

Issue: Qualification/Position/Classification/Reallocation; Ruling Date: September 21, 2001; Ruling #2001-106; Agency: Department of Transportation; Outcome: Not qualified. Appealed in the Circuit Court of Chesterfield County; File date: October 2, 2001; Case #CL01-996; EDR Decision Affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

QUALIFICATION RULING OF DIRECTOR

In the matter of Department of Transportation/ No. 2001-106
September 21, 2001

The grievant has requested a ruling on whether her September 29, 2000 grievance with the Department of Transportation (VDOT) qualifies for hearing. The grievant claims that management misapplied or unfairly applied state policy by not acting on her reallocation request when it was submitted in February 2000, and by not reallocating her position after conducting a July 2000 study of her duties. As relief, the grievant requests a reallocation to a higher role and "back pay as appropriate." The grievant also claims that management discriminated against her by not reallocating her position. For the reasons discussed below, the grievance does not qualify for hearing.

FACTS

The grievant is employed as an Administrative and Program Support Specialist III (Pay Band 3), with the working job title of Executive Secretary. Prior to the September 25, 2000 implementation of the Commonwealth's compensation reform, her job classification was Executive Secretary (Grade 6).

The grievant's supervisor submitted a reallocation request for her position on February 2, 2000, and again with the grievant's signature (as called for by the request form) on March 23, 2000. The deadline for reallocation requests was set at March 21, 2000, in anticipation of the September 25, 2000 implementation of the State's compensation reform. The grievant and her supervisor contacted the District Human Resources Office in June 2000 to inquire about the status of the reallocation request for her position and learned that it had not been received. In response to the grievant's inquiry, however, Human Resources agreed to process her request. A review of the grievant's position was conducted in July 2000 based on the position description and information that the grievant's supervisor had submitted in support of the original request(s). At the Analyst's discretion, no interviews were conducted with the grievant or others as part of the audit. The grievant was notified on September 25, 2000 that the study had concluded that her position was classified properly and would not be reallocated.

The grievant initiated her grievance on September 29, 2000 claiming that the District Human Resources Office had handled her request unfairly by not processing it when it was submitted in February 2000, by not affording her an in-person review as some others had been, and by considering applicants who had submitted requests after the deadline. In response to the grievance, management agreed to a second study of the grievant's position, to be conducted in

person and considering all documentation and input she submitted. An Analyst from a different VDOT District was assigned to conduct the audit, and her work was reviewed by a third Analyst/Team Leader from a third District.¹ The second audit and the review were conducted on December 20, 2000 and February 23, 2001 respectively. Both analyses concluded that the grievant's position was properly classified. The reviews also determined that the grievant had been properly cross-walked into her corresponding role of Administrative and Program Support Specialist III (Pay Band 3) under the September 25, 2000 implementation of compensation reform.

DISCUSSION

Misapplication or Unfair Application of Policy

The grievant alleges misapplication or unfair application of policy and procedure. For such a claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or procedural provision, or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy or procedure. In this case, the General Assembly has recognized that the Commonwealth's system of personnel administration should be "based on merit principles and objective methods" of decision-making.² In addition, the Commonwealth's classification plan "shall provide for the grouping of all positions in classes based upon the respective duties, authority, and responsibilities," with each position "allocated to the appropriate class title."³ State policy in effect during the time period addressed by this grievance (February 2000 to September 25, 2000) provided that an employee's position must be allocated to its appropriate class on the basis of assigned duties and responsibilities.⁴

On her Form A, the grievant states that management "treated [her] in an unfair manner" by the following: (1) Not documenting receipt of her February 2000 reallocation request or acting upon it until her supervisor inquired about the request in June 2000; (2) Not contacting her as part of the audit of her position, as some other employees had been contacted; and (3) Unfairly considering another employee's request for reallocation after the March 21, 2000 cutoff date.

Even assuming the facts underlying these claims are as stated, the issues they raise about the processing of the reallocation request have been rendered moot by the agency's response to the grievant's complaint. As stated, the agency audited the grievant's position (issue #1), conducted the second audit in person by someone not associated with the local District Human Resources Office, with a third review to further ensure objectivity (issue #2), and processed the

¹ This was in response to the grievant's concern that she was not allowed to select the Analyst who would conduct the second study, as she had understood from the central human resources office that she would be allowed to do (or at least to have input on). Management offered to address this concern by using an Analyst from another District conduct the second audit, and by having a third Analyst/Team Leader review the second audit's results.

