

Issue: Termination due to unsatisfactory performance; Hearing Date: 06/12/06;
Decision Issued: 06/26/06; Agency: Dept. of Health; AHO: Carl Wilson Schmidt,
Esq.; Case No. 8322; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8322

Hearing Date: June 12, 2006
Decision Issued: June 26, 2006

PROCEDURAL HISTORY

On January 18, 2006, Grievant was removed from employment based on a performance re-evaluation. 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 she requested a hearing. On April 27, 2006, the EDR Director issued Ruling Number 2006-1324 qualifying the matter for hearing. On May 11, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 12, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant's July 1, 2005 transfer was appropriate?
2. Whether Grievant's 2005 annual evaluation was arbitrary or capricious?

3. Whether Grievant's January 2006 re-evaluation and removal from employment was warranted and appropriate?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its removal of Grievant from employment was warranted and appropriate under the circumstances. Grievant has the burden of proof to show the Agency acted contrary to State policy with respect to the issues other than removal. 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:

Effective June 13, 2001, Grievant worked at one of the Department of Health's Facilities as a Clinical Social Work Supervisor. The purpose of her position was:

Supervises and provides consultation counseling staff to ensure the provision of quality social work services to clients. Characteristic duties include: serving as a member of an interdisciplinary treatment team, coordinating services with community agencies, supervising other Counselors, evaluating the effectiveness of services provided by subordinates and providing comprehensive social work services to clients and families. Coordinates, assesses & evaluates efforts of TPPI in [locality] designed to target at-risk youth through a multi-agency approach to prevent teen pregnancy & STDs. Collects, monitors, maintains and compiles statistical data. Provides internal & external marketing to promote the program.¹

Grievant was a supervisor of the Real Alternatives to Pregnancy (RAP)² staff.

On July 1, 2005, RAP staff, including Grievant, were reassigned to other departmental social work duties when funding for the program was ended. Grievant's duties changed. She began working as a Clinical Social Worker at one of the Agency's Facilities. On June 23, 2005, Grievant's Supervisor sent her a memorandum outlining her new duties to include providing social work services. Her duties included patient

¹ Agency Exhibit 4.

² The RAP was a comprehensive community-based pregnancy prevention program that had operated since 1993 as part of the Virginia Teen Pregnancy Prevention Initiative. RAP targeