

Issue: Separation from State due to unsatisfactory rating on 3 month re-evaluation;
Hearing Date: 05/14/19; Decision Issued: 06/03/19; Agency: VDOT; AHO: Carl
Wilson Schmidt, Esq.; Case No. 11329; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 11329

Hearing Date: May 14, 2019

Decision Issued: June 3, 2019

PROCEDURAL HISTORY

Grievant was removed from employment effective February 8, 2019 following an unsatisfactory three-month reevaluation.

On February 21, 2019, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 5, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 14, 2019, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant's reevaluation was arbitrary or capricious.
2. Whether the Agency complied with State policy.

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that it properly evaluated and removed Grievant from employment. The employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. 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 Transportation employed as an Outdoor Advertising Agent. He has been employed by the Agency since November 1997. The purpose of his position was:

Administer outdoor advertising and junkyard programs in assigned area in accordance with VDOT procedures and Virginia regulations. Assist with permits issuance and compliance issues for outdoor advertising, junkyards, and vegetation control. Provide technical and customer assistance to a wide range of internal and external customers.¹

Grievant began reporting to the Supervisor in June 2015.

Grievant had expressed anxiety over writing violation letters and about his mother’s health. On May 30, 2017, the Supervisor sent Grievant an email stating, “you are required to write a violation letter for every violation identified in the field and cite the correct statute and/or regulation in the letter. *** In addition, if you feel that it would benefit you, please contact [name and telephone number] in Human Resources, who can steer you to resources that may help with the anxiety you described in our meeting.”²

On October 26, 2018, Grievant received an annual performance evaluation with an overall rating of Below Contributor. The merits of Grievant’s annual evaluation are not before the Hearing Officer.

On November 8, 2018, Grievant met with the Supervisor and received an Improvement Plan as part of the reevaluation process:

¹ Agency Exhibit 3.

² Agency Exhibit 6.

Monitor and log outdoor advertising signs along the interstate.
Monitor and log NHS and FAP routes. The entire route must be logged.
Identify violations when logging routes and enter the violations into GIS.
Draft a violation letter to sign owner.
Apply statutes and regulations correctly in violation letters.
Re-inspect violations.
Update GIS³ and keep all records up-to-date.
Inspect new permit locations and complete OA-13 form.
Unless otherwise instructed, send email to supervisor with the planned work for that day.
Notify the program manager by email or phone call prior to taking leave.
Review the statutes and regulations for lease 2 hours.
Inspect repair request and review associated documentation.
Complete weekly reports on Fridays.
Address safety issues with signs within 24 hours.
Email the program manager to schedule a 1 hour meeting.
Spend 2 days a week with [Mr. T] in the field, depending upon [Mr. T's] Schedule.⁴

In the first week of December 2018, Grievant worked "snow duty" for approximately one week. He received an email asking for volunteers and Grievant volunteered to work snow duty. The Supervisor did not ask Grievant to work snow duty. Grievant worked from 7 p.m. to 7 a.m. and then began his work shift at the office. Once the Supervisor learned that Grievant was coming to work after his snow duty, the Supervisor told Grievant not to come into work until after snow duty.

On December 19, 2018, the Supervisor spoke with Grievant about four billboards located in the County. Grievant said he had contacted the City about the billboards and that the billboards were nonconforming. Grievant should have contacted the County instead of the City since the billboards were located in the County. The billboards had been removed and Grievant knew about this since July 2018. Grievant did not bring this to the Supervisor's attention until December 2018.

On November 29, 2018, the Supervisor sent Grievant and other staff an email asking:

Please start reviewing the interstates for signs that could fall in the roadway. This will include on premise and off premise signs. Please have this completed by January 4, 2019.⁵

³ Geographic Information System.

⁴ Agency Exhibit 1.

⁵ Agency Exhibit 4.

On January 3, 2018 the Governments Division asked for this information. The Supervisor sent Grievant and other employees an email to find out the status of their review, Grievant replied that he had not started the task. Grievant told the Supervisor he thought he had until January 9, 2019 to complete the task. Grievant's inaction resulted in three other team members going out to review the Interstate routes in Grievant's region.

The Supervisor brought Grievant "back into the office" instead of telecommuting to work on violations and billing beginning January 4, 2019. Grievant typically worked on billing at the beginning of the year.

Grievant had approximately 100 violations open in his region. Violations were supposed to be addressed timely. As of January 14, 2019, Grievant had submitted only four violation letters for review.⁶ Some of the letters he submitted included errors such as the wrong completion date and other incorrect information in letters.

The Supervisor considered demoting or reassigning Grievant in lieu of removal. The Supervisor contacted managers in the maintenance section to see if there positions Grievant could fill. Grievant was not suitable for any positions in maintenance. The Supervisor also concluded Grievant's duties could not be reduced. The Supervisor concluded Grievant should be removed from employment.

