

Issues: Group II Written Notice with termination (due to accumulation) unsatisfactory work performance and failure to follow supervisor's instructions, Notice of Improvement Needed/Substandard Performance, Below Contributor Performance Evaluation, retaliation; Hearing Date: 04/03/06; Decision Issued: 04/28/06; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 8253,8254,8255,8256; Outcome: Agency upheld in full



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8253 / 8254 / 8255 / 8256

Hearing Date: April 3, 2006
Decision Issued: April 28, 2006

PROCEDURAL HISTORY

On October 31, 2005, Grievant was issued a Group II Written Notice of disciplinary action for unsatisfactory work performance and failure to follow a supervisor's instructions. Grievant also received a Notice of Improvement Needed/Substandard Performance form and an evaluation. She alleged retaliation. In November 2005, Grievant timely filed grievances to challenge the Agency's actions. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On January 6, 2006, the EDR Director issued Ruling Numbers 2006-1243, 2006-1244, 2006-1245, and 2006-1246 consolidating the grievances. On March 13, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 3, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency misapplied State policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. On all other matters, Grievant bears the burden of proof. 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 Department of Social Services employed Grievant as a Quality Assurance Supervisor at one of its Facilities. The purpose of her position was, in part, to:

provide direction and guidance to an operational Quality Assurance (QA) unit to maintain and promote efficiency, effectiveness, fiscal responsibility, and compliance with both state and federal laws and regulations.¹

She had been employed by the Agency for approximately 11 years prior to her removal. Grievant's prior active disciplinary action included a Group II Written Notice issued on April 7, 2005 for unsatisfactory work performance and failure to follow supervisor's instructions.²

¹ Agency Exhibit 10.

² Agency Exhibit 8.

Grievant supervised five analysts and one administrative assistant. She was obligated to perform evaluations of her subordinates and submit those evaluations to her Supervisor by September 15, 2005.³ The timely submission of evaluations was important to the Agency because employees without evaluations might not receive annual salary increases dependent on good work performance.

On September 14, 2005, Grievant emailed to the Supervisor drafts of three Acknowledgment of Extraordinary Contribution Forms. The Supervisor sent Grievant a memorandum identifying misspelled words and grammatical errors in the forms. The Supervisor wrote:

This is not acceptable performance for a supervisor.

Since you and I talked about the need for these forms on Friday, 9/2, I expected to receive them after I returned from vacation on Monday, 9/12. It appears you have been working on these forms for several days, so it is puzzling to see the number of mistakes on each one.

A few weeks ago during a telephone conversation, I reminded you of the need for careful preparation of performance evaluation documents that are due this month for my review. It is imperative that you use correct spelling and grammar in all documents you prepare as a representative of VDSS, especially those that will become part of an employee's permanent record.⁴

On September 15, 2005 at 8:58 a.m., the Supervisor sent Grievant an email stating in part,

As we discussed during the Aug. Supervisors' Meeting, performance evaluations for analysts and your admin. assist. are due to me via email today at noon. I expect you to proofread carefully for content, spelling and grammar.

On September 15, 2005, Grievant sent an email to the Supervisor for employee Ms. PG. The draft contained approximately 13 typographical errors. The Supervisor circled the errors and also wrote, "Accuracy not calculated separately per protocol. 97.8 not rounded up to 98%." The Supervisor sent Grievant an email detailing the errors and indicating necessary revisions to the text of the evaluation. The Supervisor added, "I expect you to make corrections and send this to me in final form by 5 pm today. I notice you have emailed evaluations for the three other Analysts. Do you want to revise them

³ The Supervisor initially set this deadline to make sure the evaluations could be timely submitted to the Human Resource department.

⁴ Agency Exhibit 5.

in light of the guidance I've given for this evaluation? Or are they correct in the current form? I would prefer to wait until later in the day and be assured by you that I'm reviewing the evaluations in final, correct form."⁵

On September 15, 2005 at 3:32 p.m., Grievant emailed to the Supervisor the final drafts of her employee evaluations. She corrected 12 of the 13 typographical errors on Ms. PG's evaluation. She added text that included an additional typographical error. For Ms. EK's evaluations, Grievant had seven typographical errors. For Ms. MO's evaluation, Grievant had seven errors. For Ms. JN's evaluation, Grievant had three typographical errors. For Mr. KH's evaluation, Grievant had three typographical errors.

On September 16, 2005, the Supervisor emailed Grievant a Notice of Improvement Needed/Substandard Performance. The Notice described Grievant's grammatical and spelling errors and read, in part:

Improvement plan: [Grievant] needs to produce well-written documents whenever written material is necessary in the performance of her work duties.

This year, special assistance has been given to her regarding written communication. At her request, to help her produce satisfactory written documents, she enrolled in a grammar refresher class in the proofreading skills class at the expense of the Department. [Grievant] needs to apply the information learned in these classes to her written work.

