In response to the trial court's order, DEQ assigned the grievant to an EEC position under the Compliance Enforcement Manager (CEM or "Enforcement"). DEQ created this position in Enforcement and considered it temporary.

DEQ appealed the circuit court's ruling and on September 18, 1998, the Supreme Court of Virginia reversed the trial court and held that the trial court exceeded its authority when it ordered the grievant's reinstatement.[2] As a consequence of the Supreme Court decision, DEQ sent the grievant a notice on December 2, 1998 stating that he was being returned to an EEC position under Permitting.

On February 18, 1999, the grievant initiated another grievance, based on the agency's decision to return him to Permitting. In that grievance he alleged unjustified actions, functional demotion, involuntary demotion, retaliation, misapplication of policy, and disciplinary action. The February 18th grievance was contested by the agency and was subsequently found to be untimely by the Director of this Department. The grievance was then administratively closed.

On March 3, 1999, the grievant initiated a grievance virtually identical to the February 18th grievance except that the March 3rd grievance added an arbitrary action claim. One of the primary contentions of the March 3rd grievance was that the grievant's Permitting position did not meet grade classification requirements because he did not perform management functions. He also alleged that management acted in retaliation for his having filed his 1995 grievance.

[2] The court held that: "the hearing officer made the 'recommendation,' not an order, that the employee be reassigned to his former position. Then, the circuit court, purportedly 'implementing' the hearing officer's decision, issued an order that the hearing officer did not make; the court directed the Commonwealth to 'forthwith reinstate' the employee to his former position. This was error. The hearing officer's 'recommendation,' while included within his written opinion, was not a 'decision' within the meaning of § 2.1-116.07(D) [recodifed as Virginia Code § 2.2-3006(C)] allowing implementation 'of the hearing officer's decision.'" Note that section 2.2-3006 has since been amended to allow the circuit court to implement the order *or recommendation* of a hearing officer.

The March 3rd grievance was determined to be out of compliance as to each of these issues except for the issue of alleged policy misapplication based on the grievant's contention that his current position did not support a grade 14 classification.

On October 23, 2000, the grievant was informed that as a result of the Commonwealth's adoption of a new compensation system, he had been crosswalked from the classification of Environmental Engineer Consultant (EEC) into the role of Environmental Specialist II (ESII). On November 21, 2000, the grievant initiated a grievance challenging his placement into the ESII role, characterizing the move as unfair or a misapplication of the new classification/compensation policy. The grievant also claimed, among other things, that the action constituted a demotion. The November 21st grievance is one of the two grievances that is the subject of this qualification ruling.

On December 1, 2000, management transferred the grievant from Permitting to Enforcement where his role remained ESII. On December 26, 2000, the grievant initiated a grievance based upon the December 1st transfer. The grievance alleged, among other things, that the move constituted an adverse employment action because the grievant no longer had management or supervisory duties, misuse/misapplication of the classification/compensation system, and retaliation.[3] The December 26th grievance is the second grievance that is the subject of this qualification ruling.

DISCUSSION

In a March 28, 2001 compliance ruling, this Department concluded that if the grievant desired to continue with his November 21st and December 26th grievances beyond the agency head qualification stage, the two grievances would be consolidated and would proceed forward as a single grievance. They are discussed, in chronological order below.

I. The November 21st Grievance

The November 21st grievance centers on the agency's implementation of the Commonwealth's new compensation plan. On September 25, 2000, the Commonwealth implemented the first phase of a new compensation reform plan. On that date, 1650 classified positions were condensed ("cross-walked") into approximately 300 broader roles. The November 21st grievance challenges the grievant's "cross-walk" from his former classification of Environmental Engineer Consultant (EEC) to the role of Environmental Specialist II (ESII) in pay band 5. The grievant asserts that the cross-walk constituted: (1) an unfair/misapplication of the new classification/compensation policy; (2) an adverse employment action--being placed in a non-management category under the new compensation system; (3) a demotion; (4) removal from management career track; and (5) an agency implementation of an incomplete new compensation.

[3] The December 1, 2000 move essentially made moot the remaining claim in the March 3rd grievance: that the grievant's former position in Permitting was misclassified. Accordingly, the March 3rd grievance was not qualified for hearing.

Misapplication/Unfair Application of Policy

Issues 1-4 above are interrelated and all essentially allege misapplication or unfair application of policy. In support of his claim that he was improperly classified upon his "cross-walk," the grievant notes that field office EEC position specifications under the former compensation system indicate that EEC positions are managerial/supervisory positions. Essentially, the grievant asserts that at the time he was cross-walked, he was in a non-managerial position. He has long contended that from the time that he was removed from his Waste Management Supervisor position in 1995, he has been paid at a manager's salary but has not performed managerial tasks. The grievant characterizes the situation as a functional demotion.

The grievant is correct in that he can utilize the grievance procedure to challenge the "correctness" or accuracy of his position classification. For instance, this Department has long held that an employee who produces evidence that she is doing the work of a Repair Technician Senior (Grade 8),[4] but is only being compensated at a Repair Technician (Grade 7) rate, may take her grievance to hearing. In such a case, if the hearing officer concludes that the employee was indeed improperly classified, then the hearing officer could order the agency to properly apply the classification process, which would effectively compel the agency to compensate the Technician at the Senior pay rate.

Here, however, the grievant does not appear to desire to have his salary adjusted to conform to the level of work that he was doing at the time of the crosswalk.[5] Instead, he seeks to have a hearing officer transfer him back into a management track position. In other words, the grievant is essentially trying to use the grievance process to revisit an issue long since adjudicated and closed: his 1995 removal from the Waste Management Position.

