

Issue: Arbitrary or capricious performance evaluation; Hearing Date: 03/29/04;
Decision Issued: 03/31/04; Agency: VCCS; AHO: David J. Latham, Esq.;
Case No. 609



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 609

Hearing Date: March 29, 2004
Decision Issued: March 31, 2004

PROCEDURAL ISSUE

Grievant requested as part of the relief she seeks, that the supervisor's decision to perform an interim evaluation in three months be rescinded. During the second resolution step, the agency acceded to this request and agreed to conduct a less formal, quarterly performance review of grievant's work.

APPEARANCES

Grievant
Representative for Grievant
One witness for Grievant
Director of Information Technology
Representative for Agency

ISSUE

Was grievant's performance evaluation fair and adequate?

FINDINGS OF FACT

The Virginia Community College System (Hereinafter referred to as “agency”) has employed grievant for 14 years (10 years as a classified employee; four years as a wage employee). She is an information technology specialist.

On November 7, 2003, grievant received her evaluation for the annual performance cycle that ended October 24, 2003, earning an overall rating of “Contributor.”¹ However, grievant was dissatisfied with the supervisor’s rating of “Below Contributor” on three of her seven core responsibilities. She filed a grievance alleging that the evaluation was unfair and inadequate.²

In 2001 and 2002, grievant earned an overall rating of “Contributor” for both performance cycles; she did not grieve either evaluation. For the performance cycles in the previous four years, grievant had been rated “Exceptional.”³ The individual ratings for grievant’s seven core responsibilities during the three most recent performance cycles are shown in the table below:

Core Responsibility	2001	2002	2003
Perform. Mgt.	Contributor	Below Contributor	Below Contributor
Network Install.	Extraordinary Con	Below Contributor	Below Contributor
Computer Install.	Extraordinary Con	Contributor	Contributor
Computer Repairs	Contributor	Contributor	Contributor
Staff Training	Contributor	Contributor	Below Contributor
Appl. Training	Extraordinary Con	Extraordinary Con	Extraordinary Con
Customer Service	Extraordinary Con	Contributor	Extraordinary Con
Overall Rating	Contributor	Contributor	Contributor

¹ Agency Exhibit 3. Performance Evaluation for grievant, November 7, 2003.

² Agency Exhibit 1. Grievance Form A, filed December 4, 2003.

³ See Agency Exhibit 2. 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 most 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. Only a small minority of employees may earn an Extraordinary Contributor rating, which is defined as: “Results or work that is characterized by exemplary accomplishments throughout the rating period; performance that is considerably and consistently well above performance measures. Employees must have received at least one documented Acknowledgement of Extraordinary Contribution form to receive an [overall] Extraordinary Contributor rating.”

Grievant's supervisor joined the agency as Director of Information Technology in June 2001. When he wrote grievant's first performance evaluation in October 2001, he had observed her performance for only four months.

Until March 2003, grievant had been performing a supervisory function. The first core responsibility (listed in the above table as Performance Management) is used only for employees who supervise others. Grievant's supervisor had observed deficiencies in grievant's supervisory skills soon after he became IT Director. In the 2001 evaluation, he noted that grievant should improve her organizational skills and obtain additional technical training. In the 2002 evaluation, the Director gave grievant a Below Contributor rating because the deficiencies in her supervisory skills had become more apparent.⁴ He detailed her shortcomings in several aspects of supervision including organization, technical expertise, assertiveness and, accountability. In the 2003 evaluation, he cited some of the same deficiencies noted during the previous two performance cycles. The IT Director removed grievant's supervisory responsibilities in March 2003 because of her failure to improve and because grievant and a subordinate had left a work function early without permission.

Grievant's second core responsibility is Network Installation and Maintenance. While rating grievant highly in the first year, the Director noted that grievant needed a more structured approach and additional documentation. By 2002, he observed that grievant was not keeping up with the rapidly changing technology and, in some areas, she was less knowledgeable than subordinates whom she was charged with supervising. During 2003, grievant's lack of organization and formal training exacerbated the problems noted in the preceding two years.