² See Va. Code § 2.1-110.

³ Va. Code § 2.1-114.2(A).

⁴ DHRM Policy 3.05 (IV) (C) (effective September 16, 1993).

grievant's request despite the fact that the signed form was dated March 23, 2000, which was after the March 21 deadline (issue #3).

The decision not to reclassify the grievant's position was based upon a review of all the supporting data and consideration of the determination factors for classifying positions. In each of the three audits, Human Resources determined that the position had been classified properly (and crosswalked into the correct role after September 25, 2000). Specifically, Human Resources found that the grievant's current duties were "typical" for the Executive Secretary position and that there had been "no substantive changes in the duties" since 1997.⁵ Thus, the classification determination process involved a review of the grievant's qualifications and current duties and responsibilities. Further, the grievance presents no evidence that the determination was arbitrary, capricious, or inconsistent with other pay practice decisions within the agency.

In light of the above, it appears that management more than fulfilled its responsibility under policy to review and determine the classification of the grievant's position. Although the grievant may disagree with management's assessment of her position, her grievance does not raise a sufficient question as to whether state or agency policy was misapplied or unfairly applied.

Discrimination Based on Race

The grievant claims that management has discriminated against her based on her race.⁶ Grievances that may be qualified for a hearing include actions related to discrimination on the basis of race.⁷ The grievant has the burden of proving that she was intentionally discriminated against because she is a member of a protected group.⁸ To qualify for hearing, a grievant must establish: (1) that she is a member of a protected class; (2) that her job performance was satisfactory; (3) that in spite of her performance she suffered an adverse employment action; and (4) that she was treated differently than similarly situated employees outside the protective class.⁹ If the agency provides a legitimate, non-discriminatory reason for its actions, the grievance should not be qualified for hearing, absent sufficient evidence that the agency's professed business reason was a pretext or excuse for discrimination.¹⁰

As an African American, the grievant is a member of a protected class. Also, for purposes of this ruling, we will assume that her job performance is satisfactory. In addition, the failure to be reallocated to a higher pay grade could be viewed as an adverse employment

⁵ See for example, Human Resources Memorandum dated December 20, 2000.

⁶ The grievant's Form A, in her 'employee comments' to the first resolution step response, states that Human Resource's actions in handling her reallocation request constitute "bias". She has explained that this refers to discrimination on the basis of race, as does her complaint that the process was "unfair".

⁷ See *Grievance Procedure Manual* § 4.1(b), page 10.

⁸ See *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993)).

⁹ See *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998)(citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973)).

¹⁰ *Hutchinson v. INOVA Health System, Inc.*, 1998 U.S. Dist. LEXIS 7723 (E.D. Va. 1998).

action.¹¹ However, the grievant has not presented evidence to show that she was treated differently from similarly situated employees outside of her protected class.

In support of her discrimination claim, the grievant cites two white secretaries in her office who were reallocated as part of the pre-Compensation Reform review. However, it is not disputed that, as Program Support Technicians at Grade 5, the two employees were not in the same pay grade or job classification as the grievant. Moreover, the review of their positions showed a significant change in their job duties, warranting an upgrade (to Grade 6). By contrast, as stated above, the reviews of the grievant's position determined that the grievant's current duties were "typical" for the Executive Secretary position and that there had been "no substantive changes in the duties" since 1997.¹² Thus, the white employees were not similarly situated to the grievant, and there is a nondiscriminatory reason for the grievant not being reallocated as they were, which is that the grievant's job duties had not changed to the point that she was performing work outside of her job classification, as were the white employees. The grievant has presented no additional evidence that she was treated differently than similarly situated employees outside the protective class. Accordingly, this issue does not qualify 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, she should 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 receipt of the court's decision, the agency will request the appointment of a hearing officer unless the grievant notifies the agency that she does not wish to proceed.

Neil A.G. McPhie, Esquire
Director

Jeffrey L. Payne
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¹¹ An "[a]dverse employment action includes any retaliatory act or harassment if, but only if, that act or harassment results in an adverse effect on the 'terms, conditions, or benefits' of employment." See *Von Gunten v. Maryland Dept. of the Environment*, 243 F.3d 858 (4th Cir. 2001). This would encompass any tangible employment action by management that has some significant detrimental effect on factors such as an employee's hiring, firing, compensation, job title, level of responsibility, or opportunity for promotion. See *Boone v. Goldin*, 178 F.3d. 253 (4th Cir. 1999).

¹² See Human Resources Memorandum dated December 20, 2000.