

Issue: Arbitrary and Capricious Performance Evaluation and Retaliation;
Hearing Date: July 3, 2002; Decision Date: July 8, 2002; Agency:
Department of Social Services; AHO: David J. Latham, Esquire; Case
Number: 5469; **Administrative Review: Hearing Officer Reconsideration**
Request received 07/17/02; Reconsideration Decision Date 07/26/02;
Outcome: No basis to change decision; request denied



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5469

Hearing Date: July 3, 2002
Decision Issued: July 8, 2002

PROCEDURAL ISSUE

Grievant initially filed her grievance on October 16, 2001. On December 13, 2001, the agency head denied grievant's request that her grievance be qualified for a hearing. Grievant requested a ruling from the Director of the Department of Employment Dispute Resolution (EDR) as to whether her grievance qualifies for a hearing. The EDR Director ruled that this grievance does qualify for a hearing on the allegations of an arbitrary or capricious performance evaluation and retaliation.¹

APPEARANCES

Grievant
One witness for Grievant

¹ Exhibit 1. Department of Employment Dispute Resolution, *Qualification Ruling of Director No. 2002-005*, June 5, 2002.

Representative for Agency
Four witnesses for Agency

ISSUES

Was the grievant's evaluation of "Below Contributor" in one core responsibility arbitrary or capricious? Was the evaluation retaliatory?

FINDINGS OF FACT

The grievant filed a grievance alleging that her supervisor retaliated against her by giving her an arbitrary or capricious performance evaluation.²

The Department of Social Services (hereinafter referred to as agency) has employed the grievant as a Financial Services Practitioner for 3½ years. Grievant has one active disciplinary action – a Group I Written Notice issued in October 2000 for leaving a meeting with her supervisor without permission.³ During her first performance cycle ending in September 1999, and her second performance cycle ending in September 2000, she exceeded expectations.⁴

The Commonwealth implemented a new performance evaluation methodology for the performance cycle that began in the fall of 2000. While the previous evaluation scale had five possible ratings, the new methodology has only three possible ratings – Extraordinary Contributor, Contributor, and Below Contributor. The overwhelming majority of employees are rated Contributor; those few who are deemed to have performed extraordinarily receive the highest rating while one who performs below minimum expected standards is rated Below Contributor.

The grievant's performance evaluation for the cycle ending in September 2001 rated her an overall Contributor. Grievant's core responsibilities are divided into three major functions; she was given a Contributor rating on two of the functions. The remaining responsibility is, "Maintain the Department of Social Services' Chart of Accounts as per State and Federal Regulations/Guidelines," which accounts for 25 percent of her time.⁵ The Employee Work Profile (EWP) states that the measure for this core responsibility is:

Ensures the set-up and proper disposition of needed Department of Social Services (DSS) accounts on all automated systems (i.e., FAAS, CARS, SSCARS and Web Sheets), in accordance with the

² Exhibit 2. Grievance Forma A, filed October 15, 2001.

³ Exhibit 6. Written Notice, issued October 11, 2000.

⁴ Exhibits 10 & 11. Performance Evaluations, September 20, 1999 and September 25, 2000, respectively.

⁵ Exhibit 3. Grievant's *Employee Work Profile, Core Responsibilities*, signed March 30, 2001.

standards and guidelines of Virginia Department of Accounts (DOA) and Generally Accepted Accounting Principles (GAAP). Performs analysis and quality control reviews of funds, programs, cost codes, project codes, fips codes and grant codes in relation to the Chart of Accounts.⁶

Grievant's rating for this core responsibility was Below Contributor.⁷ The evaluation notes that grievant is unable to handle a high volume of requests for opening and closing account segments, that she failed to establish a schedule of times for set-up and disposition of account segments, and that she made errors inputting data into the system. Grievant's supervisor began supervising her in June 2000. Within a month or two, the relationship between the two deteriorated as the supervisor established due dates for certain work and grievant did not always meet the due dates.

