

Issue: Performance (Arbitrary/Capricious Evaluation); Hearing Date: 08/01/17;  
Decision Issued: 09/05/17; Agency: Va Tech; AHO: Thomas P. Walk, Esq.; Case  
No. 10977; Outcome: No Relief – Agency Upheld.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,  
OFFICE OF EQUAL EMPLOYMENT AND DISPUTE RESOLUTION**

**IN RE: CASE NO. 10977**

**DECISION OF HEARING OFFICER**

**HEARING DATE: AUGUST 1 AND 2, 2017**

**DECISION DATE: SEPTEMBER 5, 2017**

**I. PROCEDURAL MATTERS**

The grievant commenced this matter by filing her Form A on November 4, 2016, challenging a rating of “Unacceptable” on her employee performance evaluation. She requested that the rating be changed and that she be transferred out of the group in which she was working. On January 4, 2017, the President of the University found the matter to be non-grievable because of facts in dispute in a separate pending grievance of a Group II Written Notice. On February 24 the Director of the Office of Equal Employment Dispute Resolution found the grievance of the Performance Evaluation to be grievable. He consolidated it for hearing with a third grievance involving this grievant (Case No. 10978). I was appointed as Hearing Officer for the consolidated matters on March 8. A prehearing conference was held and my initial prehearing order was issued on March 30. The grievant submitted an email request for the production by the school of several documents. To address those documents, I issued a supplemental prehearing order on April 25, 2017. The grievant requested a compliance ruling from the Director of the Office of the Equal Employment Dispute Resolution on July 20. He issued his compliance ruling on July 28, 2017. As indicated by me prior to that ruling and consistent with it, at the conclusion of the hearing the grievant was given leave to file supplemental exhibits by August 18. Both parties submitted large binders of exhibits prior to the hearing. The documents

behind Tab 6 of the school's exhibits numbered 32, 33, and 34, were withdrawn and not accepted into evidence. All other exhibits provided, both before and after the hearing, were admitted into evidence.

## **II. APPEARANCES**

The school was represented by legal counsel and a designated representative was present throughout the hearing over the objection of the grievant. That representative served as the only witness called by the school in this matter. Prior to the hearing the grievant had been assisted by an advocate. On July 31 the advocate requested a continuance, by email, due to illness. That request was denied. On the morning of the first day of the hearing, the grievant appeared and did not renew the request for a continuance. The advocate did not appear, either in person or by electronic means. The grievant was self-represented throughout the hearing and performed competently.

## **III. ISSUE PRESENTED**

Whether the rating of "unfavorable" given to the grievant in her October 3, 2016 Performance Evaluation was arbitrary and capricious.

## **IV. FINDINGS OF FACT**

The agency in this case is a State University. The grievant worked at the University as an applications developer during the time frame covered by the subject Performance Evaluation. She had worked at the University for approximated ten years. In the evaluation year for 2014, her overall evaluation was that of "strong." Her performance for that year was labeled as model in two areas, including job knowledge and technical competency.

Her 2015 Performance Evaluation yielded an overall evaluation of “Developing Performance.” Such a rating is deemed to be appropriate where an employee only partially meets performance expectations and improvement is needed. The grievant’s supervisor noted in the evaluation concerns over: her administrative duties being properly reflected in a timekeeping program; communications with users of the group needing to be in a positive light; a tendency to advocate for an unrealistic approach to a technical issue; and unprofessional communication. She was graded as less than strong in the core competencies of: adaptability and flexibility; communication skills; and interpersonal skills.

As a result of these concerns and deficiencies, the Supervisors of the grievant closely monitored her performance. On or about March 11, 2016 she met with her direct supervisor to address certain issues. He directed her not to seek advice from the director of the Data Warehouse regarding questions about the MicroStrategy software tool being used by the school. He addressed what he believed to be improper discussions by the grievant with other users of MicroStrategy within the university.

The grievant was concerned and confused about the directions in an e-mail from the supervisor dated March 11. She stated that she was unsure what he was referring to when he told her to ask the “right questions.” He believed that the grievant tended to focus too much on “big picture” issues rather than merely seeking to solve the immediate problems presented. He also felt that it was inappropriate for her to question why certain tools were being used and things done in a certain manner.

The Supervisor described communications with the grievant as requiring “considerable effort” and involving a lot of “back and forth.” He believed that she challenged even simple requests. The grievant was asked to participate in a task force working on the website of the

university. She expressed some reservations about taking on that task. When the task force first met after she was directed to join it, the supervisor attended that meeting to confirm that the grievant was there and actively participating.

The grievant and supervisor also felt that her true contributions to the group were not being seen in the same way. The supervisor believed that she was not effectively utilizing her time. He believed that she was spending too much time working with a tool (EMP 11) that was being phased out in favor of and replaced by the MicroStrategy tool. The grievant had also missed deadlines on multiple tasks.

At one point the grievant requested that her issues with the supervisor be submitted to mediation. He declined. Instead, the individuals met with a facilitator who suggested that the grievant be given the job of writing certain standards for the working group. The grievant undertook this task but it was tabled by the Department Head before completion.

The Department Head had her own concerns over certain work being done by the grievant outside normal procedures. She believed such work could possibly compromise the security of certain data. In years prior to the 2016 evaluation year, the grievant had received strong ratings for her work involving the WebJob/WebDist tool. During 2016 the supervisor and Department Head decided to take those responsibilities away from the grievant, believing that she was too slow in performing those duties and assigning tasks to the wrong “buckets.”

The grievant had concerns or questions regarding whether people in her group, including herself, were entitled to be awarded compensatory or flex-time, given the need for them to sometimes perform services outside of normal working hours. She addressed her questions to the Human Resources Department. She believed that her taking these issues to that Department were proper given that she did not feel she could discuss them directly with her supervisor or the

Department Head. She believes that she was held responsible by the supervisor for the employees in the group not being eligible for compensatory or flex-time because of her questions to the Human Resources Department.

The supervisor had difficulties in communicating with the grievant. He felt that she would not engage with him in a constructive discussion of any relevant issue. Also, he felt that she would not respond to his efforts to establish a dialogue.

The school did not believe that the grievant was spending an appropriate amount of time for the tasks assigned to her. They concede that on one particular metric, she completed more work tickets than any other individual in the group. The supervisor believes that is somewhat a function of her assigning somewhat repetitive tasks to herself as a way of making herself look better.

The working group had a large number of open work tickets that had been pending for a large amount of time. The Department Head and the Supervisor agreed to close those tickets and did so without prior communication with the grievant.

During this evaluation period the grievant received a Group II Written Notice for inadequate performance and failing to follow instructions. That disciplinary action involved her using a process she had been directed not to use and failing to meet a deadline for another task. On May 5, 2017 that grievance was decided adversely to the grievant, the discipline being upheld.

When the grievant was evaluated in October, 2016, she received a rating of "Unacceptable." In a drastic drop off from prior years, she was rated as Unacceptable for the task of developing and maintaining Business Intelligence Services. She was, however, rated as strong for her work as being primary administrator for EPM II and WebJob/WebDist. She

received a rating of “Developing” for her communications skills.

Under the core competency section of the evaluation she received acceptable ratings for the following: Teamwork; adaptability and flexibility, communication skills; time management; and work habits.

## **V. ANALYSIS**

As an employee at a State University the grievant is entitled to those protections set forth in Chapter 30 of Title 2.2 of the Code of Virginia. Section 4(B) of the Grievance Procedure Manual developed by the Department of Human Resource Management (as in effect of the filing of this grievance) states that an unsatisfactory performance evaluation may qualify for a hearing if its claims and the facts, taken as a whole, raise a sufficient question as to whether the evaluation was arbitrary or capricious. Once qualified for the hearing, the grievant has the burden of proving by a preponderance of the evidence, that the evaluation meets those standards. Section 9 of the Grievance Procedure Manual defines arbitrary or capricious as being “in disregard of the facts or without a reasoned basis.” The Rules for Conducting Grievance Hearings cites the case of *Norman v. Department of Game and Inland Fisheries* (5<sup>th</sup> Judicial Circuit of Virginia, July 28, 1999) for the elaboration that an arbitrary or capricious evaluation “is one that no reasonable person could make after considering all available evidence, and that if an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. A hearing officer is directed to uphold the evaluation “as long as there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to the established expectations.”

The testimony of the supervisor amply supports the evaluation. I found his testimony to be at least as credible as that of the grievant. The facts recited above show that the grievant and

the Supervisor had a difference of opinion over what constitutes an effective management style, as well as differing in how the grievant should be performing her duties. The grievant has noted her concerns over the way the working group was managed compared to other places she had worked, as well as how things had been done under a prior department head. It is obvious that the steps taken by management to correct what they saw as the shortcomings of the grievant were ineffective. Otherwise, her behaviors would not have been ongoing. The evidence is that the problems existing in October, 2016 were addressed in March, 2016, and continued thereafter. It is not for me to speculate as to whether any other approach taken with the grievant would have been more effective. The steps taken were reasonable.

The Qualification Ruling mentioned above recites that the Group II Written Notice and the events leading up to it is relevant in this case “to some degree.” Even assuming that they are not sufficient to support an “Unfavorable” evaluation in the absence of other evidence, they are consistent with the behavior and performance of the grievant described as occurring throughout the entire performance period. Therefore, I have given them more than minimal weight.

The lines of demarcation between the various competencies on which she was evaluated are far from clear. I believe that communication skills and teamwork are closely related. Also, time management and work habits as competencies would seem to have a great deal of overlap. The ability to determine fine lines when evaluating the employee in each of those categories is a matter to which I am required to give some deference to management. The grievant describes downgrading an employee in one area and having that rating spill over to another area as being a “pitchfork” system of evaluation. I do not disagree with that assessment. I do find, however, that the ratings given on the evaluation were not without reason. The overall rating of “Unacceptable” was not proven to be arbitrary or capricious.



## **VI. DECISION**

For the reasons stated, I uphold the Performance Evaluation of the grievant dated October 3, 2016.

## **APPEAL RIGHTS**

You may file an administrative review request within 15 calendar days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov), or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be received by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, 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.

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.<sup>a</sup>

[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].

ORDERED this September 5, 2017

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Thomas P. Walk, Hearing Officer

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