The third rating with which grievant disagreed involves the core responsibility of supporting staff training and lab assistance. In 2001, the Director advised grievant to engage in more professional development in order to keep her technical skills current. He repeated the same admonition in 2002. By 2003, grievant had still not taken sufficient steps necessary to improve her skills and technical knowledge. The field of computer technology is advancing so rapidly that it is vital to constantly take training courses in order to keep up with changes. During the 2002-03 fiscal year, the agency had allocated money in its budget for professional development.⁵ This money was available for tuition reimbursement, conference/workshop fees, and other professional development activity. The Financial Vice President had encouraged grievant on two occasions to pursue professional development activities.

⁴ Agency Exhibit 3. Grievant's performance evaluations for 2001 & 2002.

⁵ Agency Exhibit 5. Letter from agency Vice-President for Financial & Administrative Services, March 19, 2004.

Pursuant to policy, grievant's supervisor gave her an opportunity to complete a self-evaluation before he evaluated her.⁶ Grievant did not want to write a self-evaluation until after she had seen the supervisor's performance evaluation. The supervisor acceded to grievant's request.

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, including claims of discrimination and retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.⁷

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

⁶ Agency Exhibit 2. *Ibid.* "Each employee must be afforded an opportunity to provide the supervisor with a self-assessment of his or her job performance for the rating period. The employee should be asked to provide a self-evaluation at least two weeks prior to the evaluation meeting. *A supervisor must review and consider the self-assessment when completing each employee's performance evaluation.*" (Underscoring and Italics added).

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

basis related to established expectations.⁸ “Arbitrary or capricious” is defined as “in disregard of the facts or without a reasoned basis.”⁹ The remedy cannot include an award of any particular rating.

Grievant contends that the Director did not give her a chance to show her supervisory skills. She alleges that he excluded her from some changes because she is female.¹⁰ However, grievant failed to produce any evidence to support this allegation. Instead, grievant attempts to shift responsibility to the Director claiming that he is confrontational and argumentative. Assuming that grievant is correct about the Director’s management style, that does not absolve grievant from her responsibility to develop her own supervisory skills. If the Director needs to improve his personal interaction skills, that is an issue that must be dealt with by his supervisor – the Finance Vice President. Every employee has areas of performance that can be improved; grievant must focus on her own development rather than on her disagreements with the supervisor.

Grievant contends that the IT Director had told her during 2003 that there was no money in the budget for training and professional development. The preponderance of evidence indicates otherwise. First, the Director denies telling grievant that money was not available. He also testified that he had given grievant a packet of information regarding the availability of grant money for professional development. Second, grievant was aware that the Director had attended professional development training during the year. Third, grievant’s own witness – a coworker – testified that he knew money was available during 2003, and the Director never told him he could not take training. Fourth, the Finance Vice President has certified that training money was available in the budget and, that she had encouraged grievant to take professional development courses. Finally, grievant could have increased her skills by reading manuals and other publications related to the changing technology in her field.

During the hearing, the hearing officer observed that grievant’s Employee Work Profile Work Description was incomplete in two respects. The Work Description failed to include an organization chart¹¹ and, the percentage of time

⁸ 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.

⁹ Definitions, *EDR Grievance Procedure Manual*, effective July 1, 2001.

¹⁰ Agency Exhibit 3. Grievant’s self-evaluation, October 29, 2003.

¹¹ DHRM Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001, Attachment B, *Instructions for Completing Employee Work Profile*, Item 24 Addendum provides: “An **Organization Chart** must be included with the Work Description/Performance Plan. (required)”

assigned to each core responsibility is missing. However, since grievant did not disagree with her overall rating, the absence of time percentages did not adversely affect this Decision, which addresses only three of the seven core responsibilities.

In summary, grievant has not shown by a preponderance of evidence that her 2003 performance evaluation was arbitrary or capricious. Moreover, she has not demonstrated that the evaluation was either unfair or inadequate. The agency considered the available facts and had a reasoned basis for the ratings given to grievant. While grievant may disagree with the ratings for three of her seven core responsibilities, it is not unusual that employees disagree with some aspects of a supervisor's evaluation. The 2003 evaluation was consistent with the previous two evaluations reflecting a similar performance pattern over the three-year period. Further, the Director gave grievant the highest ratings for two core responsibilities in which she demonstrated extraordinary performance. This supports a conclusion that the evaluation was fair and balanced – recognizing excellent performance in some areas, while noting substandard performance in other areas.

DECISION

Grievant has not borne the burden of proof to demonstrate that her evaluation was arbitrary or capricious, unfair, or inadequate. 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, 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.¹² 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.¹³

[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

¹² 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).

¹³ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.