During the performance cycle at issue herein – October 2000 through September 2001 – grievant was supervised by a financial services manager from October through December 2000, and from May through September 2001. During the period from January through April 2001, the financial services manager was on temporary assignment to help in a different area. In addition, management wanted to separate grievant and her supervisor for a period of time because they were aware of the friction between the two. However, during that period the supervisor continued to receive monthly reports from grievant and retained some oversight responsibility for her work with respect to the Chart of Accounts (COA) core responsibility. From January through April 2001, the financial services manager's immediate supervisor (who also holds the title of financial services manager) oversaw grievant's other responsibilities.

In February 2001, grievant's supervisor provided her with a written interim evaluation form that addressed performance areas identified for improvement or that were deemed substandard.⁸ Grievant refused to sign the evaluation form. The supervisor directed grievant to:

- Provide her supervisor a schedule for timely set-up and disposition of accounting segments.
- Develop a methodology for performing analysis and quality control reviews of the COA.
- Develop and maintain a rapport with her supervisor/manager to provide feedback on special projects and daily issues.

⁶ Exhibit 3. *Ibid.*

⁷ To receive a Below Contributor rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle. DHRM Policy No. 1.40, *Performance Planning and Evaluation*, April 1, 2001.

⁸ Exhibit 4. Grievant's *Interim Evaluation Form*, February 21, 2001. Interim Performance Evaluations are retained in the supervisor's confidential file for use in constructing the annual performance evaluation. DHRM Policy No. 1.40, *Ibid.*

- Attend time management and communication classes.

Although grievant partially completed the schedule, she never brought it to full completion. She did not develop the quality analysis methodology, and she never attended time management or communication classes.

On July 25, 2001, in a meeting with her supervisor and his supervisor, grievant told her supervisor that he was not her supervisor; he responded angrily that he was indeed her supervisor. She wrote a letter to her supervisor's manager asking that her supervisor be reassigned and not be allowed to write her annual performance evaluation.⁹ Grievant did not take her concerns about her supervisor either to the manager or to the human resources department.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁰

⁹ Exhibit 5. Letter from grievant to manager, July 26, 2001.

¹⁰ § 5.8, Grievance Procedure Manual, *Rules for the Hearing*, Effective July 1, 2001.

The evidence reflects that, almost from the beginning, grievant's supervisor and grievant encountered difficulties in working together. It is unclear whether this is attributable to a personality difference or whether grievant felt the supervisor was too demanding due to his emphasis on compliance with deadlines, or both. In any case, grievant chafed under his supervision. Grievant was resistant to her supervisor's suggestions to improve her performance, refusing to sign her interim evaluation and instead wrote a memorandum of rebuttal. She was also argumentative when she disagreed with her supervisor's instructions, contending that he had been given different instructions from his superiors. The poor relationship between the two was apparent to others in the office including the supervisor's first- and second-level managers. This, in part, resulted in the supervisor's four-month assignment to another department.

Retaliation

To prove a claim of retaliation, grievant must demonstrate whether 1) she engaged in a protected activity, 2) she suffered an adverse employment action, and 3) there is a causal link between the protected activity and the adverse action. If the agency presents a nonretaliatory business reason for the adverse action, the grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation.¹¹ It is undisputed that grievant engaged in a protected activity – filing a grievance – and that she suffered an adverse employment action – a Below Contributor rating on one element of her performance evaluation.

Grievant alleges that management retaliated against her by allowing the supervisor to complete her performance evaluation knowing that there was interpersonal conflict between the two employees. With the exception of the period from January through April 2001, the supervisor was grievant's supervisor during the entire evaluation cycle. Moreover, even during the four-month temporary reassignment, the supervisor continued to oversee grievant's COA work. Therefore, it was entirely appropriate for management to expect the supervisor to prepare grievant's performance evaluation. The fact that a supervisor does not get along equally well with all his subordinates is insufficient reason to have someone else evaluate a subordinate. Every supervisor, at some time or other, has a subordinate with whom the working relationship becomes difficult. Therefore, it is concluded that management did not retaliate against grievant by allowing grievant's supervisor to write her evaluation.

