

Issue: Separation from State due to Below Contributor rating on re-evaluation; Hearing Date: 06/29/17;
Decision Issued: 09/21/17; Agency: DOC; AHO: Sondra K. Alan, Esq.; Case No. 10993; Outcome:
No Relief - Agency Upheld.

COMMONWEALTH of VIRGINIA
Office of Employment Dispute Resolution
Department of Human Resource Management

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
IN RE: CASE NO. 10993

HEARING DATE: June 29, 2017
DECISION ISSUED: September 21, 2017

PROCEDURAL HISTORY

Grievant was removed from employment on February 17, 2017 following an unsatisfactory three-month performance evaluation.¹

Grievant made a timely request for review. On April 5, 2017, a Hearing Officer was appointed. A Pre-Hearing Conference was scheduled for April 13, 2017. A Motion was filed on May 9, 2017 regarding which party would be the forward party. A phone conference was scheduled on May 16, 2017. The Agency was available for the phone conference but Grievant was not. A letter was sent on May 16, 2017 with the repose to the Motion that the Agency would give testimony first due to this being a termination matter. The hearing was scheduled for May 23, 2017 at the facility. Due to a witness being unavailable for the hearing on May 23, 2017, a new hearing date of June 26, 2017 was agreed upon.

At the hearing, the Agency and Grievant were given 30 days to file a memo and 15 additional days to respond. Grievant's memo was sent on July 16, 2017. The Agency responded to the Grievant's memo on July 16, 2017. The Agency's memo was received on July 19, 2017. Grievant responded to Agency's memo on August 8, 2017.

APPEARANCES

Agency Advocate
Agency Representative as witness
3 Agency witnesses
Grievant
Grievant as witness
7 Grievant witnesses

¹ Agency Exhibit 3

ISSUES

1. Whether Grievant's re-evaluation and removal was consistent with state policy?
2. Whether Grievant's re-evaluation was arbitrary or capricious?

BURDEN OF PROOF

In re-evaluation actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances.² A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not.³ Grievant has the burden of proving any affirmative defenses raised by Grievant.⁴

APPLICABLE LAW AND POLICY

This hearing is held in compliance with Virginia Code § 2.2-3000 et seq, the Rules for Conducting Grievances effective July 1, 2014 and the Grievance Procedure Manual (GPM) effective July 1, 2014.

DHRM Performance Planning and Evaluation Policy 1.40 which relate to the herein case are as follows:

Below Contributor Rating – Results or work that fails to meet performance measures. To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle.⁵

Effective July 10, 2007

A Written Notice (Standards of Conduct Policy 1.60) that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "Below Contributor".⁶

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below.⁷

² Grievance Procedure Manual (GPM) § 5.8.

³ GPM § 9.

⁴ GPM §5.8.

⁵ Agency Exhibit 9

⁶ *Id.*

⁷ Agency Exhibit 9

Improvement Plan – The Notice of Improvement Needed/Substandard Performance form must include an improvement plan, which should have an improvement period of no less than 30 days or more than 180 days. The improvement plan shall be developed by the supervisor and the employee. If agreement cannot be reached, the supervisor may establish the improvement plan. The plan should be included on the form or attached to it. Employees should be given a copy of the Notice and plan. When the annual evaluation is completed, the Notice and plan must be attached to the Evaluation Form if the overall evaluation reflects a rating Below Contributor. Otherwise, the form is retained in the supervisor's file as described in the Retention of Performance Forms section of this policy. Substandard performance on the improvement plan also may result in disciplinary action under the Standards of Conduct. (See Policy 1.60 Standards of Conduct.)⁸

Re-Evaluation Plan – 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.⁹

- 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.

NOTE: Regardless of the employee's movement to another position during this re-evaluation period, the employee will not be eligible for a performance increase.

