

Issues: Group II Written Notice with Suspension (failure to follow instructions), and Separation from State due to below contributor rating on re-evaluation; Hearing Date: 02/23/18; Decision Issued: 06/14/18; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 11133, 11153; Outcome: No Relief – Agency Upheld;
Administrative Review: Ruling Request received 06/24/18; EEDR Ruling No. 2018-4750 issued 07/27/18; Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11133 / 11153

Hearing Date: February 23, 2018
Decision Issued: June 14, 2018

PROCEDURAL HISTORY

On October 25, 2017, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions with a five workday suspension. On December 1, 2017, Grievant was removed from employment for failure to meet performance expectations following a three-month re-evaluation.

On October 25, 2017, Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On December 4, 2017, Grievant timely filed a grievance to challenge the Agency's decision to remove her based on performance expectations. On January 17, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On February 28, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
Agency Representative
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 the Agency's evaluation of Grievant's work performance was arbitrary or capricious?
6. Whether the Agency removed Grievant 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 its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. The burden of proof is on the Agency to show that its evaluation of Grievant's work performance was not arbitrary or capricious and to show that it complied with State Policy to remove Grievant from employment. 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 Virginia Employment Commission employed Grievant as a Computer Programmer. The purpose of her position was:

Works on multiple, complex projects and has responsibilities in all Phases (Inception, Elaboration, Construction, Transition) and all Disciplines (Business Modeling, Requirements, Analysis & Design, Implementation, Test, Deployment, Change Management, Project Management) of the lifecycle of one or more automated data processing systems under limited supervision of the supervisor or other team member designated by a supervisor.¹

¹ Agency Exhibit 5.

Grievant had been employed by the Agency since June 14, 1999. Grievant had prior active disciplinary action. On March 6, 2017, Grievant received a Group II Written Notice for failure to follow a supervisor's instructions.

Many of the Agency's computer systems were kept on the Agency's mainframe computer. Grievant's work duties primarily included developing applications relating to the Agency's mainframe computer.

Grievant had Core Responsibilities including:

- A. Performance Management (for employees who supervise others).
- B. Programming for moderately complex to complex applications/systems.
- C. Application Support and Defect Resolution for moderately complex to complex applications/systems.
- D. Systems Analysis and Design for moderately complex to complex applications/systems.
- E. Manage activities for moderately complex projects to support timely completion of project deliverables.
- F. Perform administrative, organizational, or on-call and strategic planning tasks to achieve timely service delivery to customers.
- G. Provide application support for UI Tax Internet Filing and Registration Partnership application to ensure timely service delivery to customers.
- H. Perform other related duties as assigned.

On September 8, 2017, Grievant received an overall rating of "Below Contributor" on her 2017 annual performance evaluation. The Supervisor commented:

[Grievant] has been given multiple opportunities where feedback was provided and coaching was offered yet she has shown no improvement in key areas as detailed above. She has indicated that coaching is not desired and she disagrees with the feedback provided throughout the year, and therefore nothing is improving. Without [Grievant] embracing the feedback and having the desire to improve, this is not going to get any better.²

On September 11, 2017, the Agency placed Grievant on a re-evaluation plan using Grievant's existing Employee Work Profile.

On September 28, 2017, the Supervisor sent Grievant an email stating:

As ACERT Ticket [number] is not in production, please see below for your next assignment. Create a new ACERT ticket for this.

Check Print File Tasks That Were Not Completed with Current Implementation:

² Agency Exhibit 10.

1. Number of Checks and Total \$ of Checks should not be blank; zero suppression is eliminating entire value; see attachment.
2. NeedParms for test & production usage vs. hard-coded values; affects file transmissions to STAM & STAPUFT when testing.
3. Need VSAM file usage for dynamic sequence numbers vs. hard-coded values.
4. Unnecessary files?, see attachment and make sure all files being created are necessary.
5. Ensure Requirements are brought up-to-date and reflect what is in production; see attachment.³

Tasks 2 and 3 should not have taken Grievant more than one or two days to complete.

