

Issues: Performance (arbitrary/capricious evaluation), and Group I (unsatisfactory work performance); Hearing Date: 12/06/17; Decision Issued: 04/20/17; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10895, 10896; Outcome: Partial Relief.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10895 / 10896

Hearing Date: December 6, 2016
Decision Issued: April 20, 2017

PROCEDURAL HISTORY

On September 11, 2015, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance and failure to follow instructions.

On October 11, 2015, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing.

Grievant received an unsatisfactory annual performance evaluation. On February 29, 2016, he filed a grievance challenging that evaluation. On October 13, 2016, the Office of Employment Dispute Resolution issued Consolidation Ruling 2017-4426.

On October 25, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 6, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether Grievant's annual performance evaluation was arbitrary or capricious?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievant has the burden of proof to show that his performance evaluation was arbitrary or capricious. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Social Services employed Grievant as a Support Enforcement Supervisor. He has been employed by the Commonwealth for approximately 20 years.

The District Manager supervised 46 employees including two contract employees. Four supervisors including Grievant reported to the District Manager. The District Manager reported to the Regional Director.

Grievant's team included 10 specialists and two seniors. The number of employees reporting to Grievant did not change when the Agency merged two offices in different localities into one office. The Agency increased his staff size by two employees in July 2015.

In September 2014, Grievant asked the District Manager to hire an additional supervisor to assist with the existing caseload.

On October 24, 2014, the District Manager sent employees in Grievant's Office a memorandum regarding "Customer Service Protocols." She wrote:

The number of escalated complaint calls has increased significantly in the past two months. *** [C]lients are complaining that they are not receiving a return phone call. As a result, they are contacting the call center multiple times in an attempt to reach their worker. ***

The way complaints are to be handled has been reorganized to immediately begin to address and prevent complaints. ***

Call and Worklist Record-keeping –

1. All workers will keep a log of received and missed transfer calls from the Call Center.
2. All workers will review worklists daily and call clients that have requested a return call. Workers are to report any calls that have not been returned within 5 business days to their supervisor.
3. Workers will report all temporary or continuing issues with the soft phone to their supervisor. Please call in a ticket to VITA if issues remain longer than 1 day. Records as to the type and frequency of problems will help address repetitive issues.¹

On January 15, 2015, Grievant received a Notice of Improvement Needed/Substandard Performance. He was advised:

Filing a minimum number of [show cause rulings (SCRs)] significantly impacts our ability to meet current support and arrears goals in addition to the total number of dollars collected for children.

[Grievant] is responsible for ensuring that Enforcement Specialists complete 175 SCRs per month. This has been challenging while moving the office. Files were being imaged and with employee vacancies. However, in both October and November, the number of SCRs were extremely low with 3 SCRs in October and 8 in November. Despite an email to your team November 14th reinforcing the need to increase show cause rules, there were 20 filed in December 2014 (based on court log).

Providing great customer service requires timely complete and accurate responses to clients' issues.

¹ Agency Exhibit 11.

[Grievant] is responsible for ensuring client issues are addressed timely, accurately, and completely by Enforcement team employees. The number of complaints from clients that are referred to me because no one was called them back or no follow up action was taken are at an all time high. As noted above, I recognize the challenges of change plus operating in temporary office space with equipment that may not always be reliable. However, follow up and follow through on case issues and casework is a critical and priority responsibility that you must oversee and manage daily.

Improvement Plan:

Ensure the Enforcement team files a minimum of 70 SCRs in January and 100 in February 2015. These numbers do not replace your current monthly goal but recognize that you have fewer designated specialists.

Ensure new Enforcement team members are scheduled for training by January 30, 2015 so they can begin actively working toward designation of show cause rules. This will ultimately increase the number of designated specialist, SCRs and progress toward 175 SCRS monthly.

Review the performance expectations with SES staff versus the number of SCRs filed in recent months. Develop improvement or other plans with employees as needed to increase SCRs.

Conduct weekly case and worklist reviews with an emphasis on preventing or fully resolving complaints on a timely basis. Address any training or other requirements to improve the quality of SES' casework and follow up.

