

Issue: Separation from State due to Below Contributor Rating on Re-Evaluation;
Hearing Date: 06/14/17; Decision Issued: 06/28/17; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11000; Outcome: No Relief – Agency Upheld;
**Administrative Review Ruling Request received 07/12/17; Ruling No. 2018-4583
issued 08/03/17; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11000

Hearing Date: June 14, 2017

Decision Issued: June 28, 2017

PROCEDURAL HISTORY

On February 24, 2017, the Agency removed Grievant from employment following a three month re-evaluation.

On March 23, 2017, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 11, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 14, 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 the re-evaluation was arbitrary or capricious?
2. Whether the Agency complied with State policy to remove Grievant from employment.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its re-evaluation was not arbitrary or capricious and that it complied with State policy for Grievant's removal. 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.

State agencies must comply with DHRM Policy 1.40 governing Performance Planning and Evaluation. This policy sets forth the method by which agencies may re-evaluate and remove an employee.

The Virginia Department of Transportation employed Grievant as a Benefits Administrator. She began working for the Agency on July 10, 2015.

Grievant received a Below Contributor rating on her annual performance evaluation. Grievant met with the Supervisor on November 4, 2016 to discuss the annual evaluation. On November 9, 2016, Grievant appealed the Supervisor's decision to give her a Below Contributor rating. On November 21, 2016, the HR Division Administrator denied Grievant's request for relief regarding her annual performance evaluation.

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

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.

The Agency failed to create a re-evaluation development plan within 14 days. The re-evaluation development plan should have been issued ten days after November 4, 2016 when Grievant's performance evaluation was presented to her.

The Agency created a Development Plan for the period November 28, 2016 through February 28, 2017. The plan listed Core Responsibilities, Expected Tasks/Duties, Details/Steps to Take, and Timeframe. The plan was sufficient in detail to properly inform Grievant of the Agency's expectations for her work performance during the three month period.

The HR Division Administrator was the reviewer. The HR Division Administrator failed to comply with the requirements of DHRM Policy 1.40 because she did not sign the performance re-evaluation plan. This failure, however, is harmless error. The Supervisor testified that she presented the plan to the HR Division Administrator and the HR Division Administrator approved the three month re-evaluation plan. Grievant also did not sign the re-evaluation plan as required by DHRM Policy 1.40 but the Supervisor presented it to her and she did not have any comments on the plan.

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 February 22, 2017, Grievant received a Below Contributor rating for the three month re-evaluation period. For the Core Responsibilities of Workers Compensation Administration, Retirement Administration, Health and Life Insurance Administration, Benefit Training and Education and Customer Service Grievant's work performance was satisfactory to the Agency.¹

For the Core Responsibility of Benefit Data Management, Grievant's work performance was of concern to the Supervisor. Ms. C sent an email on December 9, 2016 regarding contacting employees who were on FMLA leave in 2016 to recertify their FMLA status. The recertification date was January 10, 2017. On January 24, 2017, Employee B contacted the Supervisor because she had not been provided with recertification documents until January 19, 2017 and has not been told if her status was re-certified. The Supervisor expected Grievant to have sent emails to employees with FMLA certification in 2016 before the expiration of their leave. Grievant did not do so

¹ The Agency failed to provide percent of time devoted to each Core Responsibility and ratings for each Core Responsibility.

and, thus, the Supervisor viewed Grievant's work performance for this Core Responsibility to be inadequate.

For the Core Responsibility of Critical Thinking/Analytical Skills, Grievant's work performance was of concern to the Supervisor. Grievant received an email in December from an employee who was trying to buy years of service from the Virginia Retirement System. The employee was attempting to have the request processed in December 2016 before VRS increased significantly the cost of buying years of service in January 2017. Grievant attempted to enter the employee's information into the VRS system but received an error message. She took no further action until February 22, 2017 when she was promoted to do so. The Agency had to negotiate with VRS to let the employee pay the rate available in 2016 instead of the 2017 rate which was approximately \$6,000 higher. The Supervisor viewed Grievant's work performance for this Core Responsibility to be inadequate.

