

Issues: Retaliation and misapplication of policy; and arbitrary and capricious
Performance Evaluation; Hearing Date: 04/12/04; Decision Issued: 04/14/04;
Agency: Dept. of ABC; AHO: David J. Latham, Esq.; Case No. 554/584



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 554 & 584

Hearing Date: April 12, 2004
Decision Issued: April 14, 2004

PROCEDURAL ISSUES

Grievant filed two grievances, one alleging retaliation and misapplication of policy, and the other alleging an arbitrary and capricious performance evaluation. The agency declined to qualify the first grievance for hearing. Grievant requested a ruling from the Director of the Department of Employment Dispute Resolution (EDR) as to whether his first grievance qualifies for a hearing. The EDR Director ruled that both grievances qualify for hearing and, because both issues are significantly intertwined, that the grievances would be consolidated for one grievance hearing.¹

The hearing was originally docketed for March 8, 2003 in order to comply with the EDR timeliness requirement.² Prior to the hearing, grievant's attorney sustained an injury requiring hospitalization and recovery time. He requested,

¹ Agency Exhibit 1. *EDR Qualification and Compliance Ruling of Director*, No. 2003-474, 2004-569, issued February 3, 2004.

² §5.1 *EDR Grievance Procedure Manual*, effective July 1, 2001, requires that a grievance hearing must be held and a written decision issued within 30 calendar days of the hearing officer's appointment unless just cause is shown to extend the time limit.

and the hearing officer granted, a postponement of the hearing until April 12, 2003.

APPEARANCES

Grievant
Attorney for Grievant
Four witnesses for Grievant
Human Resources Director
Advocate for Agency
Two witnesses for Agency

ISSUES

Did the revision of grievant's job responsibilities constitute retaliation? Did the revision of grievant's job responsibilities constitute a disciplinary action? If so, did the agency act in compliance with policy when it revised grievant's job responsibilities? Did the agency misapply policy by placing a counseling memorandum in grievant's personnel file? Was the grievant's 2003 performance evaluation arbitrary or capricious?

FINDINGS OF FACT

The grievant filed a timely grievance alleging that the agency's revision of his work responsibilities constituted retaliation and was a de facto disciplinary action constituting a misapplication of policy. He also alleged that the agency further misapplied policy by placing a counseling memorandum in his personnel file.³ Subsequently, grievant filed a second timely grievance charging that his 2003 performance evaluation is arbitrary and capricious.⁴

The Department of Alcoholic Beverage Control (ABC) (Hereinafter referred to as agency) has employed grievant for ten years. He is a Law Enforcement Manager II (working title - Deputy Director) in the agency's Bureau of Law Enforcement Operations.⁵

The Commonwealth's Standards of Conduct provides for two types of corrective action to address employment problems such as unacceptable performance and/or behavior. Corrective action may range from an informal action such as counseling to formal disciplinary action.⁶ Counseling may be documented by memorandum which should be retained in the supervisors' files,

³ Agency Exhibit 2. Grievance Form A, filed September 22, 2003.

⁴ Agency Exhibit 3. Grievance Form A, filed November 18, 2003.

⁵ Agency Exhibit 8. Grievant's Work Description, September 9, 2003.

⁶ Agency Exhibit 10. Section II.A. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

not in employees' personnel files.⁷ The policy defines "disciplinary action" as an action taken in response to an employee's behavior, as described in Section V - Unacceptable Standards of Conduct (Offenses). Disciplinary actions may range from the issuance of an official Written Notice only to issuance of a Written Notice and termination of employment.⁸ Disciplinary action also may include demotion or transfer in lieu of termination. In such cases, the agency *must* initiate a disciplinary salary action.⁹

In early 2003, the General Assembly directed that the Secretary of Public Safety (Hereinafter referred to as Secretary) prepare a plan to transfer the agency's Bureau of Law Enforcement Operations (BLEO) to the Virginia State Police. This concept had been evaluated in the past and had been found undesirable. The agency believes that such a transfer is still not a good idea and is unlikely to occur. Nonetheless, the Secretary directed the agency heads of the both ABC and VSP to designate a task force to study the concept and develop appropriate plans.¹⁰ While the leadership of the task force included both ABC and VSP members (as well as members of the Secretary's staff), each agency was charged to conduct separate studies and prepare separate plans. ABC members of the task force initially included the Chief Operating Officer (COO), Chief Financial Officer, Planning Director, the Director of BLEO, two Assistant Special Agents in Charge (ASAC) and one Special Agent.

