

Issue: Qualification/Position/Classification/Working out of Class – Failure to take action;  
Separation/Layoff/Recall; Ruling date: June 18, 2003; Ruling #2003-044; Agency: Virginia  
Polytechnic Institute and State University; Outcome: qualified



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

QUALIFICATION RULING OF DIRECTOR

In the matter of Virginia Polytechnic Institute and State University  
Ruling No. 2003-044  
June 18, 2003

The grievant has requested a ruling on whether her December 20, 2002 grievance with Virginia Polytechnic Institute and State University (Virginia Tech or the agency) qualifies for a hearing. The grievant claims that her layoff resulted from the agency's improper classification of her position as Auditor III. For the reasons discussed below, this grievance qualifies for hearing.

FACTS

Prior to her layoff on December 6, 2002, the grievant was employed in the Internal Audit and Management Services (IAMS) department at Virginia Tech. The grievant was hired in 1996 as a Senior Internal Auditor. Because the scope of her duties had evolved beyond those required of a Senior Internal Auditor, the grievant was reallocated to the role of Accounting Manager C in 1997. Her job title was, and remained, Fraud Audit Coordinator until her layoff in 2002.

On September 25, 2000, the Commonwealth implemented the first phase of a new compensation reform plan. On that date, 1,650 classified positions were condensed into approximately 300 broader roles. Consequently, the grievant's former classification of Accounting Manager C was "cross-walked" (assigned) to the role of Auditor III.

The grievant was laid off on December 6, 2002. On December 20, 2002, the grievant initiated her grievance alleging that she was improperly classified before and up to the time of layoff, and that as a result, her layoff was improper. On January 21, and again on January 24, 2003, the agency conducted an internal audit of the grievant's position. Both reports concluded that the grievant was properly classified as an Auditor III.

Pursuant to gender discrimination and retaliation complaints by the grievant on October 29, 2002 and January 13, 2003, Virginia Tech's Office for Equal Opportunity (OEO) conducted an investigation into management actions and issued a report of its findings. Although the grievant complained of discrimination and retaliation, the OEO report also analyzes the appropriateness of the grievant's classification as an Auditor III and the reliability of the agency's stated reasons for eliminating the grievant's position. In its report, OEO finds that the grievant "produced significant evidence that [the agency's] articulated basis for her layoff is pretextual" and that a "court could reasonably determine that [the

agency's] rationale for the layoff is not supported, or is directly contradicted, by the facts." The OEO report further concludes that "[a] court reasonably could be expected to deny the employer's motion for summary judgment and submit this case to a jury for resolution of disputed facts" and if presented to a jury, "there is a substantial likelihood of a verdict in favor of the employee [grievant]."

## DISCUSSION

### *Classification*

By statute and under the grievance procedure, complaints relating solely to the establishment and revision of salaries and position classifications "shall not proceed to hearing"<sup>1</sup> unless there is sufficient evidence of discrimination, retaliation, discipline, or a misapplication or unfair application of policy. In this case, the grievant claims that her classification as an Auditor III is a misapplication or unfair application of policy because at the time of her layoff and for some time prior thereto she was performing the duties of, and was compensated as, a Senior Internal Auditor (Auditor II).<sup>2</sup>

For the grievant's claim to qualify for a hearing, there must be evidence raising a sufficient question as to whether management violated a mandatory policy or whether the challenged action, in its totality, is so unfair as to amount to a disregard of the intent of the applicable policy. 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.<sup>3</sup> 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."<sup>4</sup>

The above statutes evince a policy that would require state agencies to allocate positions having substantially the same duties and responsibilities to the same role. Importantly, the grievance procedure accords much deference to management's exercise of judgment, including management's assessment of the degree of change, if any, in the job duties of a position. Accordingly, this Department has long held that a hearing officer may not substitute his or her judgment for that of management regarding the correct classification of a position.<sup>5</sup> Thus, a grievance that challenges the substance of an agency's assessment of a

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<sup>1</sup> Va. Code § 2.2-3004(C).

