

Issue: Performance (arbitrary/capricious evaluation); Hearing Date: 03/21/17;
Decision Issued: 06/21/17; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case
No. 10961, 10962; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10961 / 10962

Hearing Date: March 21, 2017
Decision Issued: June 21, 2017

PROCEDURAL HISTORY

Grievant received an annual performance rating of Unsatisfactory Performer. He was re-evaluated after a three month period and removed from employment due to an Unsatisfactory Performer rating.

Grievant filed grievances to challenge the Agency's action. The matter proceeded to hearing. On February 8, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 21, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency's evaluations of Grievant were arbitrary or capricious?
2. Whether Grievant's removal was in accordance with State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show that his annual evaluation was arbitrary or capricious. The burden of proof is on the Agency to show that the re-evaluation was consistent with State policy. 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.

DISCUSSION

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.

An employee who receives a Below Contributor rating on his or her annual performance evaluation, can be re-evaluated over a three month period and removed from employment if his or her performance does not improve.

Annual Performance Evaluation

An employee cannot be rated "Below Contributor" on the annual evaluation unless he/she has received:

- At least one Notice of Improvement Needed/Substandard Performance form; OR
- A Written Notice for any reason as defined in Policy 1.60, Standards of Conduct.

Grievant received a Notice of Improvement Needed on February 22, 2016. He received a Written Notice on May 23, 2016.

On October 14, 2016, Grievant received an annual performance evaluation with ratings for core responsibilities.¹

Grievant received an Unsatisfactory Performer rating for the core responsibility of Program and Project Coordination. The Agency showed that Grievant had difficulty working independently and needed consistent feedback. For example, Grievant began

¹ The performance evaluation was later revised on December 14, 2016.

working on an outreach program in November 2015, but the plan was not fully executed.

Grievant received an Achiever rating for the core responsibility of Events, Committees and Outreach Efforts.

Grievant received an Unsatisfactory Performer rating for the core responsibility of Research and Development. The Agency showed that Grievant presented the Supervisor with the Ozzi machine as a potential project. The Supervisor provided Grievant with feedback regarding the project. Grievant did not place the project in final form. In late 2015, Grievant told the Supervisor he wanted to pursue either a LEED AP personal certification or IFMA personal certification. Grievant took over 10 months to decide which certification to pursue.

Grievant received an Achiever rating for the core responsibility of University Engagement and Community Engagement.

Grievant received an Achiever rating for the core responsibility of VCU Sustainability Committee.

Grievant received an Unsatisfactory Performer rating for the core responsibility of Communications. The Agency established that Grievant received a written notice for unprofessional communication styles both in writing and in person. Grievant sent emails relating to his projects that contained misspellings, sentence fragments, and grammar errors.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Code of Conduct. The Agency established that Grievant continued to focus on operational recycling without focusing on the duties of his position.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Leadership. The Agency established that Grievant did not work adequately to understand projects. He often did not retain information shared in staff meetings and meetings with his Supervisor.

Grievant received an Achiever rating for the Objective and/or Competencies of Teamwork.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Customer Service. The Agency established that Grievant used customer service as a justification for performing tasks outside the scope of his position.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Planning and Integration. The Agency established that Grievant sometimes sets and creates timelines for project and then forgets about them after presenting the project to his Supervisor.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Professional Attitude and Image. The Agency has established that some of Grievant's communications such as emails were not professionally written.

Grievant received an Achiever rating for the Objective and/or Competencies of Quest for Distinction.

Grievant received an overall rating of Unsatisfactory Performer for his annual evaluation. Grievant has not established that his annual performance evaluation is arbitrary or capricious.

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed.

On October 18, 2016, the Supervisor sent Grievant a memo stating:

This memorandum confirms that your reevaluation period began on October 13, 2016 through January 13, 2017, due to the recent rating of "Unsatisfactory Performer" that you received on your annual performance evaluation.

During the three month reevaluation, I will monitor your progress toward meeting the performance expectations given to you on October 13, 2016. We have discussed specific actions that you must take including completing time management training, completing Word 2016 and Excel 2016 training, spend time practicing skills honed in Word, Excel and complete project management training. I will offer assistance, but it is your responsibility to improve your performance.

You performance evaluation date does not change, and the annual performance cycle resume if you receive a rating of "Fair Performer" on the reevaluation.

If the reevaluation reflects a rating of "Unsatisfactory Performer", I will assess whether an alternative job assignment exists in the department. If no additional employment options are available to you, State policy requires that you be removed from your current position based on low performance evaluation scores.²

Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.

² Agency Exhibit 11.