On January 23, 2019, Grievant received a "90 DAY RE-EVALUATION" with an overall rating of Below Contributor:

Administer regional outdoor advertising program and junkyard program: Monitor existing signs and junkyard to determine legal compliance and issue notices of violations. Maintain program logs and files and provide evidence to AG's Office. Serve as expert witness for court cases.

- Draft a violation letter within 30 days of identifying a violation – [Grievant] has identified more violations since his last evaluation but [Grievant] is not meeting deadlines for the violations. There are currently about 100 open violations in GIS in the southeast region but [Grievant] has only sent in 4 letters.
- [Grievant] still cannot draft accurate letters and he still has trouble applying the correct letter to the violation.
- [Grievant] is not meeting other deadlines as assigned.

Technical Assistance: Provide technical assistance, guidance, and interpretation of laws and regulations for internal an external customers.

⁶ Grievant was not working on all 100 violations, but the approximate number of violations he was working on should have produced more than four violation letters.

Respond to inquiries and requests for assistance. Work with junkyard owner to resolve problems.

- Apply statutes and regulations correctly in violation letters – [Grievant] continues to have difficulty correctly applying statutes and regulations.
- [Grievant] was on a 90 day performance plan, during which he was to review the statutes and regulations. There was no significant improvement in his understanding of the outdoor advertising laws.

Outdoor Permits: Conduct the issuance and removal of outdoor advertising permits and licenses. Conduct annual audits of certification acceptance program participants and discuss findings with involved parties. Collect and process funds received for permits and licenses.

- [Grievant] has been assisting with billing.

In summary, [Grievant] continues to struggle with letter composition, accurately completing tasks and meeting deadlines.

On January 23, 2019, Grievant told the Supervisor he “had a lot going on” and that his mother had been in a car accident. Grievant said his mother had broken ribs. The Supervisor knew Grievant’s mother had been ill in the past. Grievant did not tell the Supervisor the extent of his mother’s current medical issues until January 23, 2019.

Grievant did not seek medical treatment for stress during the three month reevaluation period. When he sought leave, his requests for leave were granted.

CONCLUSIONS OF POLICY

The Agency may remove Grievant from employment only if its reevaluation was not arbitrary or capricious and it followed State policy.

Arbitrary or Capricious Reevaluation

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.

Grievant's reevaluation was neither arbitrary, nor capricious. The Agency considered Grievant's work performance during the reevaluation. The Agency did not ignore or exclude any material factor of Grievant's three month work performance.

Grievant argued that his "snow duty" made the Agency's evaluation arbitrary or capricious. The evidence showed that the Supervisor gave Grievant credit for working snow duty. Thus, Grievant's evaluation was not adversely affected by his snow duty. The Hearing Officer does not believe Grievant's work performance during the three month reevaluation period would have been materially different had he not worked snow duty. He continued to make errors when drafting violation letters and he missed deadlines arising several weeks after his snow duty had been completed. For example, Grievant would not have met the January 4, 2019 deadline to review signs in his region because he mistakenly believed the deadline was a week later.

Grievant argued he was unable to work on violations when he was brought back into the office on January 4, 2019 because he had to work on billing. The evidence showed that Grievant had time to work on violations prior to being brought into the office and that the Agency typically assigned him to work on billing near the time period he was brought back into the office.

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.

Grievant received a reevaluation plan and was notified of the Agency's expectations for his work performance during the reevaluation period.

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 received a reevaluation within approximately two weeks prior to the end of the three month period.

Grievant argued that the Agency should have extended the period for evaluation because he was absent from work approximately 65 hours during the three month period. The policy requires an absence of 14 consecutive days but Grievant was not absent from work 14 consecutive days.

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.

When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the re-evaluation period, the action is considered a Performance Demotion and the agency must reduce the employee's salary at least 5%.

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 duties of the employee, 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 Agency considered whether to demote, reassign, or reduce Grievant's duties and concluded doing so was not feasible within the Agency's expectations for its workforce and employee work duties. Accordingly, the Agency has presented sufficient evidence to show its decision to remove Grievant was appropriate.

Grievant argued the Agency failed to provide him with his options under the Family Medical Leave Act. He argued that if he had known of this option, he could have taken extended leave and cared for his mother. The evidence showed that Grievant was granted leave whenever he sought it. The Supervisor had a general awareness that Grievant's mother had medical concerns and the Supervisor suggested Grievant contact staff in the Human Resource department in 2017 to address anxiety. During the reevaluation period, however, Grievant only mentioned his mother's health conditions on January 23, 2019 which was near the end of the reevaluation period. The Agency was not obligated to notify Grievant of his rights under the FMLA until that time and by then the reevaluation had already completed.

DECISION

For the reasons stated herein, the Agency's decision to remove Grievant from employment must be **upheld**.

APPEAL RIGHTS

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

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 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 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

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