<sup>2</sup> Under the layoff policy, after identifying work that is no longer needed or that must be reassigned, agencies must select employees for layoff within the same work unit, geographic area, and **Role**, who are performing "substantially the same work," according to the following sequence: 1) wage employees; 2) part-time restricted employees by seniority; 3) part-time classified employees by seniority; 4) full-time restricted employees by seniority; and 5) full-time classified employees by *seniority*. See DHRM Policy No. 1.30 Layoff (effective 9/25/00) (emphasis added). The grievant claims to have seniority over all but one of the full-time classified employees in the Virginia Tech IAMS department with a role title of Auditor II. If this is true, and the grievant was improperly classified, the layoff policy could have been misapplied.

<sup>3</sup> Va. Code § 2.2-2900.

<sup>4</sup> Va. Code § 2.2-103(B)(1).

<sup>5</sup> See EDR Ruling No. 2001-062 ( July 18, 2001).

position's job duties does not qualify for a hearing unless there is sufficient evidence that the resulting determination was plainly inconsistent with other similar decisions within the agency or that the assessment was otherwise arbitrary or capricious.<sup>6</sup>

Under Department of Human Resource Management (DHRM) policy, the Audit and Management Services Career Group consists of roles (including the roles of Auditor II and III) that define the typical career paths for employees who pursue careers as auditors in the state system.<sup>7</sup> A role for each of these occupations represents different levels of work or career progression, and roles are distinguished based upon the Compensable Factors of Complexity, Results, and Accountability, which determine position classification.<sup>8</sup>

#### Definitions and Duties: Auditor II v. Auditor III

In general, DHRM policy maintains that “[t]he Auditor II role provides career tracks for advanced level auditors performing diverse specialized or integrated program audits to ensure compliance with regulations, laws and business operating systems.”<sup>9</sup> The Auditor III role “provides career tracks for expert auditors performing complex program audits” and employees in this role “provide professional expertise, consultation, and technical assistance to executive management regarding financial, business engineering, policy, and information systems programs in order to ensure compliance with regulations, laws, and business operating systems.”<sup>10</sup> Both roles may involve leading an audit team.<sup>11</sup> According to the OEO report, the Director of IAMS at Virginia Tech agrees that the grievant's position fits the general definition above of an Auditor II. Moreover, the Director of IAMS at Virginia Tech concedes that the grievant does not provide the technical assistance to executive management, nor does she apply knowledge of, and internal control standards for, multiple platform computer systems. In addition, she does not frequently interact with elected officials and senior executives regarding a high level of communication skills, which is another criteria used to identify an Auditor III.

In an addendum to its January 24, 2003 audit report regarding the grievant's position,<sup>12</sup> the agency defines the duties and responsibilities of an IAMS Senior Internal Auditor (Auditor II role) as follows:

They may lead an audit team or work independently on assigned audits. When acting as “auditor in charge,” they may be providing direction to a Staff

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<sup>6</sup> See *Grievance Procedure Manual* § 9, page 23. Arbitrary or capricious is defined as a decision made in disregard of the facts or without a reasoned basis.

<sup>7</sup> See [www.dhrm.state.va.us/services/compens/careergroups/admin/AuditMgmt19190.htm](http://www.dhrm.state.va.us/services/compens/careergroups/admin/AuditMgmt19190.htm) (website visited April 21, 2003).

<sup>8</sup> *Id.*; see also DHRM's Human Resource Management Manual, Chapter 6, *Job Evaluation*, pages 2-3 (describing in detail Compensable Factors).

<sup>9</sup> See general description of the roles contained on DHRM's website (*supra*, note 6).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> It should be noted that the addendum is dated April 23, 2003, three months after the January 24, 2003 audit report.

Auditor, another Senior Auditor, or an IT Auditor. The type of audits they conduct are usually either compliance or ones that relate to financial accounting. They are sometimes assigned to work with a FWA audit. If assigned to work on these audits, they would be working under the direct guidance and supervision of the FWA Coordinator, the Associate Director or the Director.

