

Issue: Grievance Procedure/Consolidation of grievances for hearing; Qualification/Retaliation/Grievance activity participation; Ruling Date: March 9, 2007; Ruling No. 2007-1511, 2007-1548; Agency: Department of Social Services; Outcome: Grievances consolidated for hearing; retaliation issue qualified.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution
QUALIFICATION AND CONSOLIDATION RULING OF DIRECTOR

In the matter of Department of Social Services
Nos. 2007-1511, 2007-1548
March 9, 2006

The grievant has requested qualification of her June 1, 2006 and June 30, 2006 grievances with the Department of Social Services (DSS or the agency). For the reasons set forth below, these grievances qualify and are consolidated for hearing.

FACTS

The grievant works as a programmer or applications development analyst. The division of the agency in which the grievant works enacted a Human Capital Management (HCM) Plan. Part of the HCM 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 more likely to have supervision of employees, a higher salary, and access to more advanced training. The grievant was slotted as intermediate. She initiated the June 1, 2006 grievance (Grievance #1) to challenge that slotting determination because she believes that she is more properly an advanced or expert programmer based on her experience, training, and education when compared to those employees rated above her. She alleges that the agency misapplied or unfairly applied policy by slotting her as intermediate.

According to the agency’s response to this Department’s investigation, slotting decisions were based upon a review of each employee’s EWP, answers to slotting questions, and a skills inventory completed by the employee.¹ The answers to slotting questions were collected during an interview with the department manager. Each employee was asked questions to describe the extent of the employee’s current duties. The skills inventory was a survey in which each employee responded to questions regarding their skills in various areas. Employees were required to self-rate within each area based upon their skills (limited, basic,

¹ The manager of the grievant’s department (“department manager”) indicated during investigation by this Department that the slotting determinations were made based upon the skills survey, the scope variants provided by an outside consultant, an employee’s years of experience, an employee’s experience with the agency, and an employee’s technical experience. In an e-mail to the grievant in May 2006, the department manager stated that slotting was based on the skills survey, the one-on-one interview, and the employee’s annual evaluation.

intermediate, advanced, or master) and provide how much experience they have in those areas. These skills inventories were then reviewed by agency management before final decisions were made.

Although there do not appear to be any documents assessing each individual's answers and ratings under these criteria, the agency provided information as to the grievant's slotting determination during the management steps of the grievance process, including the grievant's answers to the skills survey and notes from her slotting questions interview. There is no final evaluation document stating why the grievant was slotted as intermediate rather than a higher level.² However, the first step response indicated that the grievant's position

relies heavily on programming skills, and her position in the department required skills specifically related to Mapper. Management's perspective on [the grievant's] Mapper programming skills at the time of the assessment were that they were average at best. Although [the grievant] indicated significant project management skills on her assessment form, those skills have little bearing on the requirements related to [her position].

During an investigation by this Department, the department manager was asked whether he recalled the basis of the grievant's slotting determination. He stated that he did not recall her selection decision specifically.

The grievant claims that there have been problems between herself and agency management, specifically the department manager, since she was hired. At the time of her hire, the agency was seeking to fill five similar programmer positions. The grievant applied in response to the advertisement for these positions. However, the agency was also in the process of transitioning from using contractors for certain information systems positions. Five contractors who worked at DSS applied for the five open positions as well. According to the grievant, the department manager wanted these five individuals to be selected for the five open positions. The grievant stated that her qualifications and performance in the technical interview ranked her second out of all the applicants, above most of the other contractor-applicants. The grievant has alleged that the department manager suggested to human resources, without foundation, that the grievant had cheated during the technical interview. According to the grievant, human resources told the department manager that he could not remove the grievant from the pool of candidates, so consequently, the department manager was forced to create a sixth position to hire all five of the previous contractors and the grievant. The grievant asserts that there was animosity toward her from the beginning of her employment because of the nature of this selection.

The grievant initiated Grievance #1 alleging that she should have been slotted as expert or advanced, rather than intermediate. She maintains that her knowledge, skills, and abilities require that she be slotted higher than intermediate. Moreover, she asserts that she

² The grievant reportedly requested such a quantitative analysis during the management steps. The second step-respondent reportedly admitted during the second step meeting that no such quantitative analysis exists.

has performed and previously did perform the work of an advanced programmer. The grievant has additionally stated that the agency chose to slot some of these former-contractor employees higher than her (advanced) even though, as she maintains, they are less qualified than herself. Prior to the slotting determinations, the grievant and these former-contractor employees (“comparable programmers”) were all hired for the same basic position (programmers),³ and had been performing the same jobs. The grievant and the comparable programmers all had the same role title.

