

Issue: Wrongful Termination; Hearing Date: 09/09/03; Decision Issued:
09/15/03; Agency: Taxation; AHO: David J. Latham, Esq.; Case No. 5788



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 5788

Hearing Date: September 9, 2003
Decision Issued: September 15, 2003

PROCEDURAL ISSUES

Grievant requested as part of the relief he seeks, reinstatement to a *comparable* position. Hearing officers may provide certain types of relief including reinstatement and payment of back wages and benefits.¹ However, hearing officers do not have authority to transfer employees from one unit to another.² Such a decision is an internal management decision made by each agency, pursuant to Section 2.2-3004.B of the Code of Virginia, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

Grievant listed three issues as the basis for his grievance. Two of the issues – alleged arbitrary and capricious performance evaluation, and alleged discrimination – qualify for hearing. The third issue – alleged improper training – does not qualify for hearing because the grieved event occurred more than 30 days prior to the filing of the grievance.³ The training to which grievant refers

¹ § 5.9(a) EDR *Grievance Procedure Manual*, effective July 1, 2001.

² § 5.9(b)2. *Ibid.*

³ § 2.2 *Ibid.*

occurred after he was hired in 2000 and in early 2001. Grievant's training is discussed in this decision in order to provide a complete background picture, however, the hearing officer does not have authority to offer relief with respect to the training.

APPEARANCES

Grievant
Two witnesses for Grievant
Audit Supervisor
Advocate for Agency
Two witnesses for Agency

ISSUES

Was the grievant's performance evaluation arbitrary and capricious? Did the agency discriminate against the grievant on the basis of race, gender or age?

FINDINGS OF FACT

Grievant filed a timely grievance from the termination of his employment for failure to perform up to the minimum standards of the agency. Following failure to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.⁴

The Department of Taxation (Hereinafter referred to as "agency") had employed grievant for two years, nine months as an auditor. Previously, grievant had worked at five other state agencies over a period of 20 years.⁵ Grievant has a BA degree in accounting and extensive experience as a financial auditor, Medicaid auditor, healthcare auditor, fiscal assistant, and accountant.⁶

At the time grievant was hired in August 2000, he was the first new auditor hired by the agency in several years. Previously, the audit department had no formal training program for new auditors; instead, a new auditor would accompany experienced auditors on audits for several weeks. As they gained sufficient knowledge and experience, the new auditor would begin to perform audits on his own, with assistance as needed from a senior auditor. When the department decided in the spring of 2000 to begin interviewing for a new auditor, a formal training program was developed.

When grievant started work in August 2000, he was given formal training for almost four weeks, consisting of orientation, selected reading of regulations,

⁴ Exhibit 1. Grievance Form A, filed June 6, 2003.

⁵ Exhibit 12. Grievant's Application for Employment, May 2, 2000.

⁶ Exhibit 12. *Ibid.*

exercises in audit procedures, and consultations with other auditors.⁷ In addition, the agency developed a Training Manual that provided guidance on research sources, industry lingo and practices, and other information designed to assist auditors in the performance of their work. Subsequently, grievant began to accompany experienced auditors as they conducted audits at taxpayer sites. This on-the-job training (OJT) lasted for approximately six months. Thereafter, grievant began performing his own audits with assistance from the senior auditor assigned to function as his mentor.

Grievant's first performance evaluation with the agency was prepared while he was still engaged in OJT training in October 2000 and therefore could not reflect grievant's performance as an auditor.⁸ His second annual evaluation was prepared in October 2001 for the six-month period from April through October 2001.⁹ He received an overall rating of Contributor, however the evaluation noted that grievant needed to become more flexible, work more efficiently, and reduce the time spent on each audit.

In May 2002, grievant's supervisor gave him an interim evaluation that put him on notice of performance areas considered to be substandard and identified for improvement. Specifically, he was advised that his planning and conduct of audits, and his preparation of administrative and other reports were deficient.¹⁰ Grievant's third evaluation was prepared in October 2002 for the preceding 12-month period. He received an overall rating of Below Contributor.¹¹ At the same time, he was given a Notice of Improvement Needed.¹² Of the five core responsibilities in his work description, grievant received Below Contributor ratings on two responsibilities that account for 75 percent of his work time.¹³ His primary core responsibility (65 percent of his time) is the planning and conduct of audits. His tertiary responsibility (10 percent of his time) involves interpretation and application of tax law. These were the same two areas that had been identified as substandard in the May 2002 interim evaluation. Grievant did not file a grievance with respect to either the October 2002 evaluation or the Notice of Improvement Needed/Substandard Performance.

In November 2002, grievant requested mediation, which a human resources representative facilitated. During this mediation, the human resources representative advised grievant that he would be expected to promptly finalize

⁷ Exhibit 10. Grievant's Training Schedule and Training Records, August 2000.

NOTE: Testimony established that the training period was actually extended through September 6, 2000 to accommodate the grievant.

⁸ Exhibit 22. Grievant's performance evaluation, October 10, 2000.

