

Issue: Separation from State due to Below Contributor rating on re-evaluation;
Hearing Date: 06/01/17; Decision Issued: 06/05/17; Agency: DARS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10990; 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: 10990

Hearing Date: June 1, 2017

Decision Issued: June 5, 2017

PROCEDURAL HISTORY

On February 16, 2017, Grievant was separated from employment following a three month re-evaluation with an overall rating of Below Contributor.

On March 13, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 27, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2017, a hearing was held at the Agency's office.

APPEARANCES

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

ISSUES

1. Whether Grievant's three month evaluation was arbitrary or capricious?
2. Whether Grievant's removal was in accordance with State policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that Grievant's removal was in accordance 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.

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 for Aging and Rehabilitative Services employed Grievant as a Quality Assurance Specialist. She had been employed by the Agency for over 15 years. The purpose of her position was:

Serves as a lead worker in a unit of disability analysts by assisting the unit supervisor, providing programmatic guidance of casework assistance to unit staff who process claims according to Social Security regulations, performing special tasks assigned by the unit supervisor and maintaining a case load. Accurately adjudicates assigned case load of disability claims filed under Title II, Title XVI, and Title XIX of the Social Security Act, as amended. May represent the Agency as a participant in Medicaid Appeals Hearings. This position has a slightly decreased production expectation due to increased responsibilities as a lead worker in the unit.¹

Grievant received an annual performance rating on November 1, 2016 with an overall rating of Below Contributor.

On November 16, 2016, Grievant received a re-evaluation plan setting forth her job expectations for the following three months. Grievant wrote in the comments section:

I don't agree with the last paragraph of the "Performance Measures for Core Responsibilities." I do not feel that I make extended or excessive breaks on a routine basis.²

Under the re-evaluation plan, Grievant was:

responsible for the adjudication of 596 per year, 149 per quarter, and 11.4 cases per week. An immediate improvement in quality expectations is required in order to meet agency expectations.

¹ Agency Exhibit 1.

² Agency Exhibit 4.

Process Medicaid claims within 90 days of application, unless acceptable reasons for delay are present and appropriately documented.

Ninety-day old cases will receive priority attention for current actions within 3 days after receiving aged status. The percentages for 60-day cases and 90-day cases tracked on the average on the IDS Summary screen in IDS.

The number of Aged cases should be decreased by the end of the quarter (12/30/2016) to reflect the agency's goals of 20% to 24% or below for 60-day cases and 10% - 14% or below for the 90-day cases (as per the 2016-2017 EWP Evaluation Guide).³

During the three month re-evaluation period, the Supervisor provided Grievant with assistance and feedback regarding completing her case load.

As of February 16, 2017, Grievant adjudicated 114 claims originally assigned to her. She also adjudicated 17 cases originally assigned to another employee who did not complete the cases. Her total was 131 cases.

As of February 13, 2017, 84 percent of Grievant's cases were over 60 days old and 51 percent were over 90 days old.

Grievant received a Below Contributor rating on her three month re-evaluation.

Two other employees were placed on re-evaluations plans and then failed to meet their performance expectations. Within two weeks of the end of their three month re-evaluation periods, the Agency offered these two employees to work as "Q" employees meaning they were quasi full time employees but not working 40 hours per week. These two employees accepted the Agency's offer to move to Q status in lieu of termination. Thus, at the end of their three months evaluation periods, they were considered by the Agency to be on Q status.

Grievant's three month re-evaluation period had not ended at the time the Agency made offers to the other two employees for them to move to Q status.

Agency managers considered whether to demote Grievant, transfer Grievant or reassign her duties. None of these options were viable options for the Agency. The only option the Agency considered as meeting its business needs was to offer to move Grievant to Q status.

During the two week period prior to February 16, 2017, the Agency offered to move Grievant to "a 24 hour work-week with partial benefits."⁴ Grievant contacted DHRM and was told by DHRM that the Agency could not make such an offer. On February 15, 2017, Grievant sent the Manager an email stating:

³ Agency Exhibit 4.