The first meeting of the agency's task force work group took place on July 14, 2003. The BLEO Director was unable to attend the entire meeting and asked grievant (BLEO Deputy Director) to attend. He told grievant that it was an oversight that grievant had not been included in the initial list of task force work group members and that he was to be a member henceforth. During this initial meeting, the COO laid out a work plan for the group. He mentioned that one of the options to be considered would be splitting the agents between the two agencies based on a division of their law enforcement activities and their administrative responsibilities. The group met twice more in July. Although the COO and BLEO Director attended parts of these meetings, it was primarily to provide direction. The work and report preparation was performed primarily by five people: grievant, the two ASACs, and two Special Agents. The ASACs and the Special Agents were all subordinates of grievant; thus, grievant was the highest-ranking member of the actual work group.¹¹

⁷ Agency Exhibit 10. Section VI.C.2.c. *Ibid.*

⁸ Agency Exhibit 10. Section II.C. *Ibid.*

⁹ Agency Exhibit 10. Section II.C. *Ibid.*, revised September 2000. "With a disciplinary salary action, employees may be retained in their current positions and have their duties reduced or be moved to positions in the same or lower pay band with less job responsibilities. In either case, the **employee's salary must be reduced** by at least 5%." (Emphasis and underscoring added)

¹⁰ Supporting Documents. Email from Chairman of the Board to agency employees, July 11, 2003. NOTE: The Chairman of the Board specifically stated that the workgroup was designated as a "Task Force."

¹¹ Supporting Documents. See Email from COO to four task force working group members, July 29, 2003 for BLEO organization charts.

Three options for transferring the BLEO to VSP were evaluated: transferring the entire Bureau, transferring only special agents (who perform law enforcement functions), and splitting the agents between the two agencies based on a division between the agents' law enforcement duties and their administrative responsibilities. The work group agreed that if a transfer had to happen, the latter option was the least preferable because it appeared totally impractical.

On July 31, 2003, the COO distributed to the work group a draft document outlining the current organization and functions of BLEO.¹² Group members responded to the COO expressing their concerns, especially their disagreement with the percentage of time assigned to criminal activities. The COO responded that the group would have an opportunity to explain and expound on the numbers in the next step of the process.¹³

The work group met again on August 12, 2003.¹⁴ During the first part of this meeting, the COO and BLEO Director explained that the group's final report must include specific numbers of agent positions that would be transferred to VSP if a decision was later made to split positions between VSP and ABC based on a division between law enforcement and administrative functions. He advised them that the report had to be sent to the task force chairperson by August 15, 2003. A 45-minute discussion ensued in which grievant and the work group argued that the splitting of agent positions was impractical and that they did not want to do it. The COO stated that he had been tasked by the Task Force chairperson to provide that information. He emphasized that he understood their views, that the split was not being recommended, but that the group must nonetheless provide the numbers. He further advised the group that they could include in the report their recommendation that the split option not be adopted.

After the COO and BLEO Director left the meeting, the work group spent the next several hours preparing its report, which it turned over to the BLEO Director that afternoon.¹⁵ During this and other work group meetings, grievant used his portable computer to write report drafts. As the acknowledged best writer of the group, grievant wrote the entire report, albeit with limited input from others in the group. The report does not include the information requested by the COO. On the last page, the report states, in pertinent part:

“Despite the directions given this study committee to determine the appropriate division of the numbers of special agents required for the two functions, all of the committee members except the COO and Director strongly believe that such an exercise can only be misinterpreted as endorsing the feasibility of splitting the ABC special agents between ABC and VSP. ... The committee majority

¹² Supporting Documents. Email from COO to task force working group, July 31, 2003.

¹³ Supporting Documents. Email from COO to task force working group, August 6, 2003.

¹⁴ A fifth person – the second Special Agent – was added to the work group on August 12, 2003 to represent a previously unrepresented geographical area of the Commonwealth.

