

Issue: Misapplication of the Performance Planning and Evaluation policy;
Hearing Date: 07/14/05; Decision Issued: 07/15/05; Agency: DMV; AHO:
David J. Latham, Esq.; Case No. 8114



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8114

Hearing Date: July 14, 2005
Decision Issued: July 15, 2005

PROCEDURAL ISSUE

Grievant requested the Director of the Department of Employment Dispute Resolution (EDR) to issue a qualification ruling on her February 23, 2005 grievance against the Department of Motor Vehicles. The EDR Director upheld the agency's qualification of those issues directly relating to grievant's removal from employment, but denied qualification of the remaining issues raised by grievant.¹

APPEARANCES

Grievant
Division Manager
Representative for Agency
Three witnesses for Agency

ISSUE

¹ Agency Exhibit 2. EDR Access and Qualification Ruling of Director, Number 2005-1026, May 10, 2005.

Did the agency misapply policy when it removed grievant from state employment pursuant to the Performance Planning and Evaluation policy?

FINDINGS OF FACT

Grievant filed a timely grievance from the agency's decision to remove her from state employment effective February 9, 2005.² Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the termination issue of the grievance for hearing.³ The Department of Motor Vehicles (Hereinafter referred to as "agency") has employed grievant for nine years; she was a Program Support Specialist III at the time of her removal.⁴

State policy provides that annual performance evaluations are to be conducted annually.⁵ The policy provides that an employee who disagrees with an evaluation, and who cannot resolve the disagreement with her supervisor, may appeal to the evaluation reviewer for another review. An employee who receives an overall rating of "Below Contributor" must be re-evaluated in three months and have a performance re-evaluation plan developed. The employee must be re-evaluated within approximately two weeks prior to the end of the three-month period. If the employee receives an overall re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or remove the employee from employment by the end of the three-month re-evaluation period.⁶

In September 2004, grievant was given a Notice of Improvement Needed/Substandard Performance.⁷ During the next 30 days, grievant's supervisor and division manager met with her weekly to review her performance and to provide feedback on ways to improve performance. For the 2004 performance cycle, grievant's annual performance evaluation resulted in an overall rating of "Below Contributor."⁸ The evaluation reflected that grievant was not fully achieving the quantitative standards of the job; however, the more significant failures involved qualitative issues such as not achieving accuracy standards, failing to locate all files requested, leaving undone work for others to do, inappropriately refile work that had not been seen by medical evaluators, having a negative attitude, and failing to follow supervisory instructions. Grievant appealed the evaluation to the reviewer (division manager) but the reviewer upheld the evaluation as originally written. Grievant did not file a grievance regarding the evaluation.

² Agency Exhibit 8. Letter from Personnel Manager to grievant, January 25, 2005.

³ Agency Exhibit 1. *Grievance Form A*, filed February 23, 2005.

⁴ Agency Exhibit 5. *Employee Work Profile (EWP) Work Description*, January 21, 2005.

⁵ Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

⁶ Agency Exhibit 3. *Ibid.*

⁷ Agency Exhibit 1. Notice of Improvement Needed/Substandard Performance, September 24, 2004.

⁸ Agency Exhibit 4. Grievant's 2004 performance evaluation, October 26, 2004.

Within one week of receiving the evaluation, grievant met with her supervisor, the division manager, and the personnel manager. The personnel manager explained to grievant that she was beginning a 90-day re-evaluation period and it was essential she achieve at least a "Contributor" rating or better at the end of the period in order to retain her position. During the same week, grievant's supervisor gave her a detailed performance plan for grievant's guidance during the re-evaluation period.⁹ Grievant remained in the same position; the performance plan provided a detailed explanation of the component tasks contained in her EWP Work Description.

During the 90-day re-evaluation period, grievant achieved quantity standards established for her position. However, throughout the period, she continued to fail to meet various qualitative standards. She did not process work on a timely basis, did not utilize available time effectively, appeared to be less productive in the last hour of work, and gave work she was responsible for to evaluators.¹⁰ As a result of some of grievant's errors, some drivers lost their driving privileges because their license was improperly suspended. Grievant's supervisor met with her every two weeks during the 90-day period to provide feedback on performance;¹¹ the division manager also participated in some of these meetings. When problems required immediate attention, the meetings occurred more frequently.

