

Issue: Misapplication of Performance Planning and Evaluation Policy; Hearing Date: 09/11/03; Decision Issued: 09/16/03; Agency: Taxation; AHO: Carl Wilson Schmidt, Esq.; Case No. 5794; **Administrative Review: DHRM Ruling Request received 09/26/03; DHRM Ruling issued 01/15/04; Outcome: HO's decision comports with the provisions of DHRM policy. Will not interfere with decision.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 5794

Hearing Date: September 11, 2003
Decision Issued: September 16, 2003

PROCEDURAL HISTORY

Grievant was demoted and received a 15% salary reduction following an evaluation period. On May 8, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Agency refused to qualify the grievance for a hearing. On August 1, 2003, the EDR Director issued a Qualification Ruling permitting the grievance to have a hearing.¹ On August 13, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On September 11, 2003, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant

¹ The EDR Director states that DHRM Policy 1.40 requires an employee to receive a Notice of Needs Improvement/Substandard Performance within the performance cycle before the employee may receive a Performance Evaluation with an overall rating of Below Contributor. Grievant did not receive such Notice before he received a Below Contributor rating. The Hearing Officer finds this omission to be harmless error because Grievant failed to appeal his December 2002 Performance Evaluation to the Reviewer and the Agency's omission occurred more than 30 days prior to Grievant's filing of his grievance on May 8, 2003.

Agency Party Designee
Agency Advocate
Two witnesses

ISSUE

Whether the Agency misapplied policy when it demoted Grievant and reduced his compensation.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency misapplied policy. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Taxation employed Grievant as a Senior Programmer Analyst prior to his demotion to Programmer Analyst with a 15% pay reduction. On December 16, 2002, Grievant received a Performance Evaluation with an Overall Rating Earned of “Below Contributor.” On December 16, 2002, the Agency issued Grievant a Notice of Improvement Needed/Substandard Performance. This Notice described Grievant’s performance deficiencies and improvements needed. It also included an improvement plan stating:

The attached is the plan the employee will follow with his assignments: He will be evaluated and coached by his immediate supervisor in the analytical phase and the test organization phase of his projects. Reviews and advice will be given to him at all steps of the assigned projects. This process will last three months. Improvement must be noted.

The attachment to the Notice of Improvement Needed/Substandard Performance was a document stating:

PROGRAM

1. Analysis

On the assignment given, concentrate on the analysis of the problem or issue to solve:

Identification of the problem
Organization of thought process
Clarity of the work plan

2. System Design

Concentration of the logic and data flow (where appropriate):
Understanding of the logical steps
Elements to be tested
Organization of test data
Expected results

3. Program Development

Understanding the real issue:
Efficacy of the logic
Program execution

4. Project Management

Concentration on managing one's own assignment with independence and urgency:
Independence
Quality results

On January 21, 2003, the Agency issued Grievant a Performance Evaluation showing an Overall Rating Earned of "Below Contributor." On May 7, 2003, the Agency issued Grievant a Performance Evaluation reflecting an Overall Rating Earned of "Below Contributor." As a result of the May 7, 2003 evaluation, the Agency demoted Grievant to a Programmer Analyst and reduced his pay by 15%. No evidence was presented showing how the Agency determined the percentage of pay reduction.

CONCLUSIONS OF POLICY

DHRM Policy 1.40 outlines Performance Planning and Evaluation for State employees. This policy provides:

RE-EVALUATION An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below.

Re-Evaluation Plan Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth

performance measures for the following three (3) months, and have it approved by the reviewer.

- Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- The supervisor should develop an entire performance plan including, “Employee Development.”
- If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form, which will be used for re-evaluation purposes. The form should clearly indicate that it is a re-evaluation.
- The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period.
- The employee’s reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- If the employee transfers to another position during the reevaluation period, the re-evaluation process will be terminated.

DHRM Policy 1.40 also states that, “An employee whose performance during the re-evaluation period is **documented** as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee’s performance level.” (Emphasis added).

The Agency did not develop a performance re-evaluation plan prior to demoting Grievant. Because the Agency has not presented Grievant with a Performance Re-Evaluation Plan setting forth performance measures, etc., the Agency is not able to properly document Grievant’s failure to improve his work performance. Thus, insufficient evidence exists to support the Agency’s conclusion that Grievant should be demoted with a pay reduction. The Agency misapplied DHRM Policy 1.40. Because the Agency misapplied DHRM Policy 1.40, Grievant’s demotion and pay reduction must be reversed.²

It appears that the Agency may have substituted a Notice of Improvement Needed/Substandard Performance for a Performance Re-Evaluation Plan. This raises the question of whether the two processes are sufficiently similar such that they may be interchanged without creating a material error.

