Issues: Group II Written Notice (failure to perform assigned work) and arbitrary and/or capricious performance evaluation; Hearing Date: 04/01/04; Decision Issued: 04/05/04; Agency: W&M; AHO: David J. Latham, Esq.; Case No. 618/619

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 618 & 619

Hearing Date: April 1, 2004
Decision Issued: April 5, 2004

APPEARANCES

Grievant
One witness for Grievant
Representative for Agency
Two witnesses for Agency
Observer for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the grievant's performance evaluation arbitrary and capricious?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group II Written Notice for failure to perform job duties.[1] She also grieved her annual performance evaluation issued on the same date.[2] Following failure of the parties to resolve the grievances at the third resolution step, the agency head qualified the grievances and consolidated them for a hearing.[3]

The College of William and Mary (Hereinafter referred to as "agency") has employed grievant for 10 years. During the past six years, grievant has worked in the Registrar's office as an enrollment services assistant. Grievant has one active prior disciplinary action – a Group II Written Notice for making personal long distance telephone calls on agency telephones.

Grievant works at the front desk in the registrar's office handling walk-ins, answering telephone inquiries, and responding to written requests for transcripts. Grievant's performance evaluations for the 1998, 1999 and 2000 performance cycles rated her as "Meets Expectations." Her evaluations for 2001 and 2002 rated her a "Contributor."[4]

Grievant's work performance has been marginal for some time. Although she received an overall rating of "Meets Expectations" during the 2000 performance cycle, the supervisor rated her as "Fair but Needs Improvement" in two of her primary job expectations. The supervisor placed grievant on notice that failure to improve during the next performance cycle would result in a lower overall rating.[5]

In April 2002, grievant came under the supervision of the Associate Registrar, who had joined the Registrar's office that month. The Associate Registrar learned that grievant felt that her previous supervisor had been unfair. When the Associate Registrar wrote grievant's annual performance evaluation in October 2002, she had observed a number of deficiencies in grievant's performance during the preceding six months. However, she wanted to avoid having grievant feel that she would treat her unfairly. She gave grievant the

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[1] Exhibit 4. Written Notice, issued October 24, 2003.

[2] Exhibit 2. Grievant's performance evaluation, October 24, 2003.

[3] Exhibits 1 & 3. Grievance Form As, filed November 7, 2003.

[4] *See* 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. The revised DHRM performance evaluation policy provides only three possible ratings – Extraordinary Contributor, Contributor or, Below Contributor.

[5] Exhibit 5, Attachment F. Grievant's annual performance evaluation, signed November 2, 2000, states in Section I: "[Grievant] has a pleasant attitude and willingly accepts additional responsibilities when asked. However, she has frequently failed to meet the basic expectations of her position: providing accurate information to our constituents in a timely and professional manner. … Because [Grievant] needs improvement on her two primary job responsibilities and expectations, her overall performance borders on 'Fair But Needs Improvement'."

benefit of the doubt and rated her a "Contributor" but noted in the evaluation certain aspects of her work that required improvement.

During the 2003 performance cycle, grievant failed to improve her performance. A new computer system was implemented in April 2003 and grievant had still not fully learned it six months later. On May 29, 2003, the Registrar and the Associate Registrar met with grievant to discuss her failure to improve the deficiencies noted in her 2002 performance evaluation. Five specific areas were addressed during the meeting including not pulling her load, not processing transcript requests "on demand", lack of knowledge about the listserv, errors in the Banner program and, failure to order supplies before they are exhausted.[6] Grievant was on maternity leave during July and the first half of August 2003. During that period, the supervisor assigned the office email account to a coworker because grievant had said she was unable to keep up with it. By the end of August 2003, grievant had not demonstrated sufficient improvement in her overall performance. In September 2003, grievant was given a Notice of Substandard Performance that addressed performance areas needing improvement.[7] During the year and during meetings with her supervisor, grievant stated that she understood how to perform her job and that she understood she would have to demonstrate improvement.

On October 13, 2003, a customer lodged a complaint about grievant's handling of her request for verification of a student's degree. She characterized the interaction with grievant as negative and said that grievant had spoken in a condescending manner. It appeared to the customer that grievant did not want to help her. Grievant then referred the customer to another University (that had been affiliated with the College at one time). When the customer asked for the University's telephone number, grievant told her that she could look up the phone number on the University's website. Based on this incident and other recent failures by grievant to timely respond to verification requests, grievant's supervisor issued her a Group II Written Notice on October 24, 2003.

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

[6] Exhibit 5, Attachment B. Memorandum to file from Registrar, June 17, 2003.
[7] Exhibit 5, Attachment C. Notice of Substandard Performance, September 16, 2003.

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 contesting a performance evaluation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[8]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Standards provide that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment.[9]

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.[10] "Arbitrary or capricious" is defined as

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[8] § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

[9] Exhibit 11. DHRM Policy 1.60 Section V.B.2, *Standards of Conduct*, September 16, 1993. NOTE: Substandard performance may result in the issuance of both a disciplinary action in the form of a Written Notice, and a Notice of Improvement Needed. See DHRM Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

[10] 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,

"in disregard of the facts or without a reasoned basis."[11] The remedy cannot include an award of any particular rating.

The agency has borne the burden of proof to show by a preponderance of evidence that grievant's performance evaluation was not arbitrary or capricious. Moreover, the agency has demonstrated that the evaluation had a reasoned basis that is directly related to the established expectations in grievant's work description and performance plan. The record reflects that grievant's performance has been marginal since at least the 2000 performance cycle. Both grievant's previous supervisor and the current supervisor have given her the benefit of the doubt in rating her performance satisfactory overall during the 2000, 2001 and 2002 performance cycles. During the 2003 cycle, grievant was counseled about the need to improve on multiple occasions. The agency finally issued her a formal Notice of Improvement Needed to emphasize that continued substandard performance was unacceptable.