For the Core Responsibility of Communications, Grievant's work performance was of concern to the Supervisor. In October 2016, the Supervisor asked employees what dates they wanted to take leave during the winter holiday season.² After receiving response from employees, the Supervisor set the work schedule so that an adequate number of employees would be working throughout the holiday season. Grievant had a medical appointment scheduled for December 22, 2016. On December 21, 2016, the Supervisor received Grievant's email asking for leave on December 22, 2016. When the Supervisor confronted Grievant, Grievant said she had had the appointment "for some time" and would reschedule it if it created a problem. The Supervisor accommodated Grievant's leave request in order to avoid having Grievant delay receipt of medical treatment. Grievant was absent from work from February 6, 2017 to February 10, 2017. During that time, the Supervisor had to review files in Grievant's office. The Supervisor had provided with a label maker to put on files because the Supervisor could not read Grievant's handwriting. Grievant had not utilized the label maker and the Supervisor found Grievant's files to be difficult to read and out of order. The Supervisor viewed Grievant's work performance for this Core Responsibility to be inadequate.

On February 22, 2017, the Supervisor signed the re-evaluation and presented it to Grievant. Grievant received a rating of Below Contributor. Grievant refused to sign the re-evaluation.

The HR Division Administrator was the reviewer. The HR Division Administrator failed to comply with the requirements of DHRM Policy 1.40 because she did not sign the three month re-evaluation. This failure, however, is harmless error. The Supervisor appears to have made the decision to remove Grievant with several people including the HR Division Administrator. The Hearing Officer does not believe that the signing process would have resulted in a different outcome for Grievant

² The Supervisor sent two additional emails asking for employee preference for leave.

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. An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee’s performance level. A demotion or reassignment to another position will end the re-evaluation period.

The Supervisor considered whether there were options other than termination for Grievant. She reviewed the Agency’s open full time classified positions. The Supervisor was not obligated to consider part-time positions. The Agency concluded no alternatives other than remove were appropriate.

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.

The Supervisor drafted a letter dated February 24, 2017 to Grievant confirming their discussion on February 23, 2017 that Grievant had received a Below Contributor rating on her re-evaluation. The Supervisor stated, “your employment with the Virginia Department of Transportation is terminated, effective immediately.”³

DHRM Policy 1.40 provides, “[t]he employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.” (Emphasis added.) The re-evaluation period ended February 28, 2017. Thus, the Agency erred by terminating Grievant’s employment prior to the end of the re-evaluation period. Grievant is entitled to back pay and benefits for the days the Agency prematurely removed her from employment.

Grievant argued that her evaluation was affected because she reported to three different supervisors during her tenure. In July 2016, Grievant began reporting to the Supervisor. Grievant’s Supervisor did not change during the re-evaluation period.

Grievant argued that she lacked sufficient training to perform her duties. The evidence showed that many of her mistakes resulted from a lack of attention to detail – a concern the Supervisor had raised with Grievant and not corrected by training.

Grievant argued that she was required to train Ms. M and this affected her work performance. Grievant complained to the Supervisor about having too much work. The Supervisor assigned Ms. M to assist Grievant and to learn and assume some of Grievant’s work duties. Ms. M’s duties changed in September 2016 and her title was changed to Benefits Administrator in November 2016. The evidence showed that Ms. M

³ Agency Exhibit 20.

was responsible for watching Grievant perform her duties and then perform those tasks. The amount of time Grievant devoted to Ms. M does not appear material.

Grievant argued that she was not told the development plan was for the re-evaluation period and that she could be terminated at the end of that period. The Agency failed to properly describe the Development Plan as a Re-Evaluation Development Plan. The Agency's failure is harmless error because an employee is expected to perform his or her duties regardless of whether the employee knew he or she might be terminated from employment. The evidence showed that the Supervisor presented the plan to Grievant and asked Grievant if she had any questions prior to the beginning of the three month re-evaluation period.

The Agency has established that its re-evaluation was not arbitrary or capricious. The Agency has established it complied with State policy governing Grievant's removal.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a three month re-evaluation with removal is **upheld**. However, the removal is effective February 29, 2017. Grievant is awarded **back pay** and **benefits** for the time period from February 24, 2017 to February 29, 2017.

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.⁴

[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

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.