The Hearing Officer finds that a Notice of Improvement Needed/Substandard Performance and Performance Re-Evaluation Plan are not interchangeable. By using

² The Agency has presented substantial evidence supporting its conclusion that Grievant is not able to perform at the Senior Programmer Analyst level. Even if the Hearing Officer assumes the Agency’s conclusion is correct, this does not mean that the Agency can disregard the procedural requirements of DHRM Policy 1.40.

the Notice, the Agency has not engaged in harmless error. The Agency's Notice does not substitute for a Performance Re-Evaluation Plan because the Notice does not:

- set forth performance measures³
- include an Employee Development Plan
- set appropriate Core Responsibilities

Accordingly, the Agency's use of a Notice of Improvement Needed/Substandard Performance does not cure the Agency's failure to issue a Performance Re-Evaluation Plan.

DECISION

For the reasons stated herein, the Hearing Officer Orders the Agency to comply with DHRM Policy, in particular DHRM Policy 1.40, prior to taking any action to demote Grievant. Grievant is **reinstated** to his former position of Senior Programmer Analyst or, if occupied, to an objectively similar position. The Agency is Ordered to provide Grievant with **back pay** and **benefits** representing the amount of pay and benefits Grievant would otherwise have received had the Agency not demoted him.

APPEAL RIGHTS

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision

³ Grievant's April 1, 2001, Work Description/Performance Plan sets forth five Core Responsibilities which include 35 Measures for Core Responsibilities.

was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁴

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the matter of
Department of Taxation
January 15, 2004

The Department of Taxation has requested an administrative review of the hearing officer's September 16, 2003, decision in Grievance No. 5794. The agency's representative objects to the hearing officer's decision on the basis that the decision is inconsistent with state policy or agency policy. The agency head, Ms. Sara Redding Wilson, has requested that I respond to this request.

FACTS

The Department of Taxation employed the grievant as a Senior Programmer Analyst until he was demoted to Programmer Analyst with a 15% pay reduction based on performance. On December 12, 2002, the grievant signed an Interim Evaluation Form on which there was no indication that his performance for the rating period would be less than "Contributor." On December 16, 2002, Taxation officials gave the grievant a Performance Evaluation with an overall rating earned of "Below Contributor." On that same date agency officials issued a Notice of Improvement Needed/Substandard Performance to the grievant. The Notice described the grievant's performance deficiencies and improvements needed. It also had attached to it an improvement plan with a three-month duration. He was later evaluated on January 21, 2003. However, it is unclear as to what standards were used in that the signed form contained Core Responsibilities and an attached Improvement Plan, both of which are different. He was evaluated again on May 7, 2003, and was rated as "Below Contributor." The rating form contained the same Core Responsibilities as the rating form that was signed on December 16, 2002. He was demoted on May 7, 2003, and received a 15% pay reduction. The grievant challenged the demotion action by filing a grievance on May 8, 2002, and the hearing officer issued a decision on September 16, 2003. In his decision, the hearing officer rescinded the disciplinary action and directed that the Department of Taxation officials restore the grievant to his original position and restore his salary. The agency appealed the decision to the Department of Human Resource Management.

The relevant policy, the Department of Human Resource Management's Policy No.1.40, Performance Planning and Evaluation, stated purpose is to provide for the establishment and communication of employees' performance. In addition, DHRM Policy No. 1.40 provides guidance for evaluating employees' performance and how to take corrective action if employees do not meet performance standards.

In the instant case, the grievant, after receiving a “Below Contributor” rating at the end of the re-evaluation period, was demoted to a lower position and had his pay reduced by 15%. Based on the evidence, the hearing officer concluded that Department of Taxation officials did not follow policy in demoting the employee.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, this Department has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by this Agency or the agency in which the grievance is filed. Any challenge to the hearing officer’s decision must cite a particular mandate or provision in policy. The Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer’s assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In the present case, the hearing officer stated, “The Agency did not develop a Performance Re-evaluation Plan prior to demoting Grievant. Because the Agency has not presented Grievant with a Performance Re-evaluation Plan setting forth performance measures, etc., the Agency is not able to properly document Grievant’s failure to improve his work performance. Thus, insufficient evidence exists to support the Agency’s conclusion that Grievant should be demoted with a pay reduction.” He stated further, “It appears that the Agency may have substituted a Notice of Improvement Needed/Substandard Performance for a Performance Re-Evaluation Plan. This raises the question of whether the two processes are sufficiently similar such that they may be interchanged without creating a material error.” Also, “The Hearing Officer finds that a Notice of Improvement Needed/Substandard Performance and Performance Re-Evaluation Plan are not interchangeable...The Agency’s Notice does not substitute for a Performance Re-Evaluation Plan because the Notice does not;

- set forth performance measures
- include an Employee Development Plan
- set appropriate Core Responsibilities.”

This Agency has determined that the hearing officer’s decision comports with the provisions of those policies and will not interfere with the decision. In the instant case it appears that the Agency substituted the Notice of Improvement Needed/Substandard Performance for the Performance Re-Evaluation Plan. There is no indication that the agency developed an EWP within ten workdays* from the date of the issuance of the performance evaluation. These forms are not interchangeable, thus the agency was in violation of DHRM Policy No. 1.40.

* DHRM Policy No. 1.40 states, “ Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee’s supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.

If you have any questions regarding this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley
Manager, Employment
Equity Services