The Agency failed to comply with State policy because it did not develop a performance re-evaluation plan and have it approved by the reviewer. The question becomes whether this failure is harmless error. The purpose of the re-evaluation plan is to place an employee on notice of the Agency's performance expectations for the following three months. Grievant was expected to perform the same duties he performed during his annual performance evaluation. He was re-evaluated based on the same core responsibilities he had during the annual performance period. The evidence is sufficient for the Hearing Officer to conclude that Grievant knew what duties the Agency expected him to perform. He was advised of the length of the re-evaluation period and that he would be re-evaluated at the conclusion of that period with removal as a possible consequence of poor performance. The Hearing Officer concludes that the Agency's mistake was harmless error.

Grievant received an Unsatisfactory Performer rating for the core responsibility of Program and Project Coordination. In November Grievant began working on a proposal for a native flower garden by a building. Grievant submitted the proposal to the Supervisor. The Supervisor found the proposal confusing and disorganized. The Supervisor worked with Grievant from November 9, 2016 to December 20, 2016 to edit and organize the proposal. The Supervisor concluded Grievant was unable to work independently or able to retain constructive feedback. The Supervisor concluded Grievant was unable to produce quality work and follow through projects to completion.

Grievant received an Achiever rating for the core responsibility of Events, Committees and Outreach Efforts.

Grievant received an Unsatisfactory Performer rating for the core responsibility of Research and Development. The Supervisor wrote that the rating did not change.

Grievant received an Achiever rating for the core responsibility of University Engagement and Community Engagement.

Grievant received an Unsatisfactory Performer rating for the core responsibility of VCU Sustainability Committee. Grievant was responsible for assisting the Operations subcommittee of the Sustainability Committee.³ The co-chairs were responsible for implementing the action items in the Operations section of the Sustainability Plan. On November 17, 2016, the Supervisor asked Grievant for an update on all action items in the Operations section of the Sustainability Plan. Grievant was to provide the update to the Supervisor during their meeting scheduled for December 6, 2016. On December 6, 2016, Grievant presented an incomplete update to the Supervisor. Grievant had not spoken with the subcommittee co-chairs to ask for input. After the meeting, Grievant sent the Supervisor a report with information regarding each action item, however, the report was not in final form.

³ One of the co-chairs testified that Grievant was "like staff" for the subcommittee.

Grievant received an Unsatisfactory Performer rating for the core responsibility of Communications. The slides Grievant created for the Sustainability Committee presentation contained sentence fragments, run-on sentences and a video Grievant did not know how to operate during the November 30, 2016 meeting.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Code of Conduct. The Supervisor wrote that the rating did not change.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Leadership. The Supervisor wrote that the rating did not change.

Grievant received an Achiever rating for the Objective and/or Competencies of Teamwork.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Customer Service. The Supervisor wrote that this rating did not change.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Planning and Integration. The Supervisor wrote that this rating did not change.

Grievant received a Fair Performer rating for the Objective and/or Competencies of Professional Attitude and Image. The Supervisor wrote that this rating did not change.

Grievant received an Achiever rating for the Objective and/or Competencies of Quest for Distinction.

The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period. If an employee is absent for more than 14 consecutive days during the three (3)-month re-evaluation period, the period will be extended by the total number of days of absence, including the first 14 days.

On January 3, 2017, Grievant received an overall rating of Unsatisfactory Performer for his three month re-evaluation. Grievant has not established that his three month re-evaluation was arbitrary or capricious.

If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period. If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.

On January 4, 2017, the Supervisor sent Grievant a memorandum informing him that he would be removed from employment. The Agency considered whether to

demote, reassign, or reduce his duties but was unable to identify another position for Grievant.

CONCLUSIONS

The Hearing Officer draws several conclusions from the evidence presented:

The Agency substantially considered Grievant's work performance during his annual and three month evaluations.⁴

Grievant's annual evaluation and three month re-evaluation were not arbitrary or capricious.

Grievant presented evidence showing his satisfactory work performance. That evidence was not sufficient to show that the Agency's opinion of his work performance was arbitrary or capricious.

The Agency poorly communicated its evaluation of Grievant's performance. The Agency had to revise Grievant's annual performance evaluation several times. In several parts of the re-evaluation, the Supervisor wrote that the rating did not change but failed to write examples of Grievant's poor performance.

The Agency substantially complied with the material provisions of DHRM Policy 1.40 thereby justifying the Agency's decision to remove Grievant from employment.

DECISION

For the reasons stated herein, Grievant's request for relief with respect to his annual performance evaluation is **denied**. The Agency's decision to remove Grievant from employment is **upheld**.

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

⁴ Grievant pointed out that the Agency did not consider his work on the Single Stream program. This error is not sufficient to show that the Agency's evaluations were arbitrary or capricious.

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.⁵

[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

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.