

Issues: Arbitrary/Capricious Performance Evaluation, and Separation from State due to Below Contributor Rating on Re-Evaluation; Hearing Date: 04/26/17; Decision Issued: 08/03/17; Agency: DVS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10983, 10984; 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: 10983 / 10984

Hearing Date: April 26, 2017
Decision Issued: August 3, 2017

PROCEDURAL HISTORY

The Agency evaluated Grievant's work performance as Below Contributor in 2016. The Agency conducted a re-evaluation and removed Grievant from employment effective February 1, 2017.

Grievant timely filed grievances to challenge the Agency's action. The matter proceeded to hearing. The Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 26, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant's 2016 annual performance evaluation is arbitrary or capricious?
2. Whether Grievant's re-evaluation was arbitrary or capricious?

3. Whether Grievant's removal was in accordance with State policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the 2016 annual performance evaluation was arbitrary or capricious. The burden of proof is on the Agency to show by a preponderance of the evidence that the re-evaluation was not arbitrary or capricious and was issued in accordance with State policy. 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.

DISCUSSION

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.

An employee who receives a Below Contributor rating on his or her annual performance evaluation, can be re-evaluated over a three month period and removed from employment if his or her performance does not improve.

Background

The Virginia Department of Veterans Services employed Grievant as an Office Administrations Supervisor at one of its cemeteries. She was responsible for all administrative duties and supervising an administrative employee, Ms. B. Her position was Exempt under the Fair Labor Standards Act.

Grievant's work hours were from 8 a.m. to 5 p.m. She had a one hour lunch break. Grievant sometimes reported to work late and left work early.

Grievant began reporting to the Supervisor on February 10, 2016. The Supervisor worked in an office located several hundred miles away from Grievant. Grievant and the Supervisor communicated frequently, often daily, by email or telephone.

Annual Performance Evaluation

An employee cannot be rated "Below Contributor" on the annual evaluation unless he or she has received:

- At least one Notice of Improvement Needed/Substandard Performance form; OR
- A Written Notice for any reason as defined in Policy 1.60, Standards of Conduct.

On August 3, 2016, Grievant received a Group I Written Notice. Grievant was disciplined for interfering with a family's selection of a team to present military funeral honors. Her failure to follow cemetery procedures and training resulted in two funeral honors teams being present for the service.

Grievant began supervising Ms. B in 2012. The Supervisor told Grievant that she and Ms. B should work as a team. Grievant sometimes was not courteous or respectful to Ms. B during the period of November 2015 through November 2016 and during the re-evaluation period.

When Ms. B cleaned the restrooms, she locked the door in order to prevent Grievant from entering. Grievant had approached her from behind while she was cleaning and screamed to startle Ms. B.

Ms. B testified that Grievant would sometimes move behind her in order to obtain Ms. B's passwords.

Ms. B sometimes dreaded going to work because she did not know what mood Grievant would reveal. Some days Grievant was pleasant to Ms. B and some days she was "tyrannical."

Ms. B tried to avoid Grievant during the re-evaluation period. Grievant told Ms. B that all Grievant had to do was snap her fingers and Ms. B's life was over. Grievant would sometimes yell at Ms. B as a result of Ms. B testifying against Grievant in a grievance hearing in December 2016.

Because of the problems with Agency was having with Grievant's work performance, the Agency had Mr. L, Grounds Manager, supervise Grievant beginning July 26, 2016. Mr. L continued to report to the Supervisor. He supervised Grievant until September 7, 2016. Grievant was not courteous and respectful to Mr. L. Grievant would sometimes refuse to acknowledge Mr. L's position and authority. His supervision of Grievant was so unpleasant that he considered seeking other employment. He asked the Agency to remove him from supervising Grievant and his request was granted.

From November 2015 to November 2016, Grievant was sometimes "unapproachable" by the Supervisor. On September 23, 2016, the Supervisor sent an email to Grievant and Ms. B stating that, "[b]efore lunch breaks we can discuss what

has been taking place such as any first calls, visitors, funeral services, etc. Prior to the close of business we will discuss the overall day.”¹ The Supervisor would call Grievant and Grievant would respond she could not talk and was very busy.