Provide a weekly summary of case follow up actions needed and completed for all complaints referred to the DM and delegated to you.

Meet monthly to discuss progress on this plan with review in 90 days to assess improvements.²

On May 7, 2015, Grievant sent the District Manager a memorandum stating, in part:

I submitted an email last year stating the Enforcement unit would require (not desire) 2 additional Specialists to equal 16 and 2 PST's for administrative support. *** At this point none of my request was fulfilled, and a significant number of the probably scenarios have come to fruition. *** My staff is overloaded and you know it; now I have a possible long-

² Agency Exhibit 12.

term absents of one staff members, another retiring and a recent resignation of one new hire.³

On June 16, 2015, the District Manager wrote Grievant a memorandum regarding Grievant's requests for additional staffing:

I am making the following staffing changes to encourage and support enforcement staff in reaching our goals, work cases effectively and, increase positive interactions with customers.

- 1) Assignment of One Contract Staff position as of July 1, 2015 through December 15, 2015. ***
- 2) Re-assignment of One Establishment SES to Enforcement as of July 1, 2015.⁴

Worklists for July 10, 2015 and July 22, 2015 were reviewed for follow up calls made to customers. The worklist for July 10, 2015 showed 240 priority items. The worklist for July 22, 2015 showed 140 priority items. The majority of worklist items were seeking return telephone calls. These items often were noted as "no response from caseworker – request supervisor; request callback; or 2nd request."

On July 15, 2015, Grievant deleted approximately 259 worklist items without having responded to the request.⁵

On September 14, 2015, six of Grievant's subordinates filed similarly-worded grievances requesting additional staffing and resources to assist with completing the backlog of work assignments.

On March 13, 2015, the District Manager sent an email to employees including Grievant stating:

Permanent moves to different workstations must be approved by [District Manager] or [Interstate District Manager].⁶

Ms. C was transferred to Grievant's team but her workstation remained unchanged. Her workstation was approximately 20 feet from Grievant's team which was clustered in a group of workstations. One of the workstations in the group was unoccupied. According to Grievant, Ms. C met with Grievant and told him she did not feel like she was part of the team because she was sitting separate from the team.

³ Agency Exhibit 1.

⁴ Agency Exhibit 1.

⁵ Grievant asserted he was deleting duplicate items from the list.

⁶ Agency Exhibit 24.

Grievant told Ms. C he thought she did not want to move. Ms. C became emotional and said she wanted to sit with the enforcement team.

Grievant authorized Ms. C to move her workstation to the empty workstation without first consulting the District Manager. On August 3, 2015, the District Manager learned of Grievant's action. The District Manager told Ms. C to return to her former workstation.

In December 2015, Grievant received a performance evaluation for the 2014 – 2015 performance year with an overall rating of Below Contributor. With respect to Grievant's Essential Responsibilities, Grievant received the following ratings:

- Improves Organizational effectiveness through Performance Management – Below Contributor.
- Demonstrates Program Effectiveness by managing team operations and directly supervising enforcement staff in a district office that contributes to the achievement of goals and success of initiatives – Extraordinary Contributor.
- Demonstrates Public Accountability by managing case compliance and quality service delivery – Below Contributor.
- Demonstrates Public Accountability by conducting Supervisory Reviews – Below Contributor.
- Contributes to the office achieving the VDSS Agency Work Plan objectives for Collecting less than 65% of current support owed; and no less than 64% of the cases where arrearages are due – Contributor.
- Ensure supervised employees follow policies and procedures to improve the effectiveness and efficiency of agency operations, to consistently provide reliable financial information if applicable, to comply with applicable laws and regulations and to safeguard agency assets if applicable – Contributor.
- Complies with policies, procedures, and processes – Contributor.
- Ensures all steps in the grievance process are followed and completed in a timely manner. Strives towards diversity in all hiring decisions. Models behavior required of all employees – Below Contributor.
- Communication & Teamwork – Below Contributor.
- Manages worker timesheets and leave requests. Communicates and seeks approval for personal leave in advance – Contributor.

Grievant evaluated his subordinates in October 2015. He presented his proposed evaluations to the District Manager. These evaluations were favorable. The District Manager told Grievant, "I am not suggesting you change the rating – except those you rated as extraordinary in customer service."⁷

⁷ Agency Exhibit 23.