The addendum goes on to state that the grievant's position as the Fraud Audit Coordinator (Auditor III role) entailed investigating and responding to "hotline" allegations and determining whether or not additional assistance was needed to conduct the audit. Moreover, as a Certified Fraud Examiner (CFE), the Fraud Audit Coordinator provided the professional expertise and guidance to the fraud, waste and abuse audit process. Further, management asserts that the Fraud Audit Coordinator had the autonomy to interact directly with executive management as well as external agencies as she deemed appropriate. Finally, the Fraud Audit Coordinator provided oversight to the fraud, waste and abuse audits and had a direct reporting relationship with either the Director or the Associate Director.

The grievant claims that from the 1996-97 time period through fiscal year 2001, her job duties consisted of fraud auditing almost exclusively. However, over the course of her last eighteen months at Virginia Tech, the grievant claims that she was increasingly pushed out of the fraud audit oversight, coordination and investigation roles. By the fall of 2002, the grievant claims that her role as Fraud Audit Coordinator "was reduced to filing allegations in a notebook, if the allegations were routed to [her] at all, and reminding [another IAMS employee] to follow up on reports of exceeding speed limits in state vehicles." According to the grievant, IAMS management determined who would perform fraud projects and how they would be performed and provided all oversight for fraud audits conducted in fiscal year 2003. Further, the grievant asserts that some reports were issued without her review, that she was excluded from one of the agency's most serious fraud allegations, and that IAMS employees working on fraud audits reported directly to the Associate Director, not the Fraud Audit Coordinator.

### Compensable Factors

Under state policy, the "compensable factors" of a position determine the appropriate role to which the position should be allocated within a career group.<sup>13</sup>

### *Complexity*

Significant differences exist between the "complexity"<sup>14</sup> components for the roles of Auditor II and Auditor III. According to the OEO report, the Director of IAMS at Virginia Tech admits that the grievant performs two of the four complexity components of an Auditor

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<sup>13</sup> DHRM's Human Resource Manual, Chapter 6, Compensable Factors, page 2.

<sup>14</sup> The Complexity of Work factor encompasses the difficulty of the work, the scope and range of assignments, the knowledge, skills and abilities required, and the nature of contacts. See DHRM's Human Resource Manual, Chapter 6, *Job Evaluation*, page 2.

II. Specifically, according to the report, the grievant frequently contacts internal and external senior officials, professionals, and the public regarding sensitive and confidential matters and develops, interprets, and/or evaluates compliance with policies and procedures. According to this report, the Director of IAMS at Virginia Tech further admits that the grievant does not apply knowledge of principles and standards for multiple computer system platforms nor does she interact with elected officials and senior executives, two of the four expectations of an employee in the Auditor III role.

### *Results*

The second Compensable Factor is “results,”<sup>15</sup> and significant differences exist between the two roles in this category as well. Individuals in the role of Auditor III make decisions that may have a substantial impact on whether the university receives federal funding, the Commonwealth’s credit rating and interest rates, the integrity of an agency as a whole, or that may involve the Commonwealth in controversy or litigation.<sup>16</sup> In contrast, individuals in the role of Auditor II make decisions that have an impact, though significant, on a smaller scale.<sup>17</sup> When the grievant’s position was reallocated to Fraud Audit Coordinator in 1997, the agency addressed the need to have a person experienced in the investigation of frauds due to the potentially devastating impact of mishandling a fraud allegation. Such stated consequences include: mismanagement of university funds, non-compliance with federal, state, local and university rules, regulations, and policies, loss of private, state and federal funding, legal liability and public embarrassment. Neither the agency OEO report, nor the internal audits of the grievant’s position address the actual impact or consequences of the grievant’s work and decisions and how her position compares to that of an Auditor II. Additionally, the grievant has presented no evidence detailing the impact of her decisions on the agency or the Commonwealth, but merely states that at the time of her layoff she was not performing the duties of her position as set out in 1997.