Following the initiation of Grievance #1 and the alteration of her EWP to reflect her slotting as an intermediate programmer, agency management allegedly still required her to perform certain functions of an advanced or expert programmer. At that time, she was working as technical lead for a project that required her to work with Oracle, a database program, and also asked to prepare the Technical Design Document (TDD) for the project, which are tasks for an advanced or expert programmer. The grievant objected and stated that she should get credit for these advanced level assignments and that the assignments should be in writing because they did not appear in her new EWP. She initiated a grievance on June 23, 2006 after management refused to provide her these written instructions. According to the grievant, thirty minutes after she initiated that grievance on June 23, 2006, her supervisor removed her from the project for which she was the technical lead. After that point, the grievant was not permitted to do any work that involved advanced skills, such as prepare documentation, technical documents, lead work, or matrices. The grievant was to do purely programming work.

The grievant initiated a grievance on June 30, 2006 (Grievance #2), challenging the removal of her job duties. She maintains that management has removed these job duties to make it appear that the grievant has never performed and is incapable of performing advanced level work. The grievant asserts that her duties were removed in retaliation for initiating the June 23, 2006 grievance.⁴

DISCUSSION

Grievance #1

Misapplication of Policy

By statute and under the grievance procedure, complaints relating solely to issues such as the methods, means, and personnel by which work activities are to be carried out, as well as hiring, promotion, transfer, assignment, and retention of employees within the agency

³ These positions are now referred to as applications development analysts. However, for ease of reference, the term “programmers” will be used.

⁴ The grievant states that she let the June 23, 2006 grievance “drop.” Consequently, that grievance is not a subject of this ruling.

“shall not proceed to hearing” unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.⁵

The grievant claims that management misapplied or unfairly applied policy, procedures, rules or regulations by slotting her as an intermediate programmer. For an allegation of misapplication of policy or unfair application of policy to qualify for a hearing, there must be facts that raise a sufficient question as to whether management violated a mandatory policy provision, or whether the challenged action, in its totality, was so unfair as to amount to a disregard of the intent of the applicable policy. Further, the General Assembly has limited issues that may qualify for a hearing to those that involve “adverse employment actions.”⁶ An adverse employment action is defined as a “tangible employment act constitut[ing] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁷

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.”⁸ 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.⁹ 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.¹⁰

The agency has stated that the slotting determinations were based upon a number of factors, but principally each employee’s responses to the skills survey, the employee’s

⁵ Va. Code § 2.2-3004(C).

⁶ Va. Code § 2.2-3004(A).

⁷ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). In this case, there has been sufficient evidence presented to raise a question as to whether the grievant experienced an adverse employment action. Because the slotting of an employee affects salary, job duties, and training opportunities, there is no question that slotting an employee improperly would result in an adverse employment action.

⁸ Va. Code § 2.2-2900; *see also* DHRM Policy 2.10, *Hiring*, p. 15 of 21 (“Individuals are employed according to the provisions of the Virginia Personnel Act.”).

⁹ DHRM Policy No. 2.10, *Hiring*, pp. 2-4 of 22 (defining selection as the result of the hiring process that identifies the applicant best suited for a specific position; and knowledge, skill, and ability as components of a position’s qualification requirements). The slotting of employees at issue in this grievance were effectively hiring decisions, as the agency was determining what employees would be placed in differing job positions and given commensurate promotions.

¹⁰ *See Grievance Procedure Manual* § 9. Arbitrary or capricious is defined as a decision made “[i]n disregard of the facts or without a reasoned basis.”

answers to the slotting questions during an interview with the department manager, and each employee's EWP. The EWPs and job duties of the grievant and the comparable programmers do not appear determinative in the agency decision-making process. Both the grievant's and the comparable programmers' EWPs were identical prior to the slotting determinations. Further, there does not appear to be any document that reflects how an employee's responses to the skills survey were analyzed or evaluated to determine the appropriate slot for the employee. The department manager only indicated that he and his managers reviewed the information and slotted the employees where they felt they should go. The only factor specifically pointed out by the agency as a reason for slotting the grievant as intermediate was the grievant's "average at best" Mapper programming skills.¹¹ Mapper is reportedly the core of the grievant's job.

The grievant self-rated her Mapper skills as "advanced" on her skills survey, the same rating provided by two of the comparable programmers who were later slotted as advanced. During investigation by this Department, the department manager stated that when there were questions about an employee's responses on the skills survey, management questioned the employee about the subject. If management had questions about the grievant's self-rating of her Mapper skills as advanced during the slotting determination process, according to the evidence provided by the department manager, management would have questioned the grievant about her Mapper skills. The grievant denies that the agency ever questioned her about the quality of her Mapper skills.