On October 10, 2007, the Supervisor gave Grievant a copy of her 30 Day Evaluation. Grievant received a rating of Below Contributor. She was advised, "it is imperative that you refer to the feedback provided and improve your overall performance to a Contributor level before November 27, 2017. As told to you many times and as stated in the Re-Evaluation Form itself, failure to become a contributor within a 90 day re-evaluation plan can lead to termination from the agency."⁴

As of October 23, 2017, Grievant had not completed tasks 2 or 3. The Supervisor confirmed this in an email to Ms. B:

- No effort was made on task #2 for setting up parameter usage to control TEST vs. PRODUCTION file transfers; see attached email where only the program for VSAM changes attempted in July is mentioned.
- No effort has been made on task #3 since July 26; see attached Word document containing mainframe library screen shots.

Grievant was suspended from work from October 26, 2017 to November 2, 2017.

On November 7, 2017, the Supervisor gave Grievant a copy of her 60 Day Evaluation. Grievant received a rating of Below Contributor. The Supervisor advised Grievant, "as acknowledged by you during this review. You have done nothing with respect to the assigned tasks during this 30-day period. These tests were assigned you on 09-28-2017 and as of today you have made no effort to make any progress on these tasks which resulted in you getting a Group II Written Notice on 10-25-2017. You will be getting additional work assignments tomorrow, 11-08-2017, and that work will be in addition to the 2 tasks that you have yet to complete. These assignments are within your scope of expertise and there is no reason for your not working on and completing them."⁵

³ Agency Exhibit 1.

⁴ Agency Exhibit 10.

⁵ Agency Exhibit 10.

On December 1, 2017, Grievant received a 90-Day Re-Evaluation with an overall rating of Below Contributor. Grievant received a Below Contributor rating for the Core Responsibility of Programming for moderately complex to complex applications/systems. The Supervisor wrote:

On 11-08-2017 you were assigned 1 additional task to reduce report volume in 7 jobs; only 1 has been done, and that consisted of changing a "2" to a "1" in the program. The enhancements to the Agency's Check File process that were assigned on 09-28-2017 are still not in production with only the VSAM portion working in DEV after [Supervisor] helped [Grievant] resolve her coding defects, during which time you told me I was "meddling" and "torturing" you.

Grievant received a Below Contributor rating for the Core Responsibility of Application support and defect resolution for moderately complex to complex applications/systems. The Supervisor wrote:

On 11-08-2017 you were assigned 1 additional task to reduce report volume in 7 jobs; only 1 has been done, and that consisted of changing a "2" to a "1" in the program. The enhancements to the Agency's Check File process that were assigned on 09-28-2017 are still not in production with only the VSAM portion working in DEV after [Supervisor] helped [Grievant] resolve her coding defects. [Grievant] is unable to resolve coding defects without assistance from other team members, and then she pushes back on the help.

Grievant received a Below Contributor rating for the Core Responsibility of Systems analysis and design for moderately complex to complex applications/systems. The Supervisor wrote:

On 11-08-2017 you were assigned 1 additional task to reduce report volume in 7 jobs; only 1 has been done, and that consisted of changing a "2" to a "1" in the program. The enhancements to the Agency's Check File process that were assigned on 09-28-2017 are still not in production with only the VSAM portion working in DEV after [Supervisor] helped [Grievant] resolve her coding defects. [Grievant] is unable to perform analysis without assistance from other team members.

Grievant received a rating of Below Contributor for the Core Responsibility of Manage activities for moderately complex projects to support timely completion of project deliverables. The Supervisor wrote:

On 11-08-2017 you were assigned 1 additional task to reduce report volume in 7 jobs; only 1 has been done, and that consisted of changing a "2" to a "1" in the program. The enhancements to the Agency's Check File process that were assigned on 09-28-2017 are still not in production with only the VSAM portion working in DEV after [Supervisor] helped [Grievant]

resolve her coding defects. These are basic assignments that should have been completed by now. Unable to adequately manage timely completion.⁶

Agency managers considered demoting or transferring Grievant but declined to do so since no other suitable positions were available. Agency managers chose to remove Grievant from employment.

