

Issue: Separation from State (poor performance); Hearing Date: 04/27/18; Decision Issued: 05/17/18; Agency: TAX; AHO: Carl Wilson Schmidt, Esq.; Case No. 11174; Outcome: No Relief – Agency Upheld; **Administrative Review: Ruling Request received 05/31/18; EEDR Ruling No. 2018-4735 issued on 06/13/18; 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: 11174

Hearing Date: April 27, 2018

Decision Issued: May 17, 2018

PROCEDURAL HISTORY

On February 1, 2018, Grievant was removed from employment following a three month re-evaluation period.

On February 6, 2018, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 19, 2018, the Office of Equal Employment and Dispute Resolution assigned this appeal to the Hearing Officer. On April 27, 2018, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency's three-month re-evaluation was arbitrary or capricious?
2. Whether the Agency complied with State policy to remove Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its three-month re-evaluation was not arbitrary or capricious and the Agency complied with State policy. The employee has the burden of raising and establishing any affirmative defenses to the Agency's actions. 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 Department of Taxation employed Grievant as an Error Resolver. The purpose of her position was, "to analyze and resolve individual tax returns and payments."¹ She had been employed by the Agency for approximately ten years. The Agency removed Grievant based on a Below Contributor rating on her three-month re-evaluation.

The Agency processed approximately 500,000 error tax returns every year. If the Agency was slow in this processing, it may have to pay interest to taxpayers. As a result, the Agency values timely processing of tax returns containing errors.

Grievant had Core Responsibilities of: Depth of Knowledge, Technical Ability, and Communication.

On October 18, 2017, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

On November 1, 2017, Grievant received a Group I Written Notice for unsatisfactory performance.

On November 2, 2017, Grievant received a Three-Month Performance Improvement Plan addressing the Core Responsibilities of Technical and Communication:

As a result of your overall rating of "Below Contributor" for your 2016/2017 Annual Evaluation, this Notice of Improvement Needed is being issued along with the 90 – day Improvement Plan. The contributing factors that led to this rating [are] as follows:

You have not met the production standards for the following items:

¹ Hearing Officer Exhibit 1.

ITEM	STANDARD	YOUR AVG.
Current Year Returns	11.3 returns per hour	6.2 returns per hour
Prior Year	5 returns per hour	4.2 returns per hour
Payments	18 per hour	15.7 per hour
PSD-1	24 per hour	15.3 per hour

You have had several one-on-one trainings and were assigned two (2) less complicated error messages to assess the cause of your low production. You also have a NOIN review period from August 11 – September 22, 2017 in which a specialist sat with you for the first week and monitored you. I conducted weekly meetings with you throughout this review period to update you on your progress and offer suggestions for improvement. However, you continued to fall below production standards (as outlined above). Notification of your production averages were done weekly through emails and then reiterated in our weekly meetings.

You failed to follow procedures such as submitting time worked emails, and working returns that you have not been sufficiently trained on. This can lead to a substantial decrease in production when these procedures are not followed.

When you are notified of actions that must be taken to correct a return that has been posted incorrectly or needs adjusting, you think it is the responsibility of the Team Lead to make the corrections. You do not view this as a learning opportunity which will assist you in meeting the standards.

When you are advised to correct an account, you respond with an email of “Done”. However, when the account is reviewed to verify the corrective action, it is found that no action or the incorrect action has been taken.

Improvement Plan (What is expected, how it should be accomplished, and in what time frame):

A 90 – day Improvement Plan will be implemented from November 2, 2017 – January 30, 2018 to aid with your development in an attempt to assist you with performing at a satisfactory level. The plan and timeline is as follows:

November 2 – January 30, 2018 the following actions below will be implemented:

Specific error messages will be provided to assist in understanding the correct action to take to post payments and returns, to know how and when to perform correct posting and correct remittance, and to identify if the applied action resulted in a properly balanced tax account.

Payments from the PSD-1 spreadsheet will also be provided to strengthen your knowledge of locating work listed payments in AR by the DLN and payments from the Official Payment Credit Corporation spreadsheet.

Your posted returns will be reviewed weekly for accuracy. Any incorrect accounts will be discussed with you one-on-one at the end of each week as a learning opportunity and returned for correction.

You will be required to keep a daily tally of accounts worked in order to address any issues that may have caused you to not meet the standards from the previous day.

You will be required to provide timely leave requests. As advised before, continuous same-day leave requests can negatively impact your performance. In the instance where a same-day request for leave is needed, you are expected to provide justification for such request and obtain the approval before you depart.

You also need to be mindful that excessive time away from your desk has an impact on your overall work performance.

