

Issue: Separation from State due to below contributor rating on re-evaluation; Hearing Date: 05/14/18; Decision Issued: 05/29/18; Agency: VDOT; AHO: John R. Hooe, III, Esq.; Case No. 11180; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS
DECISION OF HEARING OFFICER

In the matter of: Case No. 11180

Hearing Date: May 14, 2018
Decision Issued: May 29, 2018

PRELIMINARY MATTERS

Upon being appointed as the Hearing Officer in this matter, effective March 14, 2018, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on March 19, 2018. The telephone pre-hearing conference was conducted with the Grievant and the Agency advocate. During the telephone pre-hearing conference, it was agreed that the grievance hearing was to be conducted on Monday, May 14, 2018 beginning at 10:00 a.m. at the facility. It was also agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and the other party no later than Monday, May 7, 2018 by 5:00 p.m. The Hearing Officer's letter notice dated March 22, 2018 inadvertently stated the deadline to be Thursday, May 7, 2018, rather than Monday, May 7, 2018.

APPEARANCES

Grievant
Agency Advocate
Agency Witness No. 1
Agency Witness No. 2
Agency Witness No. 3
Agency Witness No. 4
Agency Witness No. 5
Agency Witness No. 6

ISSUES

1. Did DHRM Policy 1.40, Performance Planning and Evaluation require that Grievant be terminated from his employment when the Grievant received a re-evaluation rating of "Below Contributor"?
2. Was Grievant's termination of employment an act of retaliation?

EXHIBITS

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Grievant's Form A
2. Job description
3. 90 Day re-evaluation plan
4. 90 Day re-evaluation plan 30/60/80 day status updates
5. Termination letter
6. 2016-2017 Performance documents (A, B, C, D, E, F)
7. 2015-2016 Performance Evaluation
8. 2014-2015 Performance Evaluation
9. Insurance premium reduction project (G,H,I,J)
10. Wage garnishment mapping project
11. Small purchase credit card project emails
12. Insurance premium reduction project emails
13. DHRM Standards of Conduct
14. Policy 1.40-Performance Planning and Evaluation
15. Grievant's email

The Grievant introduced two Exhibits as follows:

1. Two pages of emails dated May 11, 2017, July 7, 2017 and July 10, 2017
10. Submitted weekly work plans-weekly project plan 10-29-2017

FINDINGS OF FACT

The Grievant was terminated from his employment by letter dated January 22, 2018 from the Business Reform Manager (Agency Exhibit 5). The letter states that because the Grievant received a re-evaluation rating of "Below Contributor" for the 2016-2017 Performance Year, DHRM Policy 1.40 provides that the supervisor shall "demote, reassign, or terminate the employee." The letter further stated that there were no suitable opportunities for demotion, reassignment or reduction of the Grievant's duties, resulting in termination, effective January 22, 2018.

The Agency's witnesses established that the Grievant was hired as a "Policy and Planning Analyst." The Agency job description describes the purpose of the position for which the Grievant was hired as follows: "To lead, facilitate, and conduct advanced, complex, and often difficult organizational, operational and performance related studies and economic analyses with statewide impact..." (Agency Exhibit 2)

The Director of the office testified that the Grievant was hired as a "Senior Analyst", and

as such, is expected to have the tools necessary to immediately satisfy the purpose of the position. The Agency witnesses (which included the Director, the Employee Relations Manager, a Senior Human Resources Consultant (now retired), a Business Performance Manager, the Grievant's direct Supervisor and reviewer, and an HR Consultant) all testified in detail about the Grievant's inability to fulfill the purpose of his position.

Agency Exhibit 6 (A-F) set out in detail the performance problems experienced by the Grievant. The Performance Evaluation for Performance year October 2016 to October 2017 indicated that the Grievant was considered "Below Contributor" in five of the seven "core responsibilities." (Agency Exhibit 6A)

Agency Exhibit 4 is the "Notice of Improvement/Performance Improvement Plan" for the Grievant, specifically being a 90 day re-evaluation plan for the period of October 25, 2017 to January 25, 2018. Agency Exhibit 6D included the notes from the 20 day progress status meeting (July 19, 2017), the 40 day progress status meeting (August 8, 2017) and the 60 day/final status meeting (September 18, 2017). These documents indicated that the Grievant continued to be rated "Below Contributor." The Agency's evidence (the testimony supported by the Exhibits) established in great detail that during the re-evaluation period required by Policy 1.40 it was concluded that the Grievant was deficient in each of the areas set out in the termination letter dated January 22, 2018.

The Agency's evidence also established that the Agency followed the procedures required by Policy No. 1.40 (Agency Exhibit 14) by establishing the re-evaluation plan after the Grievant was rated "Below Contributor". The policy provides that if the employee receives (as the Grievant did receive) 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." The Agency's evidence established that due to the unique description of the Senior Analyst position, neither demotion nor reassignment is possible, resulting in termination.

The Grievant set out in Grievant's Form A (Agency Exhibit 1) that the Grievant's termination was retaliation against the Grievant by the Director "...due to my drive for projects assessed. I pushed (the Director) to provide access to key subject matter experts, as well as pushed (the Director) to clearly define the projects scope(s) in writing resulting in (the Director) becoming angry, vague and slow to respond hindering project success. As a result of my drive for project success (the Director) took a final act of retaliation where (the Director) led and progressed towards and eventually terminated my employment."

The Grievant's cross-examination of the Agency witnesses (combined with the Grievant recalling as his own witnesses three of the Agency witnesses) did not present any evidence of retaliation. The Grievant also testified generally about his belief that his termination was an act of retaliation.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code ' 2.2-2900 et. seq.,

establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code ' 2.2-3000 (A) sets forth the Commonwealth=s grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....
To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under ' 2.2-3001.

The Standards of Conduct, Policy 1.60 and DHRM Policy 1.40-Performance Planning and Evaluation provide the procedure to be followed when an employee’s performance is rated “Below Contributor.”

In considering all of the evidence, it is the Hearing Officer’s opinion that the Grievant’s performance was “Below Contributor” for the Performance Year 2016-2017, that the re-evaluation procedure was properly followed and that the Grievant continued to be rated as “Below Contributor” at the end of the re-evaluation period. It is the Hearing Officer’s opinion that DHRM Policy 1.40 required the Grievant’s termination from employment.

DECISION

The Hearing Officer upholds the termination of Grievant’s employment as being consistent with policy and procedure.

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].

John R. Hooe, III
Hearing Officer

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