In 1995, the grievant challenged his removal from a management track position. He succeeded in convincing a hearing officer that the move was arbitrary, and a circuit court subsequently implemented the hearing officer's 'recommendation' that the grievant be transferred back to his original management position. However, the grievance was ultimately concluded when the Supreme Court of Virginia held that the circuit court had exceeded the scope of its authority when it ordered implementation of the hearing officer's recommendation. The grievant may not revive his 1995 claim by asserting that his September crosswalk was a new action tantamount to demotion. The crosswalk had no impact on the grievant's salary. He was not in a management position before the crosswalk nor was he afterward. The grievant has presented no evidence that the DEQ misapplied or unfairly applied policy in conjunction with his crosswalk. All EECs were crosswalked into ESII positions. There is no evidence that the grievant was treated differently from any other EEC during the crosswalk.

[4] Under the state's new compensation plan, "grades" have been rolled into broader "pay bands."
[5] Based on the grievant's assertions such an adjustment would be downward, a pay reduction.

While the grievant characterizes agency actions as a "continuing practice to demote,"[6] he was removed *once* from his management position. That transfer was a single event that took place in 1995. It was challenged, fully adjudicated, and a final decision was rendered by the Supreme Court of Virginia. Based on the principal of res judicata[7] and finality, this matter may not be challenged again.

Use of an Incomplete Compensation Plan

The grievant claims that the agency used an incomplete compensation plan when it cross-walked him into the ESII system. The Commonwealth's Compensation plan is admittedly a work in progress. The plan has been developed and implemented in stages. The fact that it has not yet been fully implemented in its final form does not render the plan invalid.

II. The December 26th Grievance

The December 26th grievance alleges: (1) demotion; (2) retaliation; (3) unfair/misapplication of the new classification policy; and (4) agency utilization of an incomplete compensation policy.

Demotion and Unfair/Misapplication of Policy

For the reasons set forth in the above Misapplication/Unfair Application discussion, the grievant's claim that he was demoted when he was transferred from Permitting to Enforcement also fails. Again, the grievant suffered no wage loss nor was his earning potential affected by that move.[8] He was in pay band 5 before and after the move. By alleging that he was moved out of Permitting into a non-management position in Enforcement on December 1, 2000, the grievant attempts to circumvent the fact that his removal from management occurred in 1995. However, a move from a non-management position to another non-management position in the same pay band does not constitute a demotion. Moreover, under the state's new compensation policy an agency is free to move an employee from a management position to a non-management position in a lower pay band.[9] Such a move, referred to as a downward role change, is well within the discretion of the agency and does

[6] April 19, 2001, Response to Third Step Reply.

[7] Res judicata is "a judicially created doctrine resting upon public policy considerations which favor certainty in the establishment of legal relations, demand an end to litigation, and seek to prevent harassment of parties. Bates v. Devers, 214 Va. 667, 670, 202 S.E.2d 917, 920 (1974). It applies "where there is a valid, personal judgment obtained by a defendant on the merits of an action. The judgment bars relitigation of the same cause of action, or any part thereof which could have been litigated between the same parties and their privies." K & L Trucking Co. v. Thurber, 1 Va. App. 213, 219, 337 S.E.2d 299, 302 (1985). The grievance procedure recognizes and embraces the principle of res judicata in that grievances may "[n]ot duplicate another grievance challenging the same action or arising out of the same facts." *Grievance Procedure Manual,* §2.4 (5), page 7.

[8] One could certainly argue that the grievant's 1995 transfer out of management impacted his promotional and earning potential. However, that move has been grieved, adjudicated, and therefore it cannot be challenged again now.

[9] See DHRM Policy 3.05.

not violate policy absent sufficient evidence of some improper reason such as unlawful discrimination or retaliation.

Retaliation

The grievant claims that his transfer from Permitting to Enforcement was in retaliation for previously filing grievances and working with the legislature to change grievance law. For a claim of retaliation to qualify for a hearing, there must be evidence raising a sufficient question as to whether (1) the employee engaged in a protected activity;[10] (2) the employee suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse action because the employee had engaged in the protected activity. If the agency presents a non-retaliatory business reason for the adverse action, the grievance does not qualify for a hearing, unless the employee presents sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.[11]

The grievant has engaged in a protected activity by initiating numerous grievances in the past. However, it does not appear that he has suffered an adverse employment action. He was moved from one pay band 5 position to another. As a result, he was no worse off in terms of salary or promotional potential after the transfer than he was before. Moreover, there is no evidence of a causal link between the transfer and any protected activity. The agency explained that the move was based on an agency need: the recent increased emphasis on enforcement. Furthermore, the move was prompted by the agency's belief that the transfer would be beneficial to the grievant: the grievant had worked in Enforcement before, performed well there, and appeared relatively contented; thus, management and human resources concluded that a return to Enforcement might be embraced by the grievant. In any event, there is no evidence that retaliation played any role in the transfer.

Use of an Incomplete Compensation Plan

For the reasons explained above in the previous section that discussed the agencies use of an evolving compensation plan, this issue is not 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 this determination to the circuit court, he must notify the human resources office, in writing, within five workdays of receipt of this ruling. If the court should qualify this grievance, within five workdays of

[10] See the *Grievance Procedure Manual* §4.1(b)(4), page 10. Only 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 a violation to the State Employee Fraud, Waste and Abuse Hotline, or exercising any right otherwise protected by law."

[11] *See* Rowe v. Marley Co., 233 F.3d 825, 829 (4th Cir. 2000); Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653, 656 (4th Cir. 1998).

receipt of the court's decision, the agency must request the appointment of a hearing officer unless the grievant notifies the agency that he does not wish to proceed.

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