¹⁵ Exhibit 5. Report on Functions and Duties of ABC BLEO, August 12, 2003.

respectfully submits this report with the understanding that this is not what the COO requested..."¹⁶

The BLEO Director was dismayed by grievant's failure to follow instructions. He advised grievant that he wanted a written explanation of his actions and that disciplinary action was being given consideration.¹⁷ Grievant responded as requested and admitted in his response that:

"[The COO] told the committee that the Secretary's office had directed him to prepare a plan that split the special agents between ABC and VSP. ... During the intense debate over this, [the COO] said the committee needed to determine the number of agents by region to stay at ABC for administrative work and to go to VSP for criminal work. He told the committee that we could then document all the reasons why such a plan would not work."¹⁸

Subsequently, after conversations with agency management and human resources, the BLEO Director decided not to formally discipline grievant but to instead counsel him in writing.¹⁹ In addition, he advised grievant that he was reorganizing BLEO's structure because he had "lost confidence in your ability to provide leadership and guidance to field personnel that is consistent with this agency's direction." The reorganization, effective on the date of the memorandum, removed grievant's responsibility for approximately 100 special agents (taken over by the Director) and gave grievant responsibility for License Records Management and Tax Management (16 employees). Grievant's title, position, pay band, salary, office assignment, hours of work, and assignment of a state-owned vehicle remain unchanged.

Grievant's overall performance evaluation rating for 1999 and 2000 were "Exceeds Expectations." His rating for 2001 was "Contributor."²⁰ In 2002 he was rated "Significant Contributor."²¹ Grievant's overall rating for the 2003

¹⁶ Exhibit 5. *Ibid.*

¹⁷ Supporting Documents. Email from BLEO Director to grievant, August 21, 2003.

¹⁸ Supporting Documents. Memorandum from grievant to BLEO Director, August 22, 2003.

¹⁹ Supporting Documents. Memorandum from BLEO Director to grievant, September 9, 2003.

NOTE: The four other members of the task force working group also received written counseling memoranda.

²⁰ Agency Exhibit 9. Department of Human Resource Management (DHRM) Policy No. 1.40, *Performance Planning and Evaluation*, revised August 1, 2001. Following the 2000 performance cycle, the Commonwealth completely revised its performance planning and evaluation policy. There had been statewide abuse under the previous evaluation scheme resulting in a disproportionate number of employees receiving the highest ratings of "Exceeds Expectations" or "Exceptional."

The revised DHRM performance evaluation policy provides only three possible ratings – Extraordinary Contributor, Contributor or, Below Contributor. The Department of Human Resource Management made clear that, under the revised policy, the majority of employees will be rated Contributor.

²¹ As noted in the previous footnote, DHRM Policy does not provide for a rating category of "Significant Contributor." The agency did not present any evidence to show that DHRM had authorized the creation of a new rating category to be used by ABC. In fact, grievant's supervisor

performance cycle was “Contributor.” His 2003 evaluation rated seven core responsibilities; he was rated a Contributor for six of the seven responsibilities. Grievant’s rating for one area of responsibility was Below Contributor and contained comments that grievant characterized as inaccurate negative allegations.²²

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, such as claims of retaliation, misapplication of policy, or an arbitrary or capricious performance evaluation, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.²³

Retaliation

testified that he had created this rating himself. In the absence of any proof that this was an authorized rating category, it is presumed that grievant’s rating for this period would have been Contributor had the evaluation been prepared pursuant to policy.

²² The comment states: “[Grievant] did not fulfill his obligation while participating with the State Police merger committee. As the highest-ranking participant on that committee, it was his responsibility to see that orders were followed. Those orders, while understood, were not followed.”

²³ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

In his written grievance, grievant alleged retaliation because he had expressed opinions that were not received favorably by his superiors. Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.²⁴ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law.