CONCLUSIONS OF POLICY

The Agency took disciplinary action against Grievant and also removed her from employment based on her unsatisfactory work performance.

Group II 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.”⁷ 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.”

On September 28, 2017, Grievant was assigned five tasks to perform. These tasks should not have taken more than a day or two complete. Approximately 25 days after the assignment, Grievant had not completed tasks 2 and 3. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice. Upon the issuance of a Group II Written Notice, an agency may suspend an employee for up to ten workdays. Accordingly, Grievant’s five workday suspension must be upheld.

Grievant argued that she was not given a deadline to complete the project. Implicit in the Agency’s assignment was for Grievant to complete the project within a reasonable time. Grievant could have completed tasks 2 and 3 within a few days yet after 25 days she had not made any progress on the tasks. Moreover, the Agency asserted that task 3 was given to Grievant on July 26, 2017. The Agency provided Grievant with adequate time to complete the tasks yet she failed to do so thereby justifying the Agency’s disciplinary action.

Three-Month Re-Evaluation

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

⁶ Agency Exhibit 7.

⁷ The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

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 has presented sufficient facts to show that it did not disregard any material facts regarding Grievant’s work performance. The Agency showed that its opinion was based on Grievant’s work performance and with a reasoned basis. Grievant was given work assignments that she did not perform or timely perform thereby showing that her work performance was unsatisfactory to the Agency.

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed. Grievant received an overall rating of Below Contributor on her annual performance evaluation thereby justifying the Agency to begin the three-month re-evaluation.

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.

The Agency failed to comply with policy to create a Re-Evaluation Performance Improvement Plan. The Agency’s mistake, however, is harmless error. The purpose of the Re-Evaluation Performance Improvement Plan is to notify the employee of the Agency’s expectations for an employee’s work performance over the following three months. The Agency relied on Grievant’s existing Employee Work Profile. Grievant was aware of her duties under her Employee Work Profile that formed the basis for her annual performance evaluation. Grievant was reminded at the 30 day and 60 day

interim re-evaluations that her failure to meet the Agency's performance expectations could result in her removal.

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 approximately two weeks prior to the end of the three-month evaluation period. 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 for her Three-Month Re-Evaluation. The Agency's evaluation was neither arbitrary, nor capricious. The Agency considered Grievant's work performance during the three-month period. The Agency provided Grievant with 30-day and 60-day interim evaluations to inform Grievant how her performance was progressing and reminding her of the consequences for poor performance.

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. As an alternative, the agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation period to remain in his or her position, and reduce the employee's duties. Such a reduction should occur following and based on the re-evaluation and must be accompanied by a concurrent salary reduction of at least 5%. 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.

Agency managers considered demoting or transferring Grievant but declined to do so since no other suitable positions were available. Agency managers chose to remove Grievant from employment.

The Agency complied with DHRM Policy 1.40 to remove Grievant from employment follow an unsatisfactory three-month re-evaluation.

Grievant argued that her evaluations only changed when she began reporting to a new supervisor in 2017. She argued that the Agency's evaluation was arbitrary or capricious. Grievant's prior evaluations do not show the Agency's evaluation of her performance was arbitrary or capricious. The Hearing Officer cannot determine whether Grievant's work performance changed over the course of her career or the standard used by her supervisor's changed.

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”⁸ 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 consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued similarly situated employees were not disciplined by the Agency. Grievant failed to present sufficient credible evidence to show the similar behavior of other employees and that Agency managers disciplined those employees differently. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with a five workday suspension is **upheld**. The Agency’s decision to remove Grievant is **upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and 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.

⁸ Va. Code § 2.2-3005.

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

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

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.