The Supervisor sent Grievant an email on October 11, 2016 instructing Grievant:

As we did last week, please email me a rundown prior to your lunch break of your morning activities and again prior to departing daily.²

Grievant complied with the Supervisor’s instructions on occasion. Some days, she would send an email regarding only half of the day. Sometimes Grievant did not submit an email explaining her activities.

On September 23, 2016, the Supervisor instructed Grievant to rework the new format of the pre-application report with a deadline of November 1, 2016. Grievant did not meet the deadline. On November 15, 2016, the Supervisor sent Grievant an email asking Grievant to send her pre-application report. On January 4, 2017, the Supervisor sent Grievant an email stating:

[Grievant] this is a perfect opportunity for you to complete the pre-application report. A deadline had been set for quite some time ago. Please send me what you have completed to this date, today. Then ensure you work on completing the project.³

On November 3, 2016, Grievant received an annual performance evaluation regarding her Core Responsibilities. Grievant had the Core Responsibility of Burials and Committal Services. She received a Below Contributor rating for this responsibility. The evidence showed that Grievant worked well with funeral directors and families but she poorly communicated with Mr. L. and Ms. B. She sometimes lacked attention to detail regarding errors in rank, terms of endearment and war period.

Grievant had the Core Responsibility of Determines Eligibility for Burial. Grievant received a rating of Contributor for this responsibility.

Grievant had a Core Responsibility of Building Maintenance. Grievant received a Strong Contributor rating for this responsibility.

Grievant had a Core Responsibility of Administrative Duties. Grievant received a Below Contributor rating for this responsibility. The evidence showed that Grievant was timely in her support submission but sometimes made errors. When she was

¹ Agency Exhibit 2.

² Agency Exhibit 2.

³ Agency Exhibit 14.

approached by the Supervisor about the errors, Grievant became defensive and blamed others for the errors.

Grievant had a Core Responsibility of Public Relations. Grievant received a Below Contributor rating for this responsibility. The evidence showed that complaints were made about how Grievant communicated as part of her position.

Grievant had a Core Responsibility of Work Ethic. Grievant received a Below Contributor rating for this responsibility. The evidence showed that Grievant was resistant to changes in her daily work schedule. Grievant was often not a “team player” when managing her workload.

Grievant received a 2016 annual performance evaluation on November 3, 2016. Grievant received an overall rating of Below Contributor. The evidence is sufficient to support the Agency’s annual evaluation of Grievant’s work performance. The Agency’s evaluation of Grievant was not arbitrary or capricious.

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.

On November 3, 2016, Grievant was given a Notice of Improvement Needed/Substandard Performance.⁴ She was provided with an Improvement Plan specifying:

[Grievant] you must follow at all times rules, regulations and your specific Manager’s personal instruction and training pertaining to all Veterans file folders held, both at-need and pre-applications, including but not limited to, proper file creation for all functions and for documentation and specific file cabinet storage procedures to include label documentation.

You must ensure Veteran’s cemetery record keeping, log books and detailed review of military documents for eligibility are completed in their entirety, to include using all avenues available to ensure all military documents are received for interments and or memorial ordering to complete our recorded keeping policies as required by the Cemeteries Administrations Manager per past administrative training conducted.

⁴ Although the Agency should have described this document as a re-evaluation plan, the Agency’s failure to do so is harmless error. The plan clearly describes the Agency’s expectations for Grievant’s work performance.

[Grievant] your communication in person, phone and computer. You must establish a courteous, respectful, and professional relationship with all cemeteries staff members, funeral home personal, visitors, guest, all VSO's organizations and the general public.

Email response time during working hours must be timely. The content will not be belligerent, provoking, or degrading. Your response must answer the specific question(s) asked without evasion or delaying tactics. Emails may not be ignored.

You must be courteous, respectful, and professional. Direct communication is the key.

[Grievant] it is crucial that you become a team player, listening to your co-workers, employees, managers, director, funeral homes, and VSO organizations.