Grievant asserts that expression of his opinion in the workplace is a protected activity under the First Amendment. It is a common misconception that the First Amendment guarantees unlimited freedom of speech. In fact, there are limits to the freedom of expression.²⁵ In an employment situation, the employer generally cannot limit what a person says but may place limitations on the time and place of such expression. Such reasonable limits are a condition of employment that an employee accepts when he agrees to be employed. In this case, it appears that grievant's expression of opinion in the report was a protected activity because the COO told grievant (and the work group) that they could include in the report their disagreement with the concept of splitting agent positions between the two agencies.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment, such as a cut in pay.²⁶ A transfer may constitute an adverse employment action if a grievant can show that the transfer had some significant detrimental effect on the terms, conditions, or benefits of his employment.²⁷ A transfer with dramatic shift in working hours, appreciably different responsibilities, or one providing reduced opportunities for promotion can constitute an adverse employment action, depending on all the facts and circumstances.²⁸ Here, although grievant was not transferred, he was assigned significantly different job responsibilities which might, theoretically at least, reduce his opportunity for advancement, thereby satisfying the second prong of the test.

²⁴ EDR *Grievance Procedure Manual*, p.24

²⁵ The government may legitimately limit freedom of expression when, for example, one yells "Fire!" in a crowded building that is not on fire or, when one advocates illegal behavior that could pose immediate danger to the safety of others.

²⁶ *Von Gunten v. Maryland Department of Employment*, 2001 U.S. App. LEXIS 4149 (4th Cir. 2001) (citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997).

²⁷ *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999)

²⁸ See *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999); *Webster v. Henderson*, 2000 U.S. Dist LEXIS 5777 (D. Md 2000) aff'd 2002 U.S. App. LEXIS 287 (unpublished opinion). See also *Garrison v. R.H. Barringer Distributing Co.*, 152 F. Supp. 2d 856 (MD N.C. 2001).

Grievant has also established a nexus between his expression of opinion and the change in his job responsibilities. The BLEO Director changed grievant's responsibilities, in part, because of the "content and tone" of the report authored by grievant.²⁹ The Director was particularly concerned about statements in the report that appeared to be factually incorrect (salary grade increases), a questionable conclusion (that half of all alcoholic beverage sales are illegal) and, the repeated suggestion that the agency's Board places more emphasis on increasing its profit than on public safety. However, the agency has rebutted grievant's allegation of retaliation by establishing that it had nonretaliatory reasons for the realignment of grievant's work responsibilities. As a result of grievant's refusal to comply with the COO's directions, the BLEO Director lost confidence in grievant's ability to provide appropriate leadership and guidance to field personnel. As the highest-ranking member of the work group and, as a member of upper management, grievant had an implicit responsibility to assure that management's directions were complied with regardless of his own personal views.

Instead, grievant effectively aligned himself with the special agents. By taking the lead and authoring the report himself, grievant became the de facto spokesman for the special agents (even though this may not have been his intent). While some of the more controversial views in grievant's report could easily have been redacted before sending the report outside ABC, the work group's refusal to include information specifically requested by the COO was a far more serious matter. If grievant had been allowed to remain in charge of the special agents, they might have perceived him as someone who could defy agency management instructions and get away with it. Further, the agency might have lingering doubt that grievant would be able to effectively pursue agency objectives when such objectives conflicted with the preferences of special agents. These are valid management concerns; grievant has not shown that them to be pretextual in nature.

Disciplinary Action

The reassignment of grievant's job duties was, in part, a disciplinary action.³⁰ The BLEO Director and the Human Resources Director testified as much during the hearing. However, as explained in the preceding section, there were also reasonable nonretaliatory reasons for reassigning grievant.

Grievant offers several defenses. First, grievant argues that he was not formally assigned to the task force. This argument is not only unpersuasive but also specious. Grievant rebuts his own argument in the attachment to his grievance in which he states, "I was a member of the committee."³¹ (Italics

²⁹ Supporting Documents. Email from BLEO Director to grievant, August 21, 2003.

³⁰ During the hearing, grievant testified that the BLEO Director withheld assignment of a newer state-owned vehicle as a second punitive measure. However, this issue was not raised in the written grievance and, therefore, is not subject to adjudication in this case.

³¹ Agency Exhibit 2. Grievance facts attachment, September 22, 2003.

added) Although grievant's name was not mentioned in the chairman's announcement of the task force, grievant was asked to attend the first meeting of the work group. Moreover, he attended every meeting thereafter, acted as scribe to consolidate the group's ideas and, authored the entire report submitted in the group's name. The evidence is sufficient to conclude that, not only was grievant a part of the work group, but that he performed the majority of the work.