### *Accountability*

The final Compensable Factor to consider is “accountability.”<sup>18</sup> An employee in the role of Auditor II (1) “[w]orks independently or as a team leader within existing guidelines and policies;” (2) “[d]evelops audit plans, target objectives, review procedures, and project plans;” (3) “[m]ay work in a specialty program area, perform integrated multi-functional audits, or manage a small audit program;” (4) “[s]erve as a resource to others in resolving more complex problems;” and (5) “[e]xercises considerable discretion and judgment in making recommendations related to the overall audit process.”<sup>19</sup> According to the OEO

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<sup>15</sup> The Results factor includes the impact of the employee’s work, the effect of services based upon the employee’s work and the consequence of error by the employee. See DHRM’s Human Resource Management Manual, Chapter 6, *Job Evaluation*, pages 2-3.

<sup>16</sup> See general description of the roles contained on DHRM’s website (*supra*, note 6).

<sup>17</sup> *Id.*

<sup>18</sup> The Accountability factor encompasses the employee’s level of leadership, judgment and decision-making, and independence of action. See DHRM’s Human Resource Management Manual, Chapter 6, *Job Evaluation*, page 3.

<sup>19</sup> See general description of the roles contained on DHRM’s website (*supra*, note 6).

report, the Director of IAMS at Virginia Tech admits that the grievant's responsibilities included (1), (2), (3) and (4) above.

In contrast, an employee in the role of Auditor III (1) "[e]xhibits a high level of autonomy through independent decision-making, project management, and sound judgment;" (2) "[s]erves as a high level technical advisor and consultant;" (3) "[r]ecommends and develops regulations, policies, and procedures;" and (4) "[r]ecommends policies and procedures and communicates them to internal and external customers."<sup>20</sup>

In support of its assertion that the grievant was properly classified as an Auditor III under the Accountability factor, in its internal audit reports of the grievant's position, the agency states that the grievant was viewed as a program manager, received very minimal guidance from superiors and was involved in planning and coordinating audits and developing auditing objectives and procedures for the fraud, waste and abuse audits. Moreover, for purposes of layoff, the agency viewed the grievant's position as a layer of management that could be abolished. However, the agency also admits that the grievant had no "permanent supervisory responsibilities or responsibility to hire, fire, promote, or evaluate the performance of other staff."

It appears that the grievant (Auditor III) and the Senior Internal Auditors (Auditor II's) had similar accountability responsibilities at Virginia Tech. According to her Employee Work Profile (EWP) at layoff, the grievant was in charge of the coordination of fraud audits. As a coordinator of fraud audits, part of the grievant's duties included training, supervising and assigning fraud audits to subordinates and superiors as needed; however, the position did not routinely involve management of personnel. Similarly, a Senior Internal Auditor may serve as the auditor-in-charge of a program audit. As the auditor-in-charge, the Senior Internal Auditor plans resources, prioritizes activities, establishes schedules to complete assignments, plans and conducts the opening conference, prepares notification to the auditee, prepares the audit planning memorandum and serves as coordinator of the given audit. Additionally, the Senior Internal Auditor provides guidance and direction to assisting auditors. As such, the OEO report notes that the grievant's coordination of fraud audits is essentially equivalent to a Senior Internal Auditor serving as an auditor-in-charge of a programmed audit.

#### Additional Considerations

There are additional facts that call into question the grievant's classification as an Auditor III. According to her 2000 EWP, at least 65% of the grievant's core responsibilities entailed working on and coordinating fraud audits. Similarly, her 2002 EWP attributes at least 75% of the grievant's core responsibilities to working on and coordinating fraud audits. Moreover, the agency focused a great deal on the grievant's work with and coordination of fraud audits in determining that her position should be eliminated. However, based upon the agency's time posted reports for July 1, 2001 through November 2002, the grievant spent only 28.25% of her total time on fraud, waste and abuse audits. The grievant claims that the

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<sup>20</sup> *Id.*

28.25% figure is inaccurate and the amount of time that she devoted to fraud, waste and abuse activity during this period was substantially less.<sup>21</sup> Regardless of which figure is most accurate, it appears that both parties agree that the grievant spent substantially less time on fraud audits for the eighteen months prior to her layoff, than that stated in her EWP. In addition, time posted reports for one of the Senior Internal Auditors, show that he spent 33.58% of his time in fiscal year 2003 on fraud, waste and abuse audits, while the grievant spent only 18.07% of her time during this same period on such audits.<sup>22</sup>

