

Issue: Separation from State due to Below Contributor rating on re-evaluation;
Hearing Date: 05/13/19; Decision Issued: 06/03/19; Agency: Longwood University;
AHO: Carl Wilson Schmidt, Esq.; Case No. 11331; 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: 11331

Hearing Date: May 13, 2019

Decision Issued: June 3, 2019

PROCEDURAL HISTORY

Grievant was removed from employment effective February 9, 2019 following an unsatisfactory three-month reevaluation.

Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On March 4, 2019, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 13, 2019, a hearing was held at the Agency's office.

APPEARANCES

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

ISSUES

1. Whether Grievant's reevaluation was arbitrary or capricious.
2. Whether the University 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:

Longwood University employed Grievant as a Utility Manager at the Facilities Management Plant. He began working for the University in February 2012. The Purpose of his Position was:

Works within organizational and regulatory standards to provide supervision and control of the daily operations of the Steam Plant, fuel distribution systems, steam and condensate distribution systems, and maintaining operating logs. This position is vital to the overall operation of the University Campus.¹

On October 16, 2018, Grievant received his 2018 Annual Performance Evaluation with an overall rating of Below Contributor.

On October 24, 2018, Grievant received an Employee Development plan stating:

Due Immediately

- Enforce the Safety and Personnel requirements of the heat plant.
- Have work assignments for lead operators to assign on the evening and night shifts and hold them accountable for when it is not done.
- Have a regularly scheduled weekly meeting with the Utility Plant Manager II to go over personnel, operations, and maintenance issues with each boiler, infeed, ash systems, and controls.
- Follow-up on negative test results like low condensate return and make sure we have the chemicals and properly operating equipment to maintain a quality water treatment program.
- Maintain the DEQ database, ensure it is up-to-date and the data entered is correct.

¹ Agency Exhibit 1.

Due November 15th

- Provide a list of known maintenance issues and their priority of importance to be corrected for heat plant equipment to the Utility Plant Manager II. This will be updated on a weekly basis and presented at the weekly meeting.
- Provide a list of inventory with maximum and minimum amounts of parts, based on known usage. Ensure that what is in stock is there and check inventory weekly, including what [is] in the boxes[. This] will [be] update on a weekly basis and presented to the Manager II at the weekly meeting.

Due December 31st

- Established written operating procedures for all heat plant equipment for safe and reliable plant equipment operation.

Grievant was absent from work for two weeks during the Christmas break. The University extended Grievant's reevaluation period to February 9, 2019

On January 23, 2019, Grievant received a reevaluation with an overall rating of Below Contributor:

Core Responsibility	Comments on Results Achieved
Performance Management. Below Contributor.	[Grievant] is trying to do better on the day to day needs of the plant and staff. But he still lacks organization and preplanning of jobs, and normal operation of the plant. He will not take control of disputes between employees and solve issues.
Direct the implementation of the Operating Plan and Maintenance Program and identify those areas which may need improvement or further development. Ensure that startup and shutdown procedures for all plant equipment and processes are properly implemented. Prepare and maintain the plant operations manual. Below Contributor.	[Grievant] has been working on establishing operating procedures, but he is not taking this task on himself[;] he has delegated [it] to the operators.
Oversee water testing and treatment program. Below Contributor.	[Grievant] needs to make sure that we follow up on negative test results so we operate as efficiently as possible. He does not handle this task at all. [Mr. R] handles all water treatment issues and orders the chemicals needed from [Vendor].

<p>Ensure that thermal outputs are maintained at maximum levels and efficiencies. Contributor.</p>	<p>[Grievant] has done an adequate job in maintaining the DEQ database. We need to make sure this data is up-to-date and that data entry is correct and not more than two weeks behind. [Grievant] has completed this task and it is all on the thumb drive.</p>
<p>Implement the plant's preventive maintenance program, including equipment failure records, and provide trend information to the Utilities Manager. Below Contributor.</p>	<p>The Plant PM program is moving in the right direction according to [Grievant], but there is little to no minor maintenance being done in the plant. [Grievant] has a run it until failure way of doing things.</p>
<p>Administer the spare parts and tool inventory control program and prepare requisitions for purchase orders for replacement parts, as required. Below Contributor.</p>	<p>[Grievant] has improved our critical spare parts inventory. We have most of this information verified and in a spreadsheet. But this is another test that was asked of [Grievant] in employee improvement goals that he delegated to an operator and NOT taking the task on himself.²</p>

Grievant did not hold employees fully accountable for enforcing the Safety and Personnel requirements of the heat plant. He did not regularly have work assignments for lead operators to assign on the evening shift and hold them accountable when it was not done. Grievant met with the Utility Plant Manager II as expected. He delegated tasks to subordinates without ensuring they were complying with the tasks such as making sure the plant had necessary chemicals and properly operating equipment. Grievant provided a list of known maintenance issues and their priority of importance. Grievant delegated the task of providing a list of inventory with maximum and minimum amounts of parts based on known usage. Grievant delegated the task of establishing written operating procedures for all heat plant equipment and few of the procedures were completed.

The Supervisor observed that some preventive maintenance work was not being completed. After Grievant left the University, the Supervisor noticed that there were over 2,000 preventive maintenance tasks remaining uncompleted. The Supervisor wrote his comments in Grievant's reevaluation based on his observation of Grievant's work performance.

CONCLUSIONS OF POLICY

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

Arbitrary or Capricious Reevaluation

² Agency Exhibit 1.

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.

The University’s reevaluation of Grievant was neither arbitrary nor capricious. The University considered Grievant’s Core Responsibilities and performance expectations for the three-month reevaluation period. The University monitored Grievant’s work performance during the three-month reevaluation period and then compared that work performance to Grievant’s Core Responsibilities and performance expectations. The University did not disregard any material part of Grievant’s work performance during the reevaluation period.

Grievant argued the University failed to fully consider his work performance and account for such problems as an inadequate preventive maintenance system. He had identified a more logical preventive maintenance system but the University ignored his preferred system. The evidence showed that the University fully considered Grievant’s work performance during the reevaluation period. The University has presented sufficient facts to support its opinion regarding Grievant’s work performance.

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.

Although the University failed to comply with the formatting requirements of DHRM Policy 1.40, it informed Grievant of its expectations for the reevaluation period through an Employee Development plan and Employee Work Profile. The University was obligated to inform Grievant prior to the reevaluation period how his performance would be measured and judged. The University met this obligation.

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's reevaluation period was extended until February 9, 2019. He was reevaluated on January 23, 2019. Although Grievant was reevaluated a few days early, the Hearing Officer does not believe Grievant's reevaluation would be changed had the University waited several more days to complete its reevaluations.

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 University considered whether to demote, reassign, or reduce Grievant's work duties in lieu of removal. University managers did not consider any of those options as viable. Accordingly, the University's decision to remove Grievant must be upheld.

DECISION

For the reasons stated herein, the University's decision to remove Grievant is **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.

Agency Exhibit 1.