Grievant also alleges that her supervisor retaliated against her because she had filed a grievance following issuance of the disciplinary action in October 2000. However, she has not presented any evidence to conclude that the supervisor's evaluation was retaliatory. She offered no evidence that she ever

¹¹ See Dowe v. Total Action Against Poverty in Roanoke Valley, 145 F.3d 653 (4th Cir. 1998); see also Kubicko v. Ogden Logistics Services, 181 F.3d 544, 552 n. 7 (providing that a Title VII plaintiff must prove that retaliation was *the* motivating factor not just a motivating factor).

heard the supervisor or anyone else say that she was going to get a below contributor evaluation on one element because she had filed a grievance one year earlier. Moreover, there is no evidence from which one could reasonably infer that the evaluation was in any way linked to the earlier grievance. Further, the supervisor supported his evaluation by citing grievant's failure to comply with areas he had identified as substandard seven months prior to the evaluation. Thus, the supervisor had a reasoned and logical basis for his evaluation that is related to the written expectations grievant received. There is more to proving retaliation than merely making an unsubstantiated allegation. Accordingly, it is concluded that the grievant has failed to prove the retaliation allegation.

Arbitrary and capricious evaluation

In deciding whether grievant's evaluation was arbitrary and capricious, it is helpful to consider the definition of these two words. Arbitrary is defined as, "Based on or determined by individual preference or convenience rather than by necessity or the intrinsic nature of something."¹² Capricious is defined as, "Governed or characterized by a sudden, impulsive and seemingly unmotivated notion or action."¹³ Considered in the context of grievant's allegation, it must be concluded that her performance evaluation was neither arbitrary nor capricious. The downgrading of one element representing only 25 percent of her work while giving her an overall satisfactory rating suggests a measured but deliberate attempt to fairly evaluate grievant's effort and output while notifying her that one aspect of her work must be improved.

The agency has demonstrated that the comments accompanying the lower rating are supported by the supervisor's assessment in February 2001 regarding grievant's need to improve her performance in these very areas. This rules out the possibility that the evaluation was either an individual preference or an impulsive whim on the part of the supervisor. Thus grievant's performance evaluation was neither arbitrary nor capricious.

This conclusion does not mean that the evaluation was accurate. It does reflect that the agency had a reasoned basis for concluding that grievant's performance needs improvement in one of the areas for which she is accountable. Certainly, the accuracy of the supervisor's comments is debatable and reasonable people may differ regarding the extent of grievant's need for improvement. In this case, both the supervisor's manager, as well as the next higher manager supported the evaluation. Absent a showing to the contrary, the opinions of an experienced supervisor and two experienced managers must be given more evidentiary weight than an employee who has been employed only three years. Moreover, even if grievant had been able to demonstrate that her supervisor's evaluation was either retaliatory or arbitrary, the next two higher-level managers have reviewed and approved grievant's evaluation. Since the

¹² Webster's Ninth New Collegiate Dictionary

¹³ *Ibid.*

filing of this grievance, the supervisor and two managers have had ample opportunity to again review the evaluation. If they had any doubt about its accuracy, they could have required the supervisor to reconsider and revise his evaluation. The fact that they have affirmed the evaluation demonstrates their support of its accuracy.

Other factors

Grievant's resistance to authority is a significant factor in this case. During the hearing, grievant testified that she would do what the supervisor's manager told her but resisted doing what the supervisor told her if it was different from the manager's instruction. Even though she has been repeatedly told who her supervisor is, she has attempted to pretend otherwise. Following the July 2001 meeting and her annual evaluation, grievant still persisted in this self-delusion by stating on her grievance form that her immediate supervisor is the next-level manager above her supervisor.¹⁴ If grievant is in denial as to who is her supervisor, it is not surprising that she also denies constructive criticism from her superiors. Grievant testified that she did not believe that her supervisor and his manager could be objective because, "they are managers."

All performance evaluations involve some degree of subjectivity by the supervisor. When there is friction between a supervisor and subordinate, it is natural for the subordinate to conclude that any constructive criticism is biased. It is also difficult for the supervisor to prevent his subjective opinions from becoming biased. This requires the next higher levels of management to scrutinize especially carefully the performance evaluations written by that supervisor. In this case, both of the next higher-level managers were aware of the friction and, because of the importance of the COA, they were quite sensitive to any problems in this area. Nonetheless, the agency may wish to examine whether the situation might be improved by utilizing human resources to conduct team building sessions or some other appropriate training. A second alternative is to consider reassigning either grievant or the supervisor to a different area.