Grievant received the Notice on September 20, 2005.

On September 19, 2005 at 12:34 p.m., the Supervisor sent Grievant an email describing the mistakes and omissions made by Grievant in the performance evaluations of her staff. The Supervisor instructed Grievant to make the necessary corrections. The Supervisor wrote:

After you've read this email, I want to talk with you about the overall rating issues. I will call you in the early afternoon. I would like to receive the third set of these evaluations with ALL corrections by close of business today. Is that possible for you?⁶

The Supervisor learned that the deadline for submitting performance evaluations had been extended by the Human Resource department. She called Grievant to discuss several topics. On September 20, 2005 at 1:13 p.m., the Supervisor sent Grievant an email confirming their discussion. The email read, in part:

⁵ Agency Exhibit 2.

⁶ Agency Exhibit 4.

From [an HR employee's] guidance today, we are both pleased to learn there is a later deadline than I anticipated were sending final evaluations to HR. We agreed on deadlines that will allow you more time to correct the evaluations for your staff. Two are due to me on Tues. Sept. 27 and the rest by Friday 9/30.

You pointed out that it would've been better if [you had] a copy of an EWP form that wasn't locked (unable to use spell-check). If you had identified the need for this earlier, you could have called [another employee] or me to obtain a form that allows the spell-check feature. Another option would've been to prepare the narratives initially in Word, use spell check and then cut & paste into the locked form. A simpler alternative would've been to use the Word version of the form available on the state's DHRM website. This wouldn't have eliminated all the mistakes because some involved the incorrect use of a correctly spelled word.⁷

On September 30, 2005, Grievant emailed evaluations containing several errors to the Supervisor. Grievant failed to correct the errors previously identified by the Supervisor. On October 3, 2005, the Supervisor sent Grievant an email stating, in part:

Your performance evaluations emailed on 9/30/05 are better than the ones sent 9/15/05, however, they are still not acceptable. This email describes mistakes in your 3rd submission of performance evaluations for your staff.⁸

On October 7, 2005, the Supervisor issued Grievant a performance evaluation for the 2004 -- 2005 performance cycle. Grievant received a rating of Below Contributor in three of four Core Responsibilities and an overall rating of Below Contributor.⁹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).¹⁰ Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior

⁷ Agency Exhibit 5.

⁸ Agency Exhibit 6.

⁹ Agency Exhibit 10.

¹⁰ The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

of such a serious nature that a first occurrence should normally warrant removal.” DHRM § 1.60(V)(B)(3).

“Failure to follow a supervisor’s instructions” is a Group II offense. DOCPM § 5-10.16(B)(1). The Supervisor repeatedly instructed Grievant to draft performance evaluations without spelling and grammatical errors.¹¹ The Supervisor described Grievant's errors in detail. The Supervisor instructed Grievant to correct the specific errors. Grievant understood the Supervisor's instruction and knew what action was necessary to comply with the instruction. Grievant failed to comply with the Supervisor's specific instruction. The Agency has presented sufficient evidence to support its issuance to Grievant of a Group II Written Notice.¹² Based on the accumulation of active disciplinary action, Grievant's removal from employment must be upheld.¹³

Grievant argues that the disciplinary action should be reduced or reversed because she corrected the document errors with the assistance of other employees and then emailed them to the Supervisor with the belief that the documents were correct. The reason the documents continued to have errors was because the changes Grievant made did not save to the electronic documents before they were sent. Grievant's argument fails because she has not adequately explained how some of her changes were properly saved while others were not. In addition, the Supervisor presented Grievant with several solutions to the problem. The solutions included (1) preparing the narratives initially in Word software, using spell check, and then cutting and pasting them into the locked form and (2) using the Word version of the form available on the State's DHRM website. Grievant ignored these suggestions at her own risk.

Grievant contends her medical condition contributed to her poor performance in making revisions. This argument fails because Grievant did not bring her medical condition on the days she worked to the attention of the Agency. The Agency has accommodated her medical condition on prior occasions. For example, in June 2005, Grievant asked to work from home on those days her office building became too hot. The Agency granted her request.¹⁴ There is no reason to believe the Agency would

¹¹ The Supervisor's instruction had been long-standing. For example, after Grievant submitted her 2004 employee evaluations with numerous errors, the Supervisor wrote Grievant an email stating, in part, "In the future, I expect your work to be turned in by the established deadline. Because you are a supervisor, I also expect your work to demonstrate effective written communication skills including proper use of grammar and spelling."

¹² This case is more than simply an employee being instructed to perform a task and then failing to achieve an adequate level of performance. Grievant was instructed to perform a task and given the specific details of the task. She was informed of the errors she made and given an opportunity to correct those errors. The degree of instruction detail and the opportunity to correct errors, justifies the Agency's issuance of a Group II Written Notice.