On January 21, 2016, Grievant sent an email to the District Manager and Regional Manager informing them he had filed a complaint with the Equal Employment Opportunity Commission regarding retaliation, harassment, and discrimination.

CONCLUSIONS OF POLICY

The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice. Grievant has presented sufficient evidence to show that his annual performance evaluation was arbitrary or capricious.

Group I Written Notice

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”⁸ Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[U]nsatisfactory work performance” is a Group I offense.⁹ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

Grievant was instructed that permanent moves of employees to different workstations were to be approved by the District Manager or the Interstate District Manager. In August 2015, Grievant authorized Ms. C to change her workstation to be closer to his work team. He did not obtain permission of the District Manager or Interstate District Manager. Grievant’s behavior was unsatisfactory to the Agency. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

The Agency also alleged the Group I Written Notice was justified because Grievant failed to monitor worklists and review cases to improve customer service as required by his Notice of Improvement Needed/Substandard Performance.

As part of the January 15, 2015 Notice of Improvement Needed, Grievant was instructed to monitor worklists and review cases to improve customer service. Grievant was unable to improve the response time of himself and his team members. He deleted several worklist items rather than responding to them on a timely basis.

⁸ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

⁹ See Attachment A, DHRM Policy 1.60.

Grievant's Excessive Workload

Grievant argued that his workload and the workload of his team was excessive and that this affected his ability to meet the Agency's performance expectations. Grievant has established that this workload was excessive and it affected his work performance based on several factors. First, Grievant had sufficient experience to be able to determine whether his workload was excessive. Second, Grievant repeatedly and over several years asked Agency supervisors to provide additional staff without being provided adequate assistance. Third, approximately half of Grievant's subordinates filed grievances challenging the adequacy of staffing. Although the Agency observed that these grievances were similarly worded and initiated by Grievant, filing a grievance is a significant employee statement regardless of how it originated. Fourth, Grievant and his subordinates were unable to complete their work duties including timely returning telephone calls. It is not surprising that employees who are overworked would set aside returning telephone calls in order to focus on existing work tasks. Fifth, the Agency finally provided Grievant with additional staff in July 1, 2015. This confirmed Grievant's claim that he lacked an adequate number of staff.

The Agency argued that Grievant's workload was not excessive when measured against the caseloads of other districts. Whether the caseload of Grievant's district was excessive is at the high or low of the range of district caseloads is an important consideration, but not a defining consideration.¹⁰ It may be the districts with caseloads higher than Grievant's caseload are even more understaffed than Grievant's district. It may be that districts with higher caseloads also have understaffed units within them.

Mitigation

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management"¹¹ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has

¹⁰ On August 18, 2015, the Regional Director compared the 16155 caseload for the 46 employees in Grievant's district with the caseloads of other districts. She concluded that Grievant's district was "nowhere near being at the top of the highest amount of cases per worker per the most recent staffing report issued for July by Home office." Agency Exhibit 22. Although this analysis is significant, Grievant's team consisted of between 10 and 12 employees, not 46.

¹¹ *Va. Code § 2.2-3005.*

consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

The Agency issued the Group I Written Notice for two reasons – poor customer service and moving an employee's workstation without permission. Grievant's excessive workload was a mitigating factor with respect to poor customer service but not with respect to moving Ms. C. Thus, there remains sufficient evidence to support issuance of a Group I Written Notice.

Discrimination

Governor's Executive Order 1 provides:

This policy specifically prohibits discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, gender identity, age, political affiliation, or against otherwise qualified persons with disabilities.

DHRM Policy 2.05 governs Equality Employment Opportunity and provides:

Provides that all aspects of human resource management be conducted without regard to race, sex, color, national origin, religion, sexual orientation, gender identity, age, veteran status, political affiliation, genetics, or disability in accordance with the Governor's Executive Order on Equal Opportunity and state and federal laws.

Grievant had a difficult relationship with his supervisors. Grievant's supervisors expected a higher level of performance from Grievant than he was providing. Grievant expected his supervisors to respond to his requests for additional assistance. This difference in expectations resulted in conflict between Grievant and his supervisors with neither party believing the other party's position was valid.