⁹ Exhibit 21. Grievant's performance evaluation, October 22, 2001.

¹⁰ Exhibit 3. Interim Evaluation Form, May 21, 2002.

¹¹ Exhibit 4. Grievant's performance evaluation, October 9, 2002.

¹² Exhibit 7. Notice of Improvement Needed/Substandard Performance, October 9, 2002.

¹³ An employee's Work Description lists the core responsibilities that represent the primary functions of his position. Each core responsibility is assigned a percentage figure to indicate the time spent on that responsibility.

his audits, and that the consequence for failing to do so could be termination of his employment. A performance reevaluation plan was developed in November 2002 and grievant was given 90 days within which to bring his performance to an acceptable level.¹⁴ Grievant's re-evaluation was scheduled for February 25, 2003. However, in early 2003, it was decided for budgetary reasons that all auditors would be working from their residences rather than from state offices. The relocation of auditors to their homes resulted in some operational disruptions during February. Accordingly, grievant's re-evaluation was postponed for an additional 60 days thereby giving him an extra two months within which to improve his performance. Grievant's supervisor prepared his re-evaluation during late April and gave it to grievant on May 9, 2003.¹⁵ Because his overall evaluation continued to be "Below Contributor," grievant was removed from employment on that date.¹⁶

Toward the end of the re-evaluation period, grievant's supervisor prepared a synopsis of grievant's performance problems during the re-evaluation period.¹⁷ She noted grievant's indecisiveness in knowing how to approach an audit, delays in finalizing audits,¹⁸ failure to follow instructions until given personal reminders, errors in determining sample/total populations, and frequent last-minute itinerary changes. She testified to other problems that, individually, were not major but which contributed to grievant's overall performance. He had to be reminded multiple times about completion of leave slips, charging report preparation time to the appropriate category, failing to "zip" electronic files before transmitting them, and failing to use a spreadsheet for tax penalty computation even though he had been shown how. The senior auditor who functioned as grievant's team leader noted that grievant was conscientious about taking notes but then later was unable to find his notes, and the senior auditor would have to cover the same ground again. She also observed that grievant used little initiative; rather than seeking answers to questions in "ruling letters" or other sources, grievant would call her.

Although the audit supervisor assigns certain periodically required audit targets, auditors select most of their own targets to audit. Typically, they find audit targets by keeping abreast of business news throughout the state, and audit those taxpayers that the news suggests could have the potential for tax concerns. It is common knowledge among auditors that audits of larger-size

¹⁴ Exhibit 11. DHRM Policy No. 1.40, *Performance Planning and Evaluation*, revised August 1, 2001. "An employee who receives a rating of 'Below Contributor' must be re-evaluated and have a performance re-evaluation plan developed, as outlined below."

¹⁵ Exhibit 8. Grievant's re-evaluation, May 8, 2003.

¹⁶ Exhibit 11. *Ibid.* "If the agency determines that there are 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."

¹⁷ Exhibit 9. Synopsis of Grievant's Performance.

¹⁸ When grievant was removed from employment, he had several open audits that another auditor was able to finalize within one week.

companies are generally more productive than smaller companies in developing opportunities for tax recovery.

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 and dismissals for unsatisfactory performance, the agency must present its evidence first and 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 his evidence first and must prove his claim by a preponderance of the evidence.¹⁹

Grievant contends that he did not receive proper training. The facts suggest otherwise. Grievant came to the agency with a college degree in accounting, and 20 years of extensive audit experience at several other state agencies. Previously, new auditors in this agency had received only OJT experience. In contrast, grievant received a formal one-month training program prepared just for him. He was also given a newly developed training manual with valuable resource information acquired by experienced tax auditors over the years. He was then in OJT training for eight additional months, significantly longer than most previous new auditors. Even after beginning to perform audits on his own, grievant had ready access to an experienced senior auditor, and grievant took full advantage of this by frequently calling the senior auditor to ask

¹⁹ § 5.8 EDR *Grievance Procedure Manual*, effective July 1, 2001.

questions. Given grievant's background before joining this agency, it appears that he received more than adequate training.

Grievant's primary complaint about his training is that he was taken on audits by several different auditors and observed only portions of their audits. Some auditors had told grievant they felt it might have been beneficial for him to observe an audit from beginning to end. Grievant did observe all aspects of audits but would observe the beginning of one audit, and then attend the closing of a different audit. Agency management made the judgement to structure the OJT training in order to have grievant observe the audit techniques of several different auditors. The supervisor told grievant to try and glean from each of the several auditors those audit techniques that seemed best and most appropriate for grievant's style. The hearing officer is not able to second-guess the judgement made by experienced audit managers as to the best training method. However, given grievant's extensive education and experience as a seasoned auditor of 20 years, the issue of which he complains should have made little, if any, difference.