The grievant has questioned the first step-respondent's statement that her Mapper skills were "average at best." The first step-respondent reportedly told the grievant that this perception was related to her performance on a project in early 2005 that took longer to complete than anticipated. The grievant has stated that while the project was not moved into production until later than anticipated, she had completed the programming for the project months in advance, but the testing of the project lasted longer than expected. She added that she also successfully completed at least four other projects during the time she was working on the project in question. Reliance on the grievant's performance on a single project early in her career with the agency raises a question as to whether the agency's assessment of the grievant's skills fairly represents her skill level. During the investigation by this Department, the first step-respondent was asked about this evaluation of the grievant's Mapper skills. The first step-respondent admitted that the evaluation was made by another member of management¹² and concerned the grievant's performance early in her time with the agency. There does not appear to be any evidence of further problems with the grievant's skills, or at

¹¹ An example of an inconsistency with this slotting process is why agency management focused only on one skill within the entirety of the skills survey.

¹² This member of management is presumably the department manager. In mid-June 2006, when the first step-respondent would have been drafting his response, the department manager forwarded a January 2005 e-mail from the grievant related to the project discussed in this paragraph. The forwarding e-mail states, "The actual code did not make it to production until June of 2005 so it took a long time to get all of this work completed!" It is unclear whether the delay was related to problems with the grievant's programming skills or simply a perceived problem in that completion was later than expected.

least they were not relied upon by the first step-respondent in writing that her Mapper skills were “average at best.”

In addition, the department manager stated during investigation by this Department that such an evaluation of the grievant’s skills would be something that would appear in a performance evaluation. He added that such issues would be addressed throughout the evaluation period and that an employee would not be surprised by the year-end performance evaluation because such issues with work performance that were counseled during the year would appear in the evaluation. Consequently, if agency management believed that the grievant’s Mapper skills, the reported core of her work, were “average at best,” under the department manager’s reasoning, such a factor should presumably be a part of the grievant’s performance evaluation. However, it does not appear that the grievant’s Mapper skills were discussed in her performance evaluation. Additionally, the grievant points out that she ranked second overall in the technical interview when she applied for her position with the agency, indicating that her technical skills were likely more advanced than most of the comparable programmers. The grievant has also offered additional evidence that she has personally coached one of the comparable programmers through the use of certain commands in Mapper. The evidence reviewed raises questions as to whether the reason provided by the agency during the grievance process, i.e., the grievant’s “average at best” Mapper skills, was truly the basis of their decision or an after-the-fact justification. Indeed, the question also remains, even if the grievant’s Mapper skills were in fact problematic, whether that would be a proper basis under the HCM process and state policy to slot the grievant as intermediate, especially when relating the grievant’s skills to those of the comparable programmers.

The department manager also stated that a difference between an advanced employee and an intermediate employee was, in part, the leadership experience of the employee. All of the comparable programmers were in the same basic position prior to the slotting determination. As such, there is no evidence that any of the comparable programmers were supervising any employees as a leader. Indeed, all of the comparable programmers’ EWPs indicate they supervised no agency employees. The grievant answered many of the management questions on the skills survey because she had experience in at least one prior job performing project management duties. Additionally, she has received leadership training through her MBA degree and previous work. The other comparable programmers provided very limited responses in the management areas. Moreover, the first and third step-respondents indicated that management experience was not relevant to the slotting determination. This directly contradicts the department manager’s statement that leadership was a factor in the determination. According to their EWPs, advanced employees have leadership duties. This contradiction is yet another unexplainable inconsistency in the agency process.

In addition to these discrepancies, there is no clear indication in a comparison of the qualifications of the comparable programmers and the grievant why she was slotted as intermediate and the others were slotted advanced. The grievant has a bachelor’s degree in computer science and an MBA with emphasis in IT management. One of the employees slotted as advanced has an associates degree, while another has a bachelor’s degree in urban

studies. The grievant's past work experience, overall years of experience, qualifications, and skills ratings as reflected in the skills surveys all appear comparable to the employees who were slotted advanced. Additionally, the grievant has stated that prior to and immediately after the slotting determinations, she was asked to complete advanced level work, such as the completion of the TDD, and was serving as the technical lead on a project prior to the occurrences giving rise to Grievance #2.

Because the evidence raises a sufficient question as to whether the agency consistently applied the standards for slotting among all employees and whether the agency determined the grievant's slot based upon merit, this Department deems it appropriate for a hearing officer to determine the facts of Grievance #1. A hearing officer will be in a better position to assess the conflicting evidence offered by both sides. This qualification ruling in no way determines that the agency's actions were in fact improper, only that further exploration of the facts by a hearing officer is appropriate.