Grievant argued that the Agency discriminated against him because of his race. He claimed the Agency created a hostile work environment for him. Grievant testified that his supervisors discriminated against him because of his race. He presented testimony from his subordinates who also believed Grievant's managers acted based on race. These opinions are important considerations, but standing alone they are insufficient to show racial discrimination.

The conflict that arose between Grievant and his supervisors appears primarily based on the different expectations held by Grievant and his supervisors and not based on Grievant's race. The pressure Grievant's two supervisors placed on him related to their beliefs that Grievant and his unit were under performing and not because of Grievant's race. This pressure made Grievant feel he was in a hostile environment.

Grievant offered as an example of discrimination an incident when the District Manager interrupted a meeting Grievant was holding with several subordinates. The

District Manager perceived the meeting to be one where Grievant was instructing his subordinates how to file complaints regarding their workload. According to Grievant, the District Manager entered the room and threw documents on the table and in an irate manner said, "I am sorry to interrupt your little meeting, but I am sick of these complaints."¹² At the conclusion of the meeting, Grievant went to the District Manager's office and told her behavior was hostile and unprofessional. Ms. G was also in the meeting and described the District Manager's behavior as "rude and very disrespectful to [Grievant] as a Supervisor and to [Ms. R] and me as his senior staff."¹³ If the Hearing Officer assumes Grievant's version of the facts to be true, the incident shows the District Manager engaged in offensive behavior because she was tired of complaints. It does not show that the District Manager's behavior related to Grievant's race.

Grievant argued that the District Manager treated her two white supervisors differently from her two African-American supervisors because the two white supervisors were adequately staffed while the two African-American supervisors were dramatically understaffed. Insufficient evidence was presented to support this allegation.

In short, what Grievant perceived as racial discrimination was more likely the result of conflict between Grievant and several managers with strongly held beliefs regarding Grievant's work performance. The "hostile environment" Grievant experienced was not because of Grievant's race but was because Grievant disagreed with and challenged his supervisors.

The Hearing Officer's conclusion is consistent with the finding of the EEOC that it was unable to conclude civil rights statutes were violated by the Agency.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁴ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse employment action, retaliation is not established unless the Grievant's evidence shows

¹² Ms. R heard the District Manager say, "I just received another customer complaint and I am sick of it!" "Fix it now!"

¹³ Grievant Exhibit 15.

¹⁴ See Va. Code § 2.2-3004(A)(v) and (vi). 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.

by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Ultimately, to support a finding of retaliation, the Hearing Officer must find that the protected activity was a "but-for"¹⁵ cause of the alleged adverse action by the employer.¹⁶

Grievant filed complaints about his supervisors thereby engaging in protected activity. He suffered an adverse employment action because he received a Group I Written Notice. Grievant has not established a nexus between his protected activity and the Agency's disciplinary action. The Agency took disciplinary action because it believed Grievant's work performance was not adequate.

Arbitrary or Capricious Evaluations

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

To receive an overall rating of Below Contributor, an employee must receive a Notice of Improvement Needed/Substandard Performance and, or a Written Notice during the annual performance cycle. In this case, Grievant received a Notice of Improvement Needed/Substandard Performance as well as a Written Notice during the performance cycle.

Grievant's work performance was evaluated with the assumption that he was not understaffed. Grievant was understaffed for approximately nine months of the twelve month performance period. By assuming Grievant was adequately staffed for nine months, the Agency's evaluation of Grievant's work performance disregarded a material fact. This mistaken assumption affected the outcome of his evaluation. For example, Grievant received a Below Contributor rating regarding "managing case compliance and quality service delivery." Grievant's annual evaluation was arbitrary or capricious.

When an agency failed to properly evaluate an employee, the Agency must repeat the evaluation process and provide a rating with a reasoned basis related to established expectations.

¹⁵ This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.

¹⁶ See, Univ. Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**.

The Agency is **Ordered** to repeat Grievant's annual performance evaluation while recognizing that Grievant was inadequately staffed for approximately nine months of the evaluation period.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.¹⁷

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

¹⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.