It is recommended that the agency reexamine grievant's Employee Work Profile to ascertain whether the Measures for Core Responsibilities are sufficiently specific and quantitative. DHRM Policy No. 1.40 requires that performance measures, "should be specific, *measurable*, attainable and relevant." The more quantitative a measurement can be made, the more clearly an employee can determine whether she is achieving the expectation. In this case, there are no measurable yardsticks that the incumbent can use to evaluate her own progress.

DECISION

¹⁴ Exhibit 2. Section I, Grievance Form A, *Relief requested*, filed October 16, 2001.

The grievant has not demonstrated, by a preponderance of the evidence, that her performance evaluation was arbitrary and capricious, or that the evaluation was retaliatory. Her request for relief is DENIED.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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.
3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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.¹⁵

[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]

David J. Latham, Esq.
Hearing Officer

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5469

Hearing Date:	July 3, 2002
Decision Issued:	July 8, 2002
Reconsideration Received:	July 17, 2002
Reconsideration Response:	July 26, 2002

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. A copy of all requests must be provided to the other party and to the Director of the Department of Employment Dispute Resolution.¹⁶

OPINION

Grievant submitted a request for reconsideration and provided a copy to the other party. Grievant's request for reconsideration raises issues that are addressed below in the same order as presented in grievant's request.

¹⁶ § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2001.

Retaliation

Grievant argues that, in addition to the substandard rating on one element of her performance evaluation, her supervisor retaliated by yelling, screaming and giving contradictory directives. The evidence indicated that on occasion the supervisor might have raised his voice, however, there was not sufficient evidence to conclude that the supervisor was yelling or screaming in a retaliatory manner. The evidence did establish that grievant was resisting her supervisor's instructions by arguing that someone else wanted it done differently. She also acted as though her supervisor was not her supervisor. It is therefore understandable that the supervisor might have become frustrated with grievant's behavior.

Grievant notes correctly, that during the four-month reassignment of her supervisor, his manager acted as grievant's supervisor. However, the undisputed testimony established that the supervisor continued to review the end-of-month COA work product even during his reassignment elsewhere. Thus he continued to have an oversight responsibility.

Grievant argues that her supervisor's interim review of her performance constituted only suggestions rather than requirements. The largest section of the interim review document addresses "Performance Areas Identified for Improvement/Substandard." When a supervisor told grievant, in writing, that certain aspects of her work were substandard and identified for improvement, grievant had clear and unambiguous notice that immediate changes were necessary. To assume that the supervisor's recommendations for improvement are merely suggestions that can be ignored is naïve at best. It is ignoring the obvious to further believe that an interim performance review does not constitute notice that, without substantial improvement, grievant would receive a substandard evaluation on that element of her responsibilities.

Arbitrary or capricious evaluation

"Arbitrary or capricious" is defined in the Grievance Procedure Manual as "In disregard of the facts or without a reasoned basis." The agency has not disregarded salient facts and it has used a reasoned basis for downgrading one element of grievant's evaluation. Therefore, the evaluation cannot be deemed arbitrary or capricious. Grievant's supervisor gave her specific written recommendations in February 2001 to help improve her performance in one area from substandard to satisfactory. Grievant only partially addressed one of the requirements but did not make changes in three of the four areas identified by her supervisor. The interim evaluation was in grievant's file. Even if grievant reasonably believed that her supervisor was now the manager, the interim evaluation and its recommendations were in her file. Any supervisor evaluating grievant's annual performance would have reviewed this document and

concluded that she had not satisfactorily addressed the areas identified for improvement.

Some years ago, when a supervisor identified areas for improvement, he or she would simply tell the employee in no uncertain terms, "You will change that and do it this way." There was no discussion or argument tolerated; it was "Either my way or the highway." Today, modern personnel policy requires that supervisors be more pleasant and sensitive to employee egos. Supervisors "identify areas for improvement", "encourage" changes, and tell an employee that "it is important" to forward information to the supervisor. While the language used today is more soothing, the meaning is the same – Do what you are told or be prepared for consequences. Unfortunately, some employees mistake the more pleasant language as being nothing more than suggestions. Nothing could be further from the truth.

DECISION

The hearing officer has carefully reconsidered grievant's arguments and concludes that there is no basis to change the Decision issued on July 8, 2002.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

David J. Latham, Esq.
Hearing Officer