Three (3) Month Re-Evaluation – 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.¹⁰

⁸ Agency Exhibit 9

⁹ *Id.*

¹⁰ Agency Exhibit 9

If Performance Does Not Improve – 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.¹¹

Demote or Reassign – 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.¹²

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%. (See Policy 3.05, Compensation.)¹³

Reduce Duties – 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 decrease of at least 5% (See Policy 3.05, Compensation.)¹⁴

Terminate – 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.¹⁵

FINDING OF FACTS

After reviewing the evidence presented and observing the demeanor of each witness as well as due consideration given to Grievant, who was pro se, the Hearing Officer makes the following findings of fact:

Grievant was a Licensed Practical Nurse with the Agency. She was in Pay Band “3” and her status was non-exempt. Her job title was “Corrections Nurse Technician”.¹⁶ Grievant also stated she did secretarial work part of her time at the Agency although no evidence was submitted regarding the dates of this task. Grievant was acting as a Licensed Practical Nurse at the time of her re-evaluation period.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Agency Exhibit 1

The testimony in this case is very confusing partially due to Grievant's inability to present her case. Further, many different actions were happening at the same time. A time line attached to this decision may better explain the sequence of events.¹⁷

Grievant received several notes in early 2016 regarding improvements the Agency felt she needed to make.¹⁸ Generally the problem areas regarded: accurate charting, working overtime during the week to take Friday off without supervisor permission, tardy for work, truthfulness, sharing and organizing the group computer, keeping up with inventory, discussion of staff files, issue with CPR training, honesty issues, time conservation, and relations with co-workers. Mid-year, Grievant received memos regarding the manner in which she dispensed prescription medications as well as compatibility issues with co-workers.

Grievant was on leave from March 2016 to June 2016. Two days after returning in June the Warden advised Grievant she was on notice regarding a Disciplinary Action and that his letter was the 1st step in due process.¹⁹ A Written Notice for failure to follow instructions or policy with Group II discipline was issued on September 15, 2016.²⁰ Grievant did not appeal this action. Grievant's Below Contributor evaluation on November 17, 2016 was also not appealed.²¹ Accordingly, neither of these actions will be considered by the Hearing Officer as they are final matters.

Apparently after the Written Notice was received, Grievant requested extra nursing work at another facility and requested a recommendation from her Supervisor.²² The Supervisor declined to make a recommendation as the Supervisor believed Grievant had stated she was no longer interested in nursing.²³ Grievant filed a discrimination grievance on August 30, 2016 against this Superior, in which the matter was resolved by December 30, 2016 and this decision was also not challenged by Grievant.²⁴ Grievant also requested the Warden to permit her to apply for a job outside of nursing. Grievant apparently did not approve of the Warden's reply.²⁵ Grievant believed she had then filed another discrimination action against the Warden. There is no document in evidence that a complaint was filed, although Grievant wrote "follow up" letters.²⁶

Grievant received and signed her annual review on November 4, 2016.²⁷ Her previous 2015 annual review had been satisfactory. However, during the October 2015 to November 2016 period, Grievant had received several Notices of Improvement.²⁸ On September 15, 2016,

¹⁷ Hearing Officer Exhibit A

¹⁸ Agency Exhibit 3

¹⁹ Agency Exhibit 7

²⁰ Agency Exhibit 2

²¹ Agency Exhibit 8

²² Grievant Exhibit 5

²³ *Id.*

²⁴ Grievant Exhibit 9

²⁵ Grievant Exhibit 5

²⁶ Grievant Exhibit 9

²⁷ Agency Exhibit 8

²⁸ Agency Exhibit 3, 4, & 5

Grievant received a Written Notice with a Group II discipline for failure to follow instructions or policy regarding Grievant not being present for work when expected.²⁹

Grievant's evaluation of November 4, 2016 was a Below Contributor rating.³⁰ On November 17, 2016 Grievant was made aware of a re-evaluation plan. Grievant met with the evaluator and signed the plan.³¹ Notes were made about her progress or lack of progress on December 19, 2016 and February 1, 2017.³² On February 16, 2017 there was a final re-evaluation.³³ Based on the re-evaluation, Grievant was terminated on February 17, 2017.³⁴ Grievant made a timely request for the matter of her re-evaluation termination being heard by a Hearing Officer.

DISCUSSION

Grievant did not grieve her Written Notice and the time is past to do so. Issues that brought about the Written Notice cannot now be disputed. Grievant's discrimination complaint and supposed "write-up" complaints have also passed time for review. Grievant did not appeal her Below Contributor rating on November 4, 2016.

The issues that remain relate to the re-evaluation of November 4, 2017.

DHRM Policy 1.40 requires that a Grievant receive at least one notice of improvement or a Written Notice during the evaluation period in order to be considered for Below Contributor rating.³⁵ The Written Notice in the 2016 period was a qualifying event.³⁶

DHRM Policy 1.40 requires the Agency to develop a re-evaluation plan for employees who receive a Below Contributor rating. The plan must be developed within ten (10) working days of the evaluation date.³⁷ The plan was made known to Grievant on November 17, 2016 within the ten (10) business day time period.³⁸ The plan outlines improvements needed and described the re-evaluation process. Grievant signed the plan letter.

