

Issue: Termination, misapplication of policy, discrimination; Hearing Date: 04/03/06; Decision Issued: 04/07/06; Agency: VDOT; AHO: David J. Latham, Esq.; Case No. 8305; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8305

Hearing Date: April 3, 2006
Decision Issued: April 7, 2006

APPEARANCES

Grievant
Two Student Advocates
Two witnesses for Grievant
Assistant Division Administrator
Representative for Agency
Three witnesses for Agency

ISSUES

Did the agency unfairly apply or misapply policy when it removed her from employment due to a Below Contributor performance evaluation? Did the agency discriminate against grievant?

FINDINGS OF FACT

The grievant filed a timely grievance from the termination of her employment subsequent to a Below Contributor rating on her performance

reevaluation.¹ The Department of Transportation (Hereinafter referred to as agency) employed grievant for 11 years as an administrative assistant.

Grievant's job involved administrative support in the division and included routine typing, filing, mail, mass mailings, and timesheet verification. During the first several years of employment, grievant had received overall performance evaluations of "Meets Expectations" or "Contributor."² In 2004, although she received an overall "Contributor" rating, she was rated "Below Contributor" on one core responsibility for failing to follow through thoroughly on some assignments, failing to provide feedback on requests, and failing to conduct mass mailings smoothly and quickly.³

From 2000 until 2004, an assistant division administrator supervised grievant. During 2003 and early 2004, the assistant administrator had numerous discussions with grievant regarding her performance which appeared to be slipping. In May 2004, a business manager was hired to supervise grievant, a fiscal technician, and two part-time employees. The business manager reports to the assistant division administrator.⁴ The business manager was hired to provide more oversight of the four employees and, in part, to help grievant improve her performance. Grievant was offered various training classes to improve work efficiency but declined to take them because she felt it would cause her to fall behind in her work. Rather than reading e-mails and responding to or addressing them, grievant first printed out the e-mails and then addressed them.

By February 2005, grievant's performance was not meeting expectations in some areas. Grievant's supervisor issued a Notice of Improvement Needed in February documenting areas of specific performance deficiencies and providing grievant with a detailed improvement plan.⁵ Grievant refused to sign the Notice. Part of the plan included weekly meetings with her supervisor. The supervisor documented the dates of these meetings in her notes and summarized them in preparation for the hearing; the meetings were held, on average, about once per week from February through June, and more frequently from July through December 2005.⁶ By May 2005, grievant's performance continued to be at a substandard level. The supervisor consulted with the Human Resources department and then counseled grievant verbally and in writing that she would be receiving a "Below Contributor" interim performance evaluation and a development plan.⁷ One week later, the supervisor gave grievant a detailed development plan.⁸

¹ Agency Exhibit 16. Grievance Form A, filed January 11, 2006.

² The performance evaluation rating system changed in 2001. The current rating of "Contributor" is equivalent to the prior rating of "Meets Expectations."

³ Grievant Exhibit 1. Grievant's Performance Evaluation, signed October 29, 2004.

⁴ Agency Exhibit 2. Organization chart, September 2005.

⁵ Agency Exhibit 3. Notice of Improvement Needed/Substandard Performance, February 25, 2005.

⁶ Agency Exhibit 4. Summary of supervisor/grievant meeting dates, February-June 2005.

⁷ Agency Exhibit 6. Counseling memorandum, May 20, 2005.

⁸ Agency Exhibit 7. Development Plan, May 27, 2005.

Grievant received the interim performance evaluation in early July. The overall rating was “Below Contributor” and she was rated “Below Contributor” on three of six core responsibilities.⁹ Grievant refused to sign the evaluation. Among the deficiencies noted were inaccurate and slow mass mailings, allowing filing to become backlogged, not prioritizing work, and erroneous travel authorizations. One week later, the business manager documented discussions with grievant that they had on July 8 and 11, 2005.¹⁰ Grievant’s annual performance evaluation in September 2005 again resulted in an overall rating of “Below Contributor” and ratings of “Below Contributor” in four of the six core responsibilities.¹¹ Again, grievant refused to sign the evaluation. Many of the deficiencies noted were the same as or similar to those in the July interim evaluation. Grievant was also cited as having a tardiness problem. Pursuant to policy, an employee who receives a rating of “Below Contributor” on the annual performance evaluation must be re-evaluated three months after the annual evaluation.¹² The supervisor gave grievant a development plan three days after the annual evaluation.¹³ Although grievant had done some work for another division in the past, the supervisor monitored grievant’s work during the re-evaluation period to assure that she was performing work only for employees in her own division.

In early December, the supervisor again evaluated grievant’s performance rating her “Below Contributor” on four of six core responsibilities and on the overall rating.¹⁴ Grievant was given the re-evaluation on December 8 and was given four days to provide any information or explanation as to why the evaluation should be changed.¹⁵ At a meeting on December 12, 2005, grievant did not offer any information that would alter the re-evaluation. Grievant’s supervisor and human resources worked together to determine if there were any other openings within the agency to which grievant could be demoted or transferred; none were available. The agency notified her two days later of her removal from employment.¹⁶

Throughout 2005, grievant’s supervisor organized and prioritized grievant’s work to assure that grievant had an opportunity to fulfill her responsibilities in the most efficient manner. The supervisor required everyone who wanted to give grievant work assignments to give them to the supervisor to

⁹ Agency Exhibit 8. Interim performance evaluation, July 8, 2005.