⁴ Q status requires a minimum of 30 hours worked per week.

While I appreciate the option of part time work, I understand from consultation with DHRM that the offer of reduced hours and benefits is not permitted by policy and that additional consultation with the DARS HR office is needed.⁵

On February 16, 2016, the Agency removed Grievant from employment because she declined Q status.

After realizing that the Agency's offer of Q status employment to the other two employees was not permitted by DHRM, the Agency reinstated the two other employees to full time status. The Agency reinstated these employees because it believed it could no longer remove the two employees because removal had to occur during the two weeks prior to the end of the re-evaluation period and that two week window had passed. Grievant remained removed from employment.

CONCLUSIONS OF POLICY

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed. Grievant received an annual performance evaluation with an overall rating of Below Contributor on November 1, 2016.

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.

- Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- The supervisor should develop an entire performance plan including, "Employee Development."
- If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form, which will be used for re-evaluation purposes. The form should clearly indicate that it is a re-evaluation.
- The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period.
- The employee's reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- If the employee transfers to another position during the re-evaluation period, the re-evaluation process will be terminated.

Grievant received a re-evaluation plan setting forth the Agency's expectations for her work performance during the following three months.

⁵ Agency Exhibit 6.

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.

Grievant was re-evaluated within two weeks prior to the end of the three month period. She received an overall rating of Below Contributor.

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.

The Agency’s re-evaluation of Grievant was neither arbitrary nor capricious. Grievant knew she was obligated to complete 149 cases during the three month period. She failed to do so. Grievant knew she was obligated to keep her case load current yet as of February 13, 2017, 84 percent of Grievant’s cases were over 60 days old and 51 percent were over 90 days old. The Agency appropriately weighted Grievant’s work performance during the three month period and concluded her performance was Below Contributor.

Grievant argued that the Agency incorrectly calculated the number of cases she closed and the number of days she took to process her case load. The evidence showed that the Agency’s statistical calculations were easily obtainable through the three month re-evaluation period and that the Agency used the same methodology during the re-evaluation period that it used during Grievant’s other performance periods to determine how many cases Grievant closed and the age of her case load.

Grievant argued that when she had to assume the case load of another employee, those cases required additional time. She argued she spent approximately 60 percent of her time working on the additional cases she received to familiarize herself with the cases. Grievant’s argument is not persuasive. Grievant did not present sufficient evidence to show that being assigned cases of other employees was an unusual or unexpected event.

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.

Grievant received a Below Contributor rating for her re-evaluation. She was removed from employment. The Agency considered demotion and reassignment but those options were not appropriate under the Agency’s business needs. The Agency

offered Grievant the option of working under Q status⁶ but DHRM determined that was not an appropriate option. Grievant did not accept the offer of part-time employment. Grievant's removal must be upheld.

It is unfair that Grievant is removed from employment while two other employees who accepted the Agency's part-time employment offer remain full time employees. Although this difference between how employees were treated is unfair, it did not result from the unfair application of policy by the Agency.

The Agency treated all three employees the same because it offered them Q status. Grievant was treated differently from the other two employees because of the timing of when the Agency learned DHRM would not approve offering Q status to the three employees. The Agency learned that it could not offer Q status only after its offer had been accepted by the two employees and the two week window prior to the end of the three week re-evaluation period had passed. The Agency believed it would no longer remove the two employees. The Agency believed it could remove Grievant because she rejected the offer of Q status and the Agency notified Grievant during the two week time period prior to the end of the three month period.

DECISION

For the reasons stated herein, the Agency's decision to remove Grievant is **upheld**. Grievant's request for relief is **denied**.

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

⁶ Q-Status is an acronym for "Quasi Full-Time Status". Q-Status allows agencies to have employees work reduced schedules with reduced salaries while maintaining key employee benefits.

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.⁷

[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

⁷ Agencies must request and receive prior approval from EDR before filing a notice of appeal.