Failure to show significant improvement over the next 90 days could result in further action under DHRM's Policy 1.40, Performance Planning and Evaluation.²

During the re-evaluation period, the Supervisor met weekly with Grievant to discuss Grievant's work process and to ask Grievant if she was experiencing any problems or had any questions. The Supervisor sent follow-up emails regarding Grievant's work performance. For example, on November 27, 2017, the Supervisor sent Grievant an email stating:

Although your email below states you could not locate your spreadsheet as of 11/22/17 @ 11:26 a.m., I reviewed the spreadsheet you just returned to me and was able to find that many of your corrections were made on this same date of 11/22/17 and prior to the submission of your email below. In reviewing your spreadsheet there are four (4) more corrections needed and there are 3 inquiries in regards to your Overpaid TAP accounts. Please correct and send back to me by noon today – November 27, 2017.³

On December 7, 2017, Grievant received a Group II Written Notice for failure to follow policy and/or instructions.

² Agency Exhibit I.

³ Agency Exhibit I.

On January 26, 2018, Grievant received a Three-Month Re-Evaluation. For the Core Responsibility of Knowledge, Grievant received a Below Contributor rating. Grievant received this rating because: (1) she did not apply completely her knowledge of Virginia tax laws, rules, and regulations to resolve tax returns, (2) she did not demonstrate a working knowledge of the most common individual tax form, (3) she did not utilize available databases when reviewing accounts, (4) she did not display a working knowledge of the IRMS applications, (5) she did not apply her knowledge of accounting principles to ensure accounts were properly balanced, and (6) she did not demonstrate a good understanding of error messages and what procedures to use to resolve the error messages.

For the Core Responsibility of Technical, Grievant received a rating of Below Contributor. Grievant received the rating because: (1) when corrections were presented to Grievant to make adjustments, Grievant sometimes stated the account had been corrected when it had not been corrected, (2) Grievant did not recognize if applied action had resulted in a properly balanced tax account period, (3) Grievant did not ensure tax account periods (TAP) were being reviewed after a return was posted, (4) Grievant did not follow proper procedures utilizing the S application when reviewing expedited requests, and (5) Grievant fell below production standards with Current Year at 6.3 instead of 11.3, Prior Year at 4 instead of 5, Payments at 15.7 instead of 18 and PSD-1 at 16.4 instead of 24.

For the Core Responsibility of Communication, Grievant received a rating of Below Contributor. Grievant received this rating because: (1) when corrections were presented to Grievant she indicated it was the responsibility of the Team Lead to correct the error, (2) Grievant often ignored meeting requests, and (3) Grievant failed to notate accounts or had unclear notes.

Grievant received an overall rating of Below Contributor on her Three-Month Re-Evaluation.

Agency managers considered whether to demote Grievant to a different position, remove some of Grievant's job duties, and transfer Grievant to another position. Agency manager concluded that these options were not appropriate because Grievant's position was at the lowest level for her type of position and no other positions that would accommodate Grievant's skills were available within the Agency.

CONCLUSIONS OF POLICY

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.

Performance removals must be in accordance with DHRM Policy 1.40 which governs Performance Planning and Evaluation. Grievant received an overall rating of Below Contributor on her annual performance evaluation. Under DHRM Policy 1.40, 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.
- If the employee transfers to another position during the re-evaluation period, the re-evaluation process will be terminated.

On November 2, 2017, Grievant received a Three-Month Performance Improvement Plan as required by policy. The plan identified her Core Responsibilities and expected performance during the re-evaluation period. It was approved by a manager and discussed with Grievant.

The Supervisor met frequently with Grievant to provide training and feedback regarding Grievant's work performance.

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 on January 26, 2018 and received an overall rating of Below Contributor. 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.

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 Manager considered alternatives to Grievant's removal. None of those alternatives were feasible. The Agency decided to remove Grievant from employment. The Agency's decision to remove was consistent with DHRM Policy 1.40 and must be upheld.

Grievant argued that her performance numbers were manipulated. She cited discrepancies between her actual work performance as of July 31, 2015 and the Agency's accounting of her performance. The evidence showed that Grievant raised this issue in 2015 and the Deputy Commissioner asked agency managers to investigate Grievant's assertions. These managers concluded the Agency was accurately assessing Grievant's work performance. The evidence showed that Grievant's performance numbers came from an automated system used for other employees and that Grievant's performance numbers were not manipulated or incorrect.

Grievant argued that her performance was evaluated higher by former supervisors and, thus, the evaluation of her current supervisor was inaccurate. The evidence showed that the Agency's evaluation of Grievant's work performance was supported by the facts considered by the Supervisor. The Agency's evaluation of Grievant's work performance was neither arbitrary nor capricious.

Grievant argued that the Agency retaliated against her. No credible evidence was presented to support this allegation. The Agency removed Grievant from employment based on her poor work performance.

DECISION

For the reasons stated herein, the Grievant's Below Contributor rating on her three-month re-evaluation 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.

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.