Grievant contends that her failure to timely order supplies stems from a misunderstanding regarding the ordering procedure. Grievant has been ordering supplies for years and knows the procedure. She had not previously advised her supervisor of any misunderstanding. The objective is to periodically review the stock level of supplies and reorder supplies when stocks are low enough that they could be depleted before new supplies arrive.

Grievant also contends that she misunderstood the instruction to respond to requests for transcripts on demand. Grievant believed that she only had to provide transcripts on demand in an emergency.[12] The Registrar and Associate Registrar had never mentioned the word emergency when explaining the procedure to staff in numerous meetings. The instruction was that when transcript requests are received, the staff is expected to respond to the request at the time of the request, unless the transcript is not available. Grievant has failed to explain the source of her purported misunderstanding.

Grievant suggests that her evaluation should be changed to Contributor because her previous evaluations rated her a Contributor. Grievant's argument is not persuasive. If an employee automatically always received the same rating as the prior year, there would be no point in having an annual performance evaluation of employees. The fact is that employee performance can, and does, change over time. Changes in performance can be attributable to a number of factors, including the effort and knowledge that an employee applies to her

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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.

[11] Definitions, EDR *Grievance Procedure Manual*, effective July 1, 2001.

[12] Exhibit 7. Second step resolution response memorandum, December 12, 2003.

responsibilities. If performance is marginally satisfactory one year but the employee fails to improve in areas identified for improvement, it may be reasonable and appropriate to change the evaluation in the subsequent year to reflect that continued substandard performance is unacceptable.

Grievant feels she is doing her job well because she claims she receives positive feedback from students, faculty and the general public.[13] It is not surprising that grievant receives some positive feedback. As her former supervisor noted in the 2000 performance evaluation, grievant has a pleasant attitude. Her pleasant demeanor and willingness to accommodate were apparent during this hearing. However, grievant must understand that her job performance is evaluated by her supervisor – not students or others. The supervisor is required to base her evaluation on whether grievant performs her core responsibilities according to agency expectations. The evidence in this hearing is sufficient to conclude that grievant is not performing up to those expectations. In summary, grievant has not shown that the agency's evaluation was arbitrary or capricious, or without a reasoned basis.

Grievant does not recall being rude to a caller on October 10, 2003. Grievant's inability to recall the incident does not prove that it did not happen. It is more likely than not that a customer would expend additional time and effort to lodge a complaint only if the incident did, in fact, occur. The agency's written documentation of the interaction between grievant and customer reflect that the customer was significantly dissatisfied with the treatment received from grievant. Although grievant may not have *intended* to treat the customer inappropriately, the fact remains that the customer clearly perceived grievant's handling of the request to be unsatisfactory and inappropriate.

The agency disciplined grievant with a Group II Written Notice because grievant was "not performing her job duties." The Standards of Conduct provide that one example of a Group II offense is "Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy."[14] However, when one reads this offense in conjunction with the other eight examples of Group II offenses, it is apparent that Group II offenses generally require or infer *willful misconduct*. For example, a refusal to work overtime requires a conscious, deliberate decision to disobey the direct instruction of a supervisor. In most cases, the failure to perform assigned work has been considered a Group II offense only when an employee is directed to perform a task, and thereafter *deliberately* fails to perform that task. However, when an employee performs her job duties but does so in an unsatisfactory or inadequate manner, a first offense is generally considered to be the Group I offense of "inadequate or unsatisfactory work performance."[15]

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[13] Exhibit 8. Memorandum to Human Resource from grievant, December 15, 2003.
[14] Exhibit 11. Section V.B.2.a, *Ibid*.
[15] NOTE: However, when an employee has been disciplined with a Group I Written Notice for unsatisfactory performance, and thereafter continues to perform unsatisfactorily, the agency may

In this case, the agency felt that it had given the benefit of the doubt to grievant for a long enough time. Grievant's supervisor concluded that grievant's previous evaluations, counseling, and warnings had given her ample opportunity to correct deficiencies and improve performance. Thus, the supervisor felt that grievant's failure to improve must surely involve a degree of willfulness. However, it is apparent from both the supervisor's testimony and documentation[16] that she was unsure about whether grievant's failures were attributable to willfulness or to inability. After giving careful consideration to all the testimony and evidence, and giving appropriate weight to grievant's demeanor, the hearing officer concludes that grievant's failure to perform up to expectations was not willful or deliberate. Grievant attempted to perform her responsibilities but either misunderstood directions or just cannot meet the expectations of the job. Under these circumstances, grievant's offense is more appropriately characterized as a Group I.

DECISION

The decision of the agency is modified.

Grievant has not borne the burden of proof to demonstrate that her performance evaluation issued on October 24, 2003 was arbitrary or capricious. Grievant's request for relief on her performance evaluation is hereby DENIED.

The Group II Written Notice issued on October 24, 2003 is hereby REDUCED to a Group I Written Notice.

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.

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be justified in issuing a Group II Written Notice providing the employee has been given any necessary training and a reasonable time within which to improve her performance.

[16] Exhibit 5. Memorandum to Human Resources from Associate Registrar, November 11, 2003. The Associate Registrar states: "It *seems* as if the warnings, directions, and numerous counseling sessions are going unheard. It is *unclear* whether [grievant] **cannot or just will not** follow directions and procedures." (Italics and emphasis added)

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.[17] 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.[18]

[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]

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[17] 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).

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

David J. Latham, Esq.
Hearing Officer