¹³ Grievant contends she was not offered the opportunity for a demotion in lieu of removal. DHRM Policy 1.60 permits demotion in lieu of removal, but does not require an Agency to demote an employee who could otherwise be removed from employment.

¹⁴ In the prior two years, Grievant's only request for accommodation was to move her location when she deemed it appropriate. The Agency granted her requests.

have denied any reasonable request by Grievant if she had brought that request to the attention of the Supervisor.¹⁵ There is no reason for the Hearing Officer to determine why Grievant failed to comply with the Supervisor's instruction. She has, however, demonstrated a long-standing pattern of being unable to correct typographical and grammatical errors. There is no reason to believe Grievant's medical condition in September 2005 created an aberration of a lengthy pattern of difficulty with a specific function of her position.¹⁶

Performance Planning and Evaluation

DHRM Policy 1.40 governs Performance Planning and Evaluation. State agencies use this policy to evaluate the work performance of employees. Each evaluation should include an overall performance rating that may be Below Contributor, Contributor, or Extraordinary Contributor. An employee whose work "fails to meet performance measures" should receive a Below Contributor rating. "To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle." A performance cycle is "[t]he annual cycle during which an employee's supervisor documents performance, usually beginning October 25th of each year."

Grievant argues that the Notice of Improvement Needed/Substandard Performance form was false arbitrary, capricious and not in compliance with policies and practices of the Virginia Personnel Act. Grievant's argument fails. The Notice was issued within the performance cycle.¹⁷ The Notice was directed at Grievant's drafting of documents containing grammatical errors and misspelled words. The quality of Grievant's written work was below what would be expected of a Quality Assurance Supervisor.

2004-2005 Performance Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "Unreasonable action in disregard of the facts or without a determining principle." GPM § 9. If a Hearing Officer

¹⁵ Grievant asked several staff to assist her with drafting and proofreading the evaluations. Even with staff assistance she was unable to complete the assignment. If Grievant had sought accommodation due to her medical condition, the Agency may have provided her with clerical assistance. Grievant obtained that assistance on her own but nevertheless failed to complete the task. Short of removing an essential function from Grievant's position, it is difficult to identify any actions the Agency could have taken to accommodate Grievant that would have enhanced Grievant's work performance.

¹⁶ The Agency also permitted Grievant to attend workshops on grammar and on proofreading. She had completed the workshop on grammar and was near completion of the workshop on proofreading when she was removed from employment.

¹⁷ Although DHRM Policy 1.40 encourages agencies to include a performance period of at least 30 days, the policy does not require any minimum performance period.

concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

After having reviewed Grievant's performance evaluation, the Hearing Officer finds that the evaluation is not arbitrary or capricious. The Supervisor's conclusions regarding Grievant's work performance are supported by sufficient facts to prevent the Hearing Officer from modifying the evaluation. The Agency issued Grievant a Notice of Improvement Needed/Substandard Performance form within the performance cycle thereby permitting the Agency to give Grievant an overall performance rating of Below Contributor.

Retaliation

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual 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 (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁸ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity.

Grievant argued that an Agency manager, Mr. F, believed Grievant was involved in a fraud abuse complaint made against Mr. F that resulted in Mr. F having to repay the Commonwealth several thousand dollars.¹⁹ Based on this belief, Mr. F retaliated against Grievant by taking disciplinary action and poorly evaluating her work performance, according to Grievant. Grievant's argument fails because Mr. F did not initiate disciplinary action against Grievant. His only involvement was to sign the Written Notice. The Agency's internal procedures prohibit employees below Mr. F's level from issuing Written Notices resulting in an employee's removal from employment. In addition, Mr. F was not the moving force behind Grievant receiving a Notice of Improvement Needed/Substandard Performance and a Below Contributor performance evaluation. There is no credible evidence to show that the Agency retaliated against Grievant because she engaged in a protected activity.

Mitigation

¹⁸ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁹ Grievant's Supervisor reported to Mr. F.

Grievant contends the disciplinary action should be mitigated. *Va. Code § 2.2-3005.1* authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution....”²⁰ Under the EDR Director’s *Rules for Conducting Grievance Hearings*, the Hearing Officer may mitigate based on considerations including whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action, and (3) the disciplinary action was free of improper motive. The *Rules* further require the Hearing Officer to “consider management’s right to exercise its good faith business judgement in employee matters. The agency’s right to manage its operations should be given due consideration when the contested management action is consistent with law and policy.” In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency’s issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**. Grievant’s request for relief regarding her performance evaluations, Notice of Improvement Needed/Substandard Performance form, and retaliation is **denied**.

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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

²⁰ *Va. Code § 2.2-3005.*

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. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 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. 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.²¹

[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].

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.