Moreover, in the fall of 2001, the agency performed an in-band adjustment study for all senior internal auditors. Despite being in a higher payband and different role than that of the Senior Internal Auditors, the grievant was included with this group for purposes of the in-band adjustment analysis. According to the agency, the grievant's job duties as the Fraud Audit Coordinator "most closely approximate those of a Senior Internal Auditor" and she "often performs that role when fraud, waste and abuse allegation activity is low."<sup>23</sup>

Finally, one of the agency's stated reasons for eliminating the grievant's position was a decline in fraud, waste and abuse allegation activity over the past three years.<sup>24</sup> If there was a decline in fraud, waste and abuse allegations over the last three years and during such declines the grievant primarily performed the duties of a Senior Internal Auditor, it can be argued that prior to her layoff, the grievant was performing the duties of a Senior Internal Auditor (Auditor II), and as such, may have been improperly classified at the time of layoff.<sup>25</sup> On several occasions subsequent to the in-band adjustment, the grievant, frustrated by the agency's alleged failure to compensate her for her additional responsibilities as the Fraud Audit Coordinator, asked that she be reclassified as a Senior Internal Auditor.

In light of the conflicting facts above, this Department concludes that there is a sufficient question as to whether the agency's assessment of the grievant's position was arbitrary or capricious and whether such an assessment led to the grievant being inappropriately laid off. As such, this Department deems it appropriate to send the grievance to hearing for adjudication by an administrative hearing officer. This ruling does not

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<sup>21</sup> For instance, while the agency claims that the grievant spent 18.07% of her time engaged in fraud, waste, and abuse audit work in FY 2003, the grievant claims that she spent 11.52% of her time on this work. Similarly, while the agency claims that she spent 33.07% of her time engaged in such work in FY2002, the grievant asserts that the number is 10.58%

<sup>22</sup> It should be noted, however, that the grievant was laid off on December 6, 2002. Therefore, the grievant spent very little time working in the month of December 2002 compared to that of the senior internal auditor. The grievant's layoff could have attributed to the elevated percentage of the senior internal auditor's time spent on fraud, waste and abuse activity.

<sup>23</sup> During the course of the study, the agency notes that the grievant's "higher classification is due to her special expertise and certification in fraud examinations."

<sup>24</sup> The OEO report calls into question the agency's assertion that fraud, waste and abuse allegation activity has declined in recent years. Specifically, the OEO report projects an increase in fraud allegations in fiscal year 2003 compared to that of the past two years.

<sup>25</sup> This Department is mindful of the fact that business need sometimes necessitates that the work performed by employees temporarily deviate from their EWP's. In the present case, the decline in the grievant's fraud, waste and abuse work from July 1, 2001 through December 2002, which necessitated her performance of work similar to senior internal auditors, could have been temporary.



conclude that the grievant's position was improperly classified or that the layoff policy was misapplied, only that further review by an administrative hearing officer of the relevant facts, policies and law is warranted. Indeed, the classification of the grievant's position is within management's discretion, and so long as that classification has a reasonable basis in policy and duties performed, a hearing officer may not substitute his judgment for that of management's regarding the correct classification or level of an employee's position.<sup>26</sup> If a hearing officer determines that Virginia Tech has misapplied or unfairly applied policy, he may only order that the agency reapply the policy as mandated or in a manner in keeping with the intent of the applicable policy. A hearing officer may not award any particular classification as relief.<sup>27</sup>

### CONCLUSION

For the reasons discussed above, the issues of misapplication or unfair application of the compensation and layoff policies qualify for hearing. For information regarding the actions the grievant may take as a result of this ruling, please refer to the enclosed sheet.

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Director

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<sup>26</sup> Va. Code § 2.2-3004(B).

<sup>27</sup> *Grievance Procedure Manual* § 5.9(b), page 15; *Rules for Conducting Grievance Hearings*, pages 14-15.