

Issues: Qualification: Performance Evaluation – Other, Retaliation – Grievance Activity  
Participation; EDR Ruling #2007-1706; Ruling Date: June 28, 2007; Agency:  
Department of Environmental Quality; Outcome: Not qualified.



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

**QUALIFICATION RULING OF DIRECTOR**

In the matter of Department of Environmental Quality  
No. 2007-1706  
June 28, 2007

The grievant has requested qualification of his April 5, 2007 grievance with the Department of Environmental Quality (the agency). For the reasons set forth below, the grievance does not qualify for hearing.

FACTS

In 2006, the agency began a Career Path Program for environmental specialists to improve the development of employee knowledge and skills and to provide opportunities for advancement of employees within their current role based upon gained skills through a career path. As such, each Environmental Specialist II, including the grievant, was rated on a career path map based on the employee's demonstrated competencies in various areas. There are twenty categories on the career path map. Each Environmental Specialist II is rated at one of three levels (Entry, Senior, or Senior II) in each category. The employee is then given an overall rating (Entry, Senior, or Senior II) based on how the employee is rated within the categories. For example, if the employee receives a Senior II rating in at least 80% of the categories, he or she will receive an overall rating of Senior II. In this case, the grievant was rated Senior II on 75% of the categories and, therefore, was rated overall at a Senior level.

The agency states that an employee's rating does not carry any change in role, duties, or salary, and does not affect an employee's application for another position inside or outside the agency. However, an employee can achieve an in-band adjustment if, during a re-evaluation at the end of each year, the employee has demonstrated sufficient competencies to move to a higher level. Once an employee attains the Senior II level, the employee can become a team or technical leader, and there may be additional compensation available. An employee's career path map does not alter the duties in an employee's Employee Work Profile (EWP), but is attached to that document.

The grievant argues that he was not rated at the appropriate level on his career path map. Specifically, the grievant argues that the agency failed to take into account his past knowledge, skills, and abilities (KSAs) that he allegedly demonstrated in prior positions.

According to the agency, past experience in other jobs is not considered in the evaluation. Rather, the career path map assesses what the employee is doing currently to contribute to the agency. As such, the grievant's supervisor stated that he evaluated the grievant based on his knowledge of the work the grievant has performed in his current position. The grievant additionally claims that the agency's failure to recognize his past KSAs in the career path map is evidence that the agency refuses to recognize his past KSAs generally. He argues that he has been functionally demoted by the agency.

The grievant also alleges that he has been retaliated against for filing previous grievances. In an attachment to his Form A, the grievant identifies his past grievances and history of disputes with the agency dating back to 1995. The grievant asserts that his evaluation in the career path map and the agency's alleged refusal to recognize his past KSAs is a "functional demotion" and a continuation of retaliatory treatment for past grievance activity.

### DISCUSSION

#### *Misapplication or Unfair Application 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 "shall not proceed to hearing" unless there is sufficient evidence of discrimination, retaliation, unwarranted discipline, or a misapplication or unfair application of policy.<sup>1</sup> In this case, the grievant claims that management misapplied or unfairly applied policy and procedures by rating him as a Senior, rather than a Senior II, employee on his career path map, resulting in a "functional demotion." 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 grievance procedure generally limits grievances that qualify for a hearing to those that involve "adverse employment actions."<sup>2</sup> Thus, typically, a threshold question is whether the grievant has suffered an adverse employment action.<sup>3</sup> An adverse employment action is defined as a "tangible employment action 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."<sup>4</sup> Adverse

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<sup>1</sup> Va. Code § 2.2-3004(C); *Grievance Procedure Manual* § 4.1(c).

<sup>2</sup> See *Grievance Procedure Manual* § 4.1(b).

<sup>3</sup> While evidence suggesting that the grievant suffered an "adverse employment action" is generally required in order for a grievance to advance to hearing, certain grievances may proceed to hearing absent evidence of an "adverse employment action." For example, consistent with recent developments in Title VII law, this Department substitutes a lessened "materially adverse" standard for the "adverse employment action" standard in retaliation grievances. See EDR Ruling No. 2007-1538.

<sup>4</sup> *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

employment actions include any agency actions that have an adverse effect *on the terms, conditions, or benefits* of one's employment.<sup>5</sup>

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 action like the evaluation of the grievant's demonstrated work and skills 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>6</sup> Because the grievant has presented no evidence that the agency's approach to his career path map was inconsistent with that of other employees, this grievance can only qualify for hearing if the grievant were to show that the agency's action was arbitrary or capricious.

Here, the grievant's supervisor's assessment of the grievant's skills appears to have been based on his observation of the grievant's demonstrated work. The grievant's supervisor stated that he had not observed the grievant perform the Senior II work identified in the competencies for which the grievant received only a Senior rating in his current job. While the grievant disagrees with the agency's assessment of his competencies, he has not offered evidence that might show that the agency's assessment disregarded the facts or lacked a reasoned basis. Nor has the grievant provided any examples of the work that he currently performs that would contradict the agency's interpretation of his performance.<sup>7</sup> As such, the grievant has not raised a sufficient question that the agency was arbitrary or capricious in rating the grievant at a Senior level based on his work in his current position.