¹⁰ Agency Exhibit 9. E-mail from supervisor to grievant, July 15, 2005.

¹¹ Agency Exhibit 10. Annual performance evaluation, September 13, 2005.

¹² Agency Exhibit 13. Department of Human Resource Management (DHRM) Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

¹³ Agency Exhibit 11. Development plan, September 16, 2005.

¹⁴ Agency Exhibit 12. 90-day re-evaluation, December 8, 2005.

¹⁵ Agency Exhibit 14. Memorandum from supervisor to grievant, December 8, 2005. [NOTE: The letter is dated December 8, 2004, however, all agreed that this was a typographical error and that the correct date is December 8, 2005.]

¹⁶ Agency Exhibit 15. Letter from supervisor to grievant, December 14, 2005.

assure that grievant was not given too much work and that work assignments were appropriately prioritized.

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, such as claims of unfair application or misapplication of policy or discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁷

Policy 1.40 provides that if an employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate employment of the employee by the end of the three-month re-evaluation period. If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination of employment based on the unsatisfactory re-evaluation is the proper action.

A preponderance of evidence reflects that grievant's performance began to slip in 2004. The agency asserts that her work had begun to deteriorate prior to that time but the performance evaluations for prior years do not support that assertion. In 2004, the agency employed a business manager who actively

¹⁷ § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective August 30, 2004.

worked with grievant to help organize and prioritize her work and to offer training to improve grievant's efficiency. Despite these efforts, the evaluations of grievant's work reflected areas of deficient performance in her core responsibilities. In 2005, grievant was given clear written warnings about the agency's concern with her performance as well as intensified assistance by the supervisor. Finally, in the fall of 2005, grievant was given a three-month period within which to correct performance deficiencies but failed to meet the expectations of management. The agency has shown that it followed policy and procedure in working with grievant during 2005. Notwithstanding the attention to this situation, grievant did not achieve a satisfactory performance evaluation at the end of the re-evaluation period.

Grievant pointed out that some other divisions within the agency have two or three people performing the tasks that grievant performs in her own division. However, the agency noted that one division has over 200 employees, and another has 58 employees, while grievant's division has only 22 employees. Thus the significantly larger volume of employees in other divisions warrants more employees to handle the larger volume of typing, filing, and other tasks performed by grievant. Grievant's division is small and one person should be able to handle the tasks performed by grievant. The employee currently in grievant's position is performing all of grievant's prior responsibilities without assistance. The preponderance of evidence supports a conclusion that grievant's workload was appropriate and reasonable.

Grievant objected to the fact that she had no input into the improvement plan developed by her supervisor. Policy 1.40 provides that performance re-evaluation plans must be developed by the supervisor and approved by the reviewer (in this case the assistant division administrator). The policy does not state that the plan is developed jointly by employee and supervisor.

Grievant avers that on one occasion in early 2005, she overheard the division director state to a different assistant division administrator that they would have to get rid of grievant. Grievant did not request an order for either of these managers to be called as witnesses. There were no other witnesses to the alleged statement. The agency did not call either the director or the assistant administrator as a rebuttal witness to refute the statement. In the absence of any rebuttal or other evidence to the contrary, it must be presumed that the director did make the statement. However, this statement does not, by itself, support a finding of misapplication of policy. Since the time of the statement nearly a full year passed until grievant's removal from employment. During that time, a supervisor was working closely with grievant in an effort to improve her performance. Further, grievant was given repeated counseling, a Notice of Improvement Needed, an interim evaluation, and an annual evaluation. Thus, grievant had ample opportunity to improve her performance in order to avoid termination of employment.

One of grievant's witnesses testified that when she was hired in 2000, other employees told her that most coworkers did not like grievant. Grievant's

other witness agreed with that statement but explained that they didn't like grievant because her work often had errors and because grievant was unable to keep up with work and often had a backlog of filing and typing.

Grievant asserts that management targeted her for mistreatment. However, grievant did not offer any evidence to prove either that she was targeted or that management had any motive to target her.

Discrimination

An employee may demonstrate discrimination by showing direct evidence of intentional discrimination (specific remarks or practices), circumstantial evidence (statistical evidence), or disparate impact resulting from the evaluation process. The only mention of discrimination in this case is found in the second-step resolution response in which it is stated that grievant had made an allegation of discrimination based on age to the agency's Civil Rights Division. Grievant did not disclose her age during this hearing and it does not appear in the documentary evidence. Moreover, even assuming that grievant meets the age requirement for age discrimination (over 40), grievant has not presented any testimony or evidence of remarks or practices, circumstantial evidence, or disparate impact that would constitute discrimination in the evaluation process. Accordingly, grievant has failed to meet the burden of proof to demonstrate discrimination based on age.

DECISION

The agency's decision to terminate grievant's employment is hereby UPHHELD.

Grievant has not borne the burden of proof to show either unfair application or misapplication of policy, or discrimination. Grievant's request for relief 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. 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.¹⁸ 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.¹⁹

[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

¹ 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. *V. D p me v*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

¹⁹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.