[Grievant] you continual attempts to misinform your supervisor of situations, issues, problems, or directions tends to waste a considerable amount of time, you must stay on point. You will be continually monitored in this area as we move forward. ***

I expect significant improvement in the above listed areas between now and February 1, 2017 before which time we will reassess this Performance Plan. Your failure to meet the required standards could result in further disciplinary action, up to and including termination from your employment.⁵

Reevaluation

The Supervisor documented Grievant's work performance during the three month review period through the emails she sent Grievant. The Supervisor's assessment was mostly accurate and supported by the record.

On December 19, 2016, the Supervisor sent Grievant an email stating, in part:

Your performance is still below standards.

The following pertains:

- You remain disrespectful of my presence.

⁵ Agency Exhibit 5.

- I have observed your continued intimidation of the ... administrative coordinator.⁶
- You remained persistent to assist a funeral home in ordering military honors.
- I have been personally contacted by a family who had initiated a disinterment request with you. You did not report this information to me nor did you attempt to assist the family. I have taken control of this case.
- You did not make contact with me or any other member of management regarding the death of [name]'s daughter.⁷

On December 28, 2016, the Supervisor sent Grievant an email stating, in part:

Your performance is still below standards.

The following pertains:

- Timely acknowledgment and or response to email remains substandard.
- During this performance review period you have failed to submit required reports and written communication.
- Coworker report that the Administration Office remains uncomfortable and an unpleasant work environment.
- [Grievant] has made no attempt to communicate to reschedule her scheduled work trip to the [location]⁸ cemetery.⁹

On January 10, 2017, the Supervisor sent Grievant an email stating, in part:

Your performance is still below standards.

The following pertains:

- Timely acknowledgment and or response to email remains substandard.

⁶ For example, on November 8, 2016, Ms. B complained to the Supervisor that Grievant yelled at her and was saying Ms. B was lying. The Supervisor told Ms. B. "Please remove yourself from the building if you are being intimidated or yelled at." See Agency Exhibit 14.

⁷ Agency Exhibit 7.

⁸ The Supervisor sent Grievant an email on December 1, 2016 advising Grievant that she would be traveling to another cemetery on December 20, 2016 and report to work on December 21, 2016 at that cemetery. December 22, 2016 was a travel day for Grievant to return to her home cemetery. Grievant did not comply with this assigned travel.

⁹ Agency Exhibit 7.

- During this performance review period you have failed to submit required reports and written communication.
- Coworkers report that the Administration Office remains uncomfortable and an unpleasant work environment.
- [Grievant] has made no attempt to communicate to reschedule her scheduled work trip to the [location] cemetery.
- ***
- When asked to use cones for funeral services, you did not do so. You ensured you understood and would initiate this process, confirmed by email. Instead you refused and voiced rude remarks to your coworker.
- Critical Management decisions were made by you regarding an eligibility issue to also include funeral services for the deceased. You failed to communicate with your Manager and or the Director of Cemeteries regarding the eligibility issues at hand. Instead you made decisions on your own. Afterword, you were given specific instruction by your manager of which you failed to follow instructions. You have remained resistant to comply.
- You were given specific instruction to reopen a case and contact the family immediately. You did not do as instructed. Nor did you communicate with cemetery management as requested.
- Daily the alarm is not disabled until after 8 a.m. Cemetery operating hours are from 8 a.m. to 5 p.m. Signals indicate that the office is disarmed after 8 a.m. and armed before 5 p.m.
- When asked questions you continue to twist situations causing undue amounts of time to be spent on issues that can be resolved/addressed in a minimal amount of time.¹⁰

On January 23, 2017, the Supervisor sent Grievant an email stating:

Your performance is still below standards.

The following pertains:

- Time management continues, numerous alarm time stamps show that the Cemeteries Administration Office is not being opened until after 8 a.m. All Cemeteries Administration Office hours are 8 a.m. to 5 p.m.
- This review period I have identified numerous errors with both deceased files and memorials. These errors could have been avoided by paying attention to detail.

¹⁰ Agency Exhibit 7.