Second, grievant maintains that the work group was a "committee" and that they were only expected to represent the views of the special agents. He contends that the report he submitted was the expression of views held by the special agents, as represented by the five members of the work group. He, and his witnesses, apparently believed that a "committee," once appointed, became an independent entity that was entitled to submit the report in the manner it chose rather than as management had instructed. Even if the work group was a committee, this argument is semantical. Committee is defined as, "a body of persons delegated to consider, investigate, take action on, or report on some matter."³² Task forces and work groups perform the same responsibilities. In an employment situation, *any* group (by whatever appellation) selected by higher management to study and report on a topic is answerable only to higher management – not to employees. Higher management creates the group, gives the group its charge, and provides direction. The group is expected to carry out the charge given by management. In this case, management wanted the group to represent the views of special agents but it also directed, that notwithstanding such views, certain other information *must* be included in the final report.

Third, grievant argues that the agency did not *order* the group to provide the numerical breakdown of agent positions. This argument is as spurious as the previous two. Grievant points to a work plan outlining eight steps to be followed by the entire task force, which was given to the group on August 12, 2003.³³ Grievant argues that, because the work plan does not contain a specific instruction to provide the numerical breakdown of positions, it was not an "order" and therefore the group was free to disregard it. This argument ignores the obvious. A work plan is merely an outline; it is not a comprehensive and detailed instruction sheet. More importantly, as the creator of the work group, higher management is free to supplement the work plan with additional instructions. Moreover, supplemental instructions may be either in writing or verbal. The evidence in this case is clear and convincing that the COO and the BLEO Director instructed the group on the morning of August 12, 2003 to include the numerical breakdown of positions included in the report.³⁴ Finally, grievant acknowledges that, as of the July 14, 2003 meeting, "As I initially understood it, the committee task was to determine what percentage of the ABC special agent

³² *Merriam-Webster's Collegiate Dictionary*, Tenth Edition.

³³ Agency Exhibit 4, p.2.

³⁴ For corroboration, one need look no further than the work group's report of August 12, 2003 in which **the group admits that "this is not what the COO requested,"** and that it submitted the report **"despite the directions given."** Additional corroboration is found in the testimony of grievant and his witnesses reflecting that the group intentionally left out the information that the COO had requested.

duties would be defined as criminal and what would be defined as administrative.”³⁵ Thus, grievant knew from the very outset that this was one of the directives with which the work group was expected to comply.

Grievant suggests that the revision of his work responsibilities was either a demotion or a transfer. The DHRM Policies and Procedures Manual Glossary defines demotion as, “An employee’s reassignment to a position in a lower salary grade (now called pay band).” Grievant has remained in the same position and pay band as he was prior to revision of his responsibilities. Accordingly, he was not demoted. DHRM defines transfer as, “An employee’s reassignment from one position to another position in the same salary grade.” Grievant was not moved to a different position and therefore was not transferred.³⁶ He works in the same office, has the same work hours, role title, and work title and, reports to the same supervisor as before the revision of responsibilities.

It should be noted that the agency could have issued a Group II Written Notice for failure to follow a supervisor’s instructions. Had it done so, that disciplinary action would have been placed in grievant’s official personnel file and would have remained active for three years. Instead, the agency elected to counsel grievant so that his personnel record remains blemish-free.

Due Process

Grievant complains that he was denied due process because the agency did not issue a Group II Written Notice for failing to follow supervisory instructions. It is correct that, if the agency had issued a written notice of discipline, the grievance would have *automatically* qualified for a hearing.³⁷ However, this is moot because the grievance procedure provides that adverse employment actions – such as job assignments – which are not accompanied by formal discipline but which are taken for disciplinary reasons also qualify for hearing.³⁸ In this case, EDR qualified the grievance for hearing and therefore grievant has received the requisite due process. Grievant referenced a citation (presumably from the Code of Virginia) but this section (§ 9.1-500) was repealed in 1952.³⁹

³⁵ Agency Exhibit 2. Grievance facts attachment, September 22, 2003. On page 3 of the same document, grievant states: “the COO said the committee **had** to determine the number of agents [positions] by region to stay at ABC for administrative work and number of agents to go to VSP for criminal work. He told the committee that we could then document all the reasons why such a plan would not work.”