The evaluator spoke with Grievant and noted improvement on December 19, 2016.³⁹ However, the second review indicated there were problems.⁴⁰ The Agency's evaluator testified that Grievant was made aware of these issues.

²⁹ Agency Exhibit 2

³⁰ Agency Exhibit 8

³¹ Agency Exhibit 10

³² Agency Exhibit 11

³³ Agency Exhibit 12

³⁴ Agency Exhibit 13

³⁵ Agency Exhibit 9

³⁶ Agency Exhibit 2

³⁷ Agency Exhibit 9

³⁸ Agency Exhibit 10

³⁹ Agency Exhibit 11

⁴⁰ *Id.*

The Policy required review was made on February 16, 2017 the day before the 90-day re-evaluation period was completed.⁴¹ In accordance with policy on February 17, 2017 consideration was given to a demotion of Grievant, an alternative placement of Grievant and termination of Grievant.⁴² Because of Grievant's employee rank there was no lower demotion to which she could be assigned. There also was no other compatible position available. Grievant was terminated on February 17, 2017.

Grievant argued several reasons why she should not have been terminated.

Grievant produced several witnesses to say she was a friendly, hard worker that was not argumentative. However, none of these witnesses specified that they were talking about the time frame within the re-evaluation period. Further, one of these witnesses on cross-examination even stated the tension in the unit dissipated after Grievant left employment.

Grievant stated her "employee profile" was left on the counter at work and never explained to her. If Grievant is referring to the core job responsibilities paper, it needed no explanation to a seasoned employee. If Grievant is referring to the re-evaluation plan, it was in a letter personally sent to her. If Grievant is referring to her Below Contributor evaluation, she signed it.⁴³

Grievant made several statements about her past performance being better than the written documentation would indicate and that she was singled out when others were doing equal or even worse wrongdoings. Even if so, the time period to grieve these incidents is past and not an issue in the present matter.

Grievant stated she had only returned from leave two days before she received a disciplinary letter. She queried how could she have done so many wrong things in just two days. The disciplinary letter described several infractions of Policy that had occurred before Grievant left on leave.

Grievant was of the opinion the issues the Agency had with her work performance before she went on leave were all "dismissed" by the Warden. Not only are problems not dismissed but testimony from the Agency Representative was that the Warden had no authority to dismiss improper actions.

Grievant stated discrimination grievances she had filed were ignored. Only one discrimination complaint was filed and it went through all proper "step" channels before being determined unfounded.

⁴¹ Agency Exhibit 12

⁴² Agency Exhibit 13

⁴³ Agency Exhibit 8

Grievant misread DHRM Policy 1.40 (page 5)⁴⁴ believing that a specific meeting needed to occur more than 30 days after her poor evaluation. The policy to which she referred spoke of a 30 to 180-day improvement period during which time an employee's actions could be reviewed.

Grievant stated there were never any meetings with her evaluator during the re-evaluation period. The evaluator produced his notes of two meetings and affirmed he had spoken to Grievant about ways to improve her status.⁴⁵

Grievant stated she received her re-evaluation on February 16, 2017 and was only given one day to improve before she was terminated on February 17, 2017.⁴⁶ This is certainly not the case as she signed the re-evaluation EWP on November 17, 2017.

Grievant's complaints that she was terminated solely because she was being discriminated against lacks evidence. Whereas the several improvements needed by Grievant to keep her job were well documented. The policy requirements of DHMR Policy 1.40 as to re-evaluation were also well documented and all criterion met by the Agency.

DECISION

For the reason stated herein the Agency has substantially complied with State Policy. The Agency's evaluation of Grievant was not arbitrary or capricious. The Agency's decision to remove Grievant must be **UPHELD**. Grievant's request for relief is **DENIED**.

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.

⁴⁴ Agency Exhibit 9

⁴⁵ Agency Exhibit 11

⁴⁶ Agency Exhibit 12 & 13

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 specific requirements 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.⁴⁷

[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].



Sondra K. Alan, Hearing Officer

⁴⁷ Agencies must request and receive prior approval from EEDR before filing a notice of appeal.