- Timely acknowledgement and or response to emails remains substandard. I have sent numerous emails of which you choose to acknowledge only the ones you want to respond to.¹¹
- September 23, 2016, I set a deadline for the pre-application report to be completed. To this date the report has not been completed. Nor has weekly communication been given to the Director as instructed.
- During this performance review period you have failed to submit required reports and written communication.
- Coworkers report that the Administration Office remains uncomfortable and an unpleasant work environment.
- [Grievant] you have made no attempt to communicate to reschedule [your] scheduled work trip to the ... cemetery.¹²

On January 27, 2017, the Supervisor sent Grievant an email stating:

This review period it is noted that you have initiated verbal conversations, (this week) with your supervisor which is a positive change.

Your performance remains below standards as outlined below.

The following pertains:

- This week there are serious concerns regarding memorial approvals. The majority of files sent had missing and or inaccurate information. Resulting in extreme ordering delay.
- After extensive research and instruction given by your supervisor, Cemeteries Administration Manager, it is concluded that [Grievant] interred a veteran at the [location] who is a Bar to VA benefits. Records show that [Grievant] failed to review and acquire proper required documentation prior to the interment.
- A disinterment/re-interment request was received by a family. [Grievant] failed to follow proper policy and procedure. First rule is that all disinterment requests are immediately brought to the attention of the Cemeteries Administrations Manager. Instead [Grievant proceeded] to guide the family using her own direction resulting in providing the family inaccurate information[. Grievant] mislead the family up to and including suggesting they purchase a casket for cremated remains.
- As a result of the above, a grave site was issued to a veteran and spouse that [was] not authorized by National due to [Grievant's] failure to contact

¹¹ On January 11, 2017, the Supervisor sent Grievant an email stating, "yesterday I sent numerous emails to you requesting information and or documentation. You failed to send the information as well you have not acknowledged my attempts/emails." See Agency Exhibit 24.

¹² Agency Exhibit 7.

her supervisor regarding disinterment/re-interment prior to making arrangements with the family.

- Time management continued to be an issue. Alarm stamps verify [that] the office on numerous days this week was not disarmed until after 8:00 a.m. Email was sent to you regarding your recent decisions to suddenly man the office until well after 5 p.m. Office hours are 8 a.m. to 5 p.m.
- Email response has improved, (this week) but still when I send emails that are not favorable to you, you chose to not respond and or acknowledge.
- The new pre-application report was completed January 26, 2016, this was after I brought to your attention the report had a completion date of November 1, 2016. Noting that instructions were not followed in their entirety, no communication was given to the Director on a weekly report during the project period.
- During this performance review period, you have failed to submit required documents. Reminders had to be sent by me to receive required information. (Interment schedules/Interment files, etc.)
- It is still my understanding that the work environment is uncomfortable and unpleasant.
- [Grievant] you have made no attempt to communicate to reschedule your scheduled work trip to the ... Cemetery.¹³

Grievant made a significant error regarding Mr. T during the re-evaluation period. Mr. T was a veteran. Following his first enlistment, he was honorably discharged and would otherwise qualify for burial at the Cemetery. He enlisted a second time. He was dishonorably discharged from military service. Because he was dishonorably discharged, he was no longer eligible to be buried at the Cemetery. Mr. T submitted a pre-application for interment prior to his death. Ms. B signed an approval letter on December 27, 2016 authorizing his interment at the Cemetery. Ms. B gave the file to Grievant for her approval and processing.

Mr. T died on December 31, 2016; On January 6, 2017, Mr. T's Daughter called Grievant to ask that Mr. T be buried at the Cemetery. Mr. T was interred in the Cemetery on January 9, 2017 with Grievant's authorization.

Grievant sent the Monument Format Report to the Supervisor for approval on January 18, 2018. The Supervisor reviewed the file she received and immediately realized Mr. T had a second enlistment. The Supervisor asked Grievant to research the outcome of the second enlistment. Additional research showed that Mr. T had been dishonorably discharged following his second enlistment. Thus, Mr. T should not have been interred in the Cemetery.