In January 2005, grievant's performance was reviewed by her supervisor, division manager, the division director, and the personnel manager. This management group concluded that grievant's performance was still "Below Contributor." The group considered whether other options such as demotion or transfer were available; however, there were no suitable positions available into which grievant could be either demoted or transferred. Pursuant to policy, the group recommended to the agency head that grievant be discharged.

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

⁹ Agency Exhibit 6. E-mail w/4-page attachment from supervisor to grievant, October 28, 2004.

¹⁰ Agency Exhibit 6. Weekly performance charts, November 22-December 6. See also Memoranda from division manager to grievant, November 8, 2004, December 2, 2004, December 10, 2004, and January 6, 2005. See also Agency Exhibit 1, Second-Step resolution response from division manager, March 4, 2005.

¹¹ Agency Exhibit 6. E-mail from supervisor to grievant, November 1, 2004.

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 the grievant must present her evidence first and prove her claim by a preponderance of the evidence.¹²

Misapplication of Policy, Egregious errors in policy, Wrongful termination

Grievant asserts that the agency misapplied policy because she considers the re-evaluation to be arbitrary and capricious. "Arbitrary and capricious" is defined as "in disregard of the facts or without a reasoned basis."¹³ The agency has shown, through testimony and evidence, that the re-evaluation considered grievant's actual performance during the 90-day period and that it had a reasoned basis for the re-evaluation. Grievant did not demonstrate any identifiable errors in policy. Based on the available evidence and testimony, the agency followed the requirements of the Performance Planning and Evaluation policy. Unrebutted agency testimony established that, after grievant's supervisor brought performance problems to grievant's attention, she would improve for a few days and then return to doing the function incorrectly.

Other issues

As noted at the outset, the EDR Director ruled that issues not directly related to the termination of grievant's employment are not qualified for hearing. Included in this category are issues listed by the grievant as: breach of employee confidentiality of personnel records, creation of a job without proper training, and

¹² § 5.8, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

¹³ § 9, *Ibid.*

slander.¹⁴ These three issues either occurred prior to the 90-day re-evaluation period or were not specifically addressed by grievant during the hearing.

Grievant testified that she had always had satisfactory evaluations during her employment with the agency. As evidence she submitted past performance evaluations from 1998 through 2000 on which her overall rating was "Meets Expectations," and evaluations from 2001 through 2002 on which the overall rating was "Contributor."¹⁵ However, under cross-examination, grievant acknowledged that in 1997, her annual performance evaluation rating was "Does Not Meet Expectations." She also acknowledged that her 2003 overall rating was "Below Contributor" and as a result, grievant was transferred, in lieu of possible termination, in October 2003 from the driver licensing unit into her most recent position in the medical review unit.

Grievant complained that the agency did not give her a formal improvement plan. As noted above, the agency did give grievant such a plan on October 28, 2004. The essence of the plan was that grievant was to perform her existing job in an accurate and timely manner, use her time efficiently, and perform all assigned tasks herself rather than giving them to other employees.

Grievant alleged that her supervisor, division manager, and the other management members conspired to terminate her employment. However, grievant offered no credible testimony or evidence to support her allegation. There is more to proving a conspiracy theory than simply making an allegation. Grievant has not borne the burden of proof to show a conspiracy.

Grievant argued that when an employee performs poorly, management is responsible for the poor performance. Grievant's argument is indicative of a lack of understanding that each employee is responsible for their own performance. Management can guide, suggest, assist and counsel employees but in the final analysis the employee has the primary responsibility for her own performance.

DECISION

The agency's action is affirmed. Grievant has not shown that the agency misapplied the Performance Planning policy.

¹⁴ See Grievant Exhibit 3. E-mail from division manager to grievant, October 5, 2004. Grievant argued that the division manager's suggestion that grievant consider utilizing the services of the Employee Assistance Program (EAP) was slander. Making such a suggestion cannot be considered slander because the manager did not defame or malign grievant – she merely suggested grievant might benefit from using the EAP services.

¹⁵ Grievant Exhibit 4. Performance Evaluations 1998-2002.

The Agency's decision to removal grievant from employment following a performance re-evaluation rating of "Below Contributor" is hereby UPHELD.

APPEAL RIGHTS

You may file an administrative review request within **15 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 15 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 15-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.¹⁶ 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.¹⁷

[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

¹⁶ 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).

¹⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.