Grievant also contends that his problems were due, in part, to the fact that his supervisor works a four-day workweek leaving him without a supervisor on Fridays. However, undisputed testimony established that one or more senior auditors were always available on Fridays to answer questions. Moreover, the nature of tax audit work is such that there is virtually no question of such urgency that it could not wait until the following Monday if a senior auditor was unable to answer the question.

Grievant objects to the fact that quarterly reports were generated to each auditor showing the dollar recovery rate per audit hour expended. The supervisor utilizes this management tool to compare the dollars recovered to the number of hours it took to complete the audit. This measurement tool is a method of assessing auditor efficiency. The less time an auditor spends on an audit, the higher his dollar recovery rate per hour will be. A comparison among auditors of their dollar recovery rates per hour expended will, over time, indicate whether an auditor is performing with reasonable efficiency or whether he is spending too much time on each audit. This measurement tool is not included in performance evaluations. Rather, it identifies those employees who may be inefficient in their audit techniques and allows management to take appropriate corrective action to educate and train those employees to be more efficient. In fact, grievant's team leader had told him that his recovery rate was low but that he could improve it by spending less time on audits.

Grievant suggests that he should not be removed from employment because the interview panel that hired him considered him qualified for the position.²⁰ There is no question but that grievant's education and two decades of audit experience should have served him well in the auditor position. However,

²⁰ Exhibit 23. Memorandum to supervisor from interview panel, June 12, 2000.

extensive experience and qualifications are only a ticket that may get a job applicant through the door. Once hired, the applicant must prove himself by actually producing at the quality and quantity level expected by the employer. In this case, after a lengthy training period and nearly two years of work, grievant was unable to meet the agency's requirements. By the time of his 2001 performance evaluation, the supervisor began to conclude that grievant was not as savvy an auditor as he had led the interview panel to believe. This was subsequently borne out when the agency learned that grievant had taken a voluntary demotion after failing to meet the minimum performance expectations of his position at another state agency.²¹

Grievant felt that his supervisor was demanding. During the November 2002 mediation, grievant complained that he was getting different answers to the same question when he asked different senior auditors. To resolve that concern, the supervisor told grievant to come only to her with his questions so that he would always get the same consistent answers. Grievant did not like this arrangement and would have preferred to report directly to a male senior auditor with whom he felt more comfortable. The choice of supervision is a management prerogative. While grievant may have preferred a different arrangement, there is nothing inherently inappropriate about his reporting directly to the supervisor rather than a senior auditor. Moreover, both senior auditors who testified concluded that grievant was not suited for the tax auditor position.²²

Grievant points out that Policy No. 1.40 provides that an agency may demote or reassign an employee whose performance is documented as not improving. While the policy does give an agency those options, demotion or reassignment is not mandatory. Such a decision is an internal management decision made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government." The third option available to agencies is removal from employment. If there are no available positions for transfer or reassignment, then the agency has no choice but to terminate employment.

Discrimination

Grievant alleged that he was discriminated against based on his race, gender, and age. Grievant is a black, 55-year-old male. Grievant assumed that his race was a factor because he was one of only two black auditors of the 18 auditors in his department. Similarly, he felt that his age was a factor because he was the oldest auditor in the group. However, grievant provided no

²¹ Exhibit 24. Grievant's performance evaluation, November 21, 1996. NOTE: Interestingly, grievant avers that the agency he was employed by at that time deliberately failed to train him so that he would fail and be demoted.

²² One of the two auditors expressed disappointment that the agency had to remove grievant rather than transfer or demote him. However, that did not change his conclusion that grievant received adequate training but simply was not an efficient auditor.

documentation or testimony to support his assumptions and feelings. He offered the telephonic testimony of one witness (an ex-employee) who felt that the supervisor put pressure on some employees.²³ However, the witness acknowledged that some of those employees were white and some were black. During the hearing, grievant acknowledged that he had no actual evidence of discrimination.

An employee may demonstrate discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the process. In this case, grievant has not presented any testimony or evidence of remarks or practices that would constitute discrimination in the evaluation process. The statistical evidence offered is inconclusive; the fact that one black employee was discharged for unsatisfactory performance is, by itself, insufficient to conclude that race, gender, or age were motivating factors. In any case, the agency has provided ample evidence of its non-discriminatory basis (unsatisfactory performance) for removal to overcome any possible inference that grievant might have been discriminated against.

DECISION

The decision of the agency is affirmed.

The grievant has failed to demonstrate that his performance evaluation was either arbitrary or capricious. The termination of grievant's employment on May 9, 2003 is hereby UPHeld.

Grievant has also failed to prove that his removal from employment was due to his race, gender or age. Therefore, grievant's request for relief is hereby 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,

²³ This witness acknowledged that he is currently taking medication due to a health condition. The medication and his condition have caused him to have both short-term and long-term memory loss. Therefore, the testimony of this witness was accorded relatively little evidentiary weight. NOTE: Grievant references this witness in Exhibit 2, letter from grievant to agency Commissioner, July 29, 2003, p. 2, 1st paragraph.

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.²⁴ 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.²⁵

[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

²⁴ An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.