Grievance #2

Retaliation

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;¹³ (2) the employee suffered a materially adverse action;¹⁴ and (3) a causal link exists between the materially adverse 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 nonretaliatory business reason for the materially 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.¹⁵ Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the agency's explanation was pretextual.¹⁶

The grievant alleges that thirty minutes after initiating a grievance, her job duties were significantly altered and she was removed from her technical lead position on her only project. Initiating a grievance is clearly a protected activity.¹⁷ In addition, the agency's

¹³ See Va. Code § 2.2-3004(A). 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 an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law." *Grievance Procedure Manual* § 4.1(b)(4).

¹⁴ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). For a grievance to qualify for hearing, the action taken against the grievant must have been materially adverse such that a reasonable employee in the grievant's position might be dissuaded from participating in protected conduct. *Id.* at 2415.

¹⁵ *E.g.*, *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4th Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4th Cir. 2000).

¹⁶ See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

¹⁷ See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

actions could be viewed as “materially adverse.” The grievant has presented evidence of significant limitations in the work she would be permitted to perform, even though, as she has stated, that work was necessary and she was capable of completing the tasks. A hearing officer could reasonably find that such a change in an employee’s duties could dissuade a reasonable employee from engaging in protected conduct.¹⁸ Further, the extremely close temporal proximity between the grievant’s filing of a grievance and the removal of her job duties raises a sufficient question of a causal relationship. Indeed, the removal of the grievant’s job duties was directly related to the subject matter of the June 23, 2006 grievance, i.e., the assignment of her job duties.

The explanations offered by the agency for the change in the grievant’s job duties were 1) “assignments are routinely rotated through the team,” and 2) “to ensure that the work progressed during the vacation of the supervisor while the appropriateness of such an assignment could be explored.” The grievant argues that these explanations are pretextual. First, she stated that technical leads usually complete the TDD and work on a project from beginning to end. Such a position, according to the grievant, is rarely rotated unless work is needed for a higher priority project, which was apparently not an issue in this case. Secondly, the grievant asserts that the suggestion that the work was assigned to another programmer to ensure the work progressed is “fictitious.” The grievant argues that she was the only member of her team with the skills to complete the work on this project, which involved Oracle. The programmer assigned this work, in lieu of the grievant, did not have the necessary Oracle skills. She states that assistance had to be requested from the database administration (DBA) group for the work to progress.

Finally, in a case like this, where the grievant will be afforded a hearing on Grievance #1, it simply makes sense to send to hearing as well Grievance #2 challenging the change in her duties, which flows directly from the slotting determination, the subject of Grievance #1.¹⁹ Both grievances arise from the assignment of the grievant to a position as an intermediate programmer. In addition, the two grievances share common factual questions relating to her treatment by management in relation to her job duties. Finally, sending these related claims to a single hearing (see consolidation discussion below) will provide an opportunity for the fullest development of what may be interrelated facts and issues.

We note again, however, that this qualification ruling in no way determines that the agency’s actions with respect to the grievant were retaliatory or otherwise improper, only that further exploration of the facts by a hearing officer is appropriate, as a hearing officer is in a better position to determine questions of motive and credibility.

Consolidation

This Department has long held that it may consolidate grievances with or without a request from either party whenever more than one grievance is pending involving the same

¹⁸ See *Burlington N.*, 126 S. Ct. at 2415.

¹⁹ See EDR Ruling No. 2006-1291, 2006-1353; EDR Ruling No. 2005-957.

parties, legal issues, and/or factual background.²⁰ EDR strongly favors consolidation and will grant consolidation unless there is a persuasive reason to process the grievances individually.²¹

Grievance #1 and Grievance #2 share a common factual background concerning the conduct of management toward the grievant stemming from the initial slotting determination. Because the grievances additionally involve the same parties, potentially many of the same witnesses, and are essentially inextricably intertwined, this Department deems it appropriate to send both Grievance #1 and Grievance #2 for adjudication by a common hearing officer to help ensure a full exploration of what could be interrelated facts and issues.

CONCLUSION

For the reasons set forth above, the grievant's June 1, 2006 and June 30, 2006 grievances are qualified and consolidated for hearing before the same hearing officer. Within five workdays of receipt of this ruling, the agency shall request the appointment of a hearing officer to hear these grievances, using the Grievance Form B.

Claudia T. Farr
Director

²⁰ *Grievance Procedure Manual* § 8.5.

²¹ *Id.*