

Issue: Separation from State due to below contributor rating on re-evaluation; Hearing
Date: 06/04/12; Decision Issued: 06/12/18; Agency: VDOT; AHO: William S. Davidson, Esq;
Case No. 11208; Outcome: No Relief - Agency Upheld; **Administrative Review: Ruling**
Request received 06/27/18; EEDR Ruling No. 2018-4753 issued 07/11/18; Outcome:
AHO's decision affirmed.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 11208

Hearing Date: June 4, 2018
Decision Issued: June 12, 2018

PROCEDURAL HISTORY

On May 19, 2018, the Grievant was notified by letter as follows:

...This letter is to confirm your receipt of a re-evaluating rating of "Below Contributor" for the 2016-2017 Performance Year. Department of Human Resource Management (DHRM) Policy 1.40, Performance Planning and Evaluation, provides that, if an 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 of March 19, 2018 my review of the options at the conclusion of your re-evaluation period revealed no suitable opportunities for demotion, reassignment or reduction of your duties. Therefore, your employment with the [Agency] is terminated for unsatisfactory re-evaluation, effective today, March 19, 2018. Alternatively, you have the option of voluntarily resigning...¹

On April 17, 2018, the Grievant timely filed a grievance challenging the Agency's actions.² On May 3, 2018, the grievance was assigned to a Hearing Officer. The hearing in this matter was held on June 4, 2018 at the Agency's location.

APPEARANCES

Attorney for Agency
Representative for Agency
Grievant
Witnesses

ISSUES

Did the Agency comply with the procedural requirements of DHRM Policy 1.40, and pursuant to that Policy, was the Grievant's performance still such as to be evaluated as Below Contributor?

¹ Agency Exhibit 1, Tab 2, Page 1

² Agency Exhibit 1, Tab 1, Page 1

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.³ Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

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 proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened.⁴ However, proof must go beyond conjecture.⁵ In other words, there must be more than a possibility or a mere speculation.⁶

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of the witnesses, I make the following findings of fact:

³ See Va. Code § 2.2-3004(B)

⁴ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁵ *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁶ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Agency provided me with a notebook containing 32 tabs, and that notebook was accepted in its entirety as Agency Exhibit 1.

The Grievant provided me with a notebook containing tabs labeled "A" through "G." That notebook was accepted as Grievant Exhibit 1, with the following exceptions: Tab A, page 10; Tab E, pages 25, 26 and 27; and Tab G, page 8, were deleted from evidence in their entirety. Several other pages were objected to by counsel for the Agency, and were left in the notebook subject to that objection being renewed if those pages were used by the Grievant in the presentation of his evidence. As they were not used, there was no further objection to Grievant Exhibit 1.

On December 5, 2017, the Grievant's immediate supervisor submitted a Below Contributor Performance Evaluation for the performance year of October 25, 2016 through October 24, 2017. That evaluation was approved by the next level of management on December 6, 2017.⁷ Uncontradicted testimony before me was that the Grievant received his Below Contributor rating on or about December 8, 2017. On December 15, 2017, the Performance Re-Evaluation Plan was presented to the Grievant and discussed with him.

DHRM Policy 1.40 requires that within ten days of a Below Contributor evaluation, a meeting between the employee and his supervisor must take place to develop a Performance Re-Evaluation Plan that will set forth performance measures for the following three months.⁸

As stated above, the Grievant was notified on December 8, 2017 of his Below Contributor status and a Performance Re-Evaluation Plan was established on December 15, 2017, thereby complying with DHRM Policy 1.40.

During the course of the Performance Re-Evaluation Plan, the Grievant's supervisor met with him on numerous occasions to discuss his progress and produced written documentation of those meetings.⁹

Pursuant to DHRM Policy 1.40, an employee on a Performance Re-Evaluation Plan must be re-evaluated within approximately two weeks prior to the end of the three-month period.¹⁰

On March 7, 2018, the Grievant's supervisor met with him to discuss his progress. This meeting complied with DHRM Policy 1.40, which requires the meeting to take place approximately two weeks prior to the end of the re-evaluation time period.

Pursuant to DHRM Policy 1.40, if the employee is found to still be Below Contributor, the supervisor shall demote, re-assign or terminate the employee by the end of the re-evaluation period. The evidence that was presented before me indicated that, of the seven areas of

⁷ Agency Exhibit 1, Tab 10, Pages 1-4

⁸ Agency Exhibit 1, Tab 3, Page 12

⁹ Agency Exhibit 1, Tab 13, Pages 1-23

¹⁰ Agency Exhibit 1, Tab 3, Page 13

improvement set forth in the Performance Re-Evaluation Plan, the Grievant failed to comply with two of those areas. Those two areas represented 40% of the areas for which the Grievant was responsible and needed improvement.¹¹ It should be noted that, pursuant to testimony before me, during the re-evaluation period, 25% of the areas where improvement was needed had nothing actually happen that required action by the Grievant.

The Grievant offered no effective testimony to indicate that he had fully performed all of the requirements of the Performance Re-Evaluation Plan. The Grievant passionately attempted to produce evidence and make arguments regarding the original finding of Below Contributor. Pursuant to my appointment in this matter, I deemed that my appointment was for the issue only of the Performance Re-Evaluation Plan. I did not have before me the original Below Contributor finding. In addition, pursuant to a Qualification Ruling, dated March 30, 2018, made by the Director of EEDR, I further deemed that the matter that was before me was the Performance Re-Evaluation Plan and not the original finding of Below Contributor. Accordingly, as I have determined that the Agency fully complied with all of the requirements of DHRM Policy 1.40, and as I find that the Grievant produced no meaningful evidence that he had complied with 100% of the requirements of the Re-Evaluation Plan, I find that the Agency properly evaluated the Grievant as Below Contributor at the end of the re-evaluation period.

I heard credible evidence from the Agency witnesses that it considered demotion or re-assignment for the Grievant. However, the Grievant has a unique skill-set and is at a pay level where re-assignment effectively is impossible. Because of his unique skill-set, there was no position to which he could effectively be demoted. Accordingly, as the Agency testified, I find that termination was the only option available to the Agency.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” 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, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

As stated, I do not find a reason to mitigate the matter before me.

¹¹ Agency Exhibit 1, Tab 13, Pages 20-22

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof in this matter and that termination of the Grievant was proper.

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].



William S. Davidson
Hearing Officer

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