The grievant further asserts that it was improper for the agency to ignore his past KSAs during the career path process. While there is no portion of the agency's Career Path Program Procedure stating that an employee's past KSAs do not count in an assessment of the employee's competencies for the career path map, there is nothing in the procedure that is inconsistent with that approach either. Moreover, many of the competency descriptions, including all those for which the grievant was rated at the Senior level only, describe conduct in the present tense, i.e., what the employee "demonstrates" now in his or her position. In this case, therefore, the agency's decision to implement the Career Path Program based on assessments of its employees' demonstrated competencies in their current position is entitled to deference absent evidence of inconsistent treatment. Because the grievant has presented no evidence that past KSAs were considered for other employees, the grievant has failed to raise a sufficient question of a misapplication or unfair application of policy to qualify for hearing.

### *Retaliation*

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<sup>5</sup> Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4<sup>th</sup> Cir 2001)(citing Munday v. Waste Management of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> Cir. 1997)).

<sup>6</sup> 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."

<sup>7</sup> The grievant stated that he received a Senior level competency rating in certain categories for which he believes he performs work at a Senior II level in his current position. However, the grievant has not provided specific examples or any evidence that would indicate that the agency's assessment was arbitrary or capricious.

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;<sup>8</sup> (2) the employee suffered a materially adverse action;<sup>9</sup> and (3) a causal link exists between the materially adverse action and the protected activity; in other words, whether management took a materially adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory 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.<sup>10</sup> 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>

Initiating and participating in a grievance is clearly protected activity.<sup>12</sup> However, even if it is assumed that the grievant has experienced a materially adverse action,<sup>13</sup> the

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<sup>8</sup> 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).

<sup>9</sup> *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15 (2006). Based on this Department's construction of the grievance statutes, a grievance must involve a non-trivial harm to qualify for hearing. *E.g.*, EDR Ruling No. 2004-932. Frequently, the non-trivial harm constitutes an "adverse employment action," (defined as a "tangible employment action 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"). However, we have recognized that in some circumstances it is appropriate to send grievances to hearing when the grievant may not have suffered an "adverse employment action." For example, this Department qualified a grievance involving a purported violation of the state's military leave policy (DHRM Policy 4.50). The agency had allegedly failed to reinstate an Army National Guard member to his former position and duties upon his return from active military duty. In EDR Ruling Nos. 2006-1182 and 2006-1197, we noted that Virginia law served as the underpinning for the state's policy and that the Virginia statute requires that an employee must be returned to the position he held when ordered to duty unless such position has been abolished or otherwise ceases to exist. Moreover, we noted that there is no adverse employment action requirement under the state statute (or pertinent provisions of federal law). Thus, we concluded that "if there is a state or federal law that forms the basis of the policy at issue and that state or federal law does not require the presence of an 'adverse employment action' for an actionable claim, this Department will defer to the standard set forth by that state or federal law." Thus, consistent with developments in Title VII law (*Burlington Northern*), on July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, this Department adopted the "materially adverse" standard for qualification decisions based on retaliation. We note that in the *Burlington Northern* decision the Court observed that the requirement of "materiality" is critical to "separate significant from trivial harms." *Burlington N.*, 126 S. Ct. at 2415. The latter, including normally petty slights, minor annoyances, snubbing, and simple lack of good manners, do not deter protected activity and are therefore not actionable. For the same reason, in the context of the grievance process, a retaliation grievance based on a trivial harm will not be qualified for hearing by this Department. Moreover, to establish a consistent standard for retaliation cases, this Department has construed the grievance statutes and the *Grievance Procedure Manual* and adopted the materially adverse action standard for all claims of retaliation, whether they arise under a Title VII analog or not.

<sup>10</sup> See *EEOC v. Navy Fed Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005); *Rowe v. Marley Co.*, 233 F.3d 825, 829 (4<sup>th</sup> Cir. 2000).

<sup>11</sup> See *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

<sup>12</sup> See Va. Code § 2.2-3004(A); *Grievance Procedure Manual* § 4.1(b)(4).

grievant has presented no evidence that a causal link exists between the grievant's prior protected acts and the alleged adverse action at issue in this case. The grievant has provided information regarding his past grievances and the alleged retaliatory conduct of the agency with regard to those past grievances. Much of the conduct he cites occurred more than five years ago, and some more than ten years ago. The grievant has not presented any evidence that the agency's assessment of his competencies for the career path map was motivated by improper factors. Moreover, the grievant's supervisor stated that the determinations were based on his assessment of the grievant's demonstrated work in his current position. The grievant has not presented evidence that raises a sufficient question that the agency's stated rationale for placing the grievant at the Senior level on the career path map was pretextual. Because the grievant has not raised a sufficient question as to the elements of a claim of retaliation, the grievant's claim does not qualify for hearing.

*Failure to Consider Past KSAs*

In addition to claiming that the agency failed to consider his past KSAs in conjunction with the career path map, the grievant asserts that the agency has improperly refused to recognize his past KSAs generally. The grievant has presented no evidence, however, that the agency has improperly failed to recognize his past KSAs in any manner. Moreover, the conduct the grievant does point to relates to prior concluded grievances and events at least five years in the past. As such, the grievant's general arguments concerning his past KSAs do not constitute a claim that qualifies for a 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 the qualification determination to the circuit court, the grievant 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 wishes to conclude the grievance and notifies the agency of that desire.

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Claudia T. Farr

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<sup>13</sup> In *Burlington Northern*, the Court noted that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 126 S. Ct. at 2415. "A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children." *Id.* The Court determined that "plaintiff must show that a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

Director