³⁶ Exhibit 8. Grievant’s Employee Work Profile reflects that he still occupies the same position number.

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

³⁸ §4.1(b)5, *Ibid*.

³⁹ It is not known whether this section was subsequently recodified, and if so, what the new section number is. Grievant neither proffered this provision nor referred to it during the hearing.

Misapplication of Policy

Grievant alleged that the agency misapplied policy by placing a copy of the counseling memorandum in his official personnel file. The BLEO Director noted on the counseling memorandum that copies were sent to both the COO and "Personnel File." The Standards of Conduct policy provides that a counseling memorandum is not to be placed in an employee's personnel file. The Human Resource Manager testified that although she received a copy of the memorandum for information purposes, it was never placed in grievant's personnel file. Since the event from which grievant seeks relief never occurred, this issue is moot.

Performance Evaluation

If a contested performance evaluation is qualified for hearing, and a hearing officer finds that it is arbitrary or capricious, the only remedy is for the agency to repeat the evaluation process and provide a rating with a reasoned basis related to established expectations.⁴⁰ "Arbitrary or capricious" is defined as "in disregard of the facts or without a reasoned basis."⁴¹ The remedy cannot include an award of any particular rating. Further, the remedy cannot include the expungement of specific comments from the evaluation merely because the employee disagrees with the comments.

In the instant case, grievant did not allege that his performance evaluation was arbitrary and capricious, nor did he present any evidence to show that it was arbitrary and capricious. The overall rating for 2003 was generally consistent with the ratings during the preceding four performance cycles. Certain responsibilities were not rated as highly as in past cycles but grievant did not grieve those changes. His sole grievance with regard to the evaluation was the inclusion of comments on only one area of responsibility that he alleges contain inaccurate negative allegations. Of the three specific comments, one does contain technically inaccurate information by describing grievant as the "highest-ranking participant" on the task force.⁴² In fact, the highest ranking member of

⁴⁰ Section VI.C.2, *EDR Rules for Conducting Grievance Hearings*, effective July 1, 2001. See also *Norman v. Dept. of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999). The court's opinion in *Norman* indicates that an arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence, and that if an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to sustain an arbitrary or capricious performance evaluation claim as long as there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations.

⁴¹ Definitions, *EDR Grievance Procedure Manual*, effective July 1, 2001.

⁴² However, grievant was the highest-ranking member of the group of five task force members who actually did the majority of work and prepared the task force's report.

the task force was the chief operating officer of the agency.⁴³ Based on the evidence in this hearing, the other comments were not inaccurate.

However, even if it could be concluded that the comments in this single area of responsibility were inaccurate, that would be insufficient reason to repeat the entire evaluation process. It is not unusual that employees disagree with a supervisory comment on their evaluation, especially when the comment addresses an area deemed to need improvement. As the evaluation has not been shown to be arbitrary and capricious, grievant's request for relief must be denied.

Conduct of Hearing

Following the testimony of the first two of grievant's witnesses, grievant's counsel objected to the hearing officer asking questions of the witnesses during direct examination and limiting the testimony of the witnesses. The hearing officer explained that hearing officers may ask questions at any time during the hearing. In this case, the questions were asked to obtain a more specific response rather than the very general answer ("others" were on the committee) given by the witness. During cross-examination, the two witnesses sometimes attempted to include irrelevant information that was not directly responsive to questions. It appeared that the second witness had a hostile attitude toward the agency (and by extension, to the agency advocate). It is worth noting that grievant's subsequent two witnesses presented their testimony concisely, were responsive to all questions, did not attempt to pursue their own agendas, and comported themselves appropriately.

DECISION

Grievant has not borne the burden of proof to demonstrate that the agency either retaliated against him or misapplied policy when it revised his job responsibilities. Grievant's request that the agency's action be reversed is hereby DENIED.

Grievant has not borne the burden of proof to show that his 2003 performance evaluation was arbitrary and capricious. Grievant's request that certain comments be removed from his 2003 performance evaluation is hereby DENIED.

⁴³ Supporting Documents. Email from Chairman of the Board to agency employees, July 11, 2003.

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. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe 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. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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.⁴⁴ 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.⁴⁵

⁴⁴ 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).

⁴⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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