The Supervisor met with Mr. T's Daughter and explained why he had to be disinterred from the Cemetery. The Daughter cried hysterically. She did not know

¹³ Agency Exhibit 7.

about her father's dishonorable discharge. She could not understand how this could have happened.

Mr. L dug up the box of Mr. T's remains and gave it to the Daughter.

Grievant argued that Mr. T was interred based on the mistake made by Ms. B who send the family a letter pre-authoring burial at the Cemetery. This argument fails. Grievant received the call from the Daughter seeking burial. Grievant had been instructed to send the file to the Supervisor prior to internment. Grievant authorized the funeral home to bury Mr. T in the Cemetery and failed to send the file to the Supervisor prior to burial. Grievant sent the file to the Supervisor after internment and the Supervisor immediately recognized there was a second enlistment. Even if Ms. B was responsible for erroneous pre-authorization, Grievant prevented the Agency from discovering the error by failing to comply with the Supervisors instruction for Grievant to send the file to her prior to internment.

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.

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. If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, 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 concluded Grievant's work performance during the re-evaluation period was Below Contributor. Agency manager considered whether to demote or reassign or reduce Grievant's duties. Grievant's position underwent a Downward Role Change effective February 10, 2016 as part of an Agency business reorganization. They concluded no positions or other options were available other than removal.

On February 1, 2017, the Supervisor sent Grievant a memorandum stating, in part:

You were rated Below Contributor on your 2016 performance evaluation. On November 3, 2016, you were issued a 90 day Notice of Improvement Needed/Substandard Performance plan. Since that time, you have been provided and afforded daily verbal feedback along with written performance status reviews.

In addition it items already discussed with you, you recently interred a veteran at the Cemetery who is a Bar to VA benefits. Records show

that you failed to review and acquire proper required documentation prior to the interment. This is a violation of Agency Standard Operating Procedures.

In addition, a disinterment/re-interment request was received by a family and you failed to follow procedures and notify the Cemeteries Administrations Manager/Cemeteries Director of the situation. Instead, you proceeded to guide the family on your own which resulted in providing the family inaccurate information. You provided misleading and inaccurate information to the family which included suggesting they purchase a casket for cremated remains. As a result, a second grave site was issued to a veteran and spouse that are not authorized by DVS or the National Cemetery Association.

Based on the two above items in addition to your performance since being placed on the performance improvement plan, your performance is still at the Below Contributor level. Therefore, your employment with the Department of Veterans Services is terminated effective today, February 1, 2017.¹⁴

Grievant's Defenses and Arguments

Grievant presented evidence showing she provided good service to the Facility's customers. Although it is clear that Grievant performed some of her duties well some of the time, she did not perform them at an adequate level for a sufficient amount of time.

Grievant disagrees with the Agency's annual evaluation. Grievant must show more than that she disagrees with the Agency's evaluations, she must show that the evaluation was arbitrary or capricious. It is clear that the Agency considered all relevant aspects of Grievant's work performance during the annual evaluation.

Grievant asserts that the Agency's re-evaluation was inaccurate. The Agency has established that its re-evaluation was not arbitrary or capricious and that it followed State policy to provide Grievant with an adequate opportunity to improve her performance.

Grievant argued that the Agency failed to consider two letters complimenting her performance. Although the Agency did not consider the letters, the failure to do so is not sufficiently material as to undermine the Agency's re-evaluation.

CONCLUSIONS

The Hearing Officer draws several conclusions from the evidence presented:

¹⁴ Agency Exhibit 10.

The Agency substantially considered Grievant's work performance during his annual and three month evaluations.

Grievant's annual evaluation and three month re-evaluation were not arbitrary or capricious.

Grievant presented evidence showing her satisfactory work performance. That evidence was not sufficient to show that the Agency's opinion of her work performance was arbitrary or capricious.

The Agency substantially complied with the material provisions of DHRM Policy 1.40 thereby justifying the Agency's decision to remove Grievant from employment.

DECISION

For the reasons stated herein, Grievant's request for relief with respect to his annual performance evaluation is **denied**. The Agency's decision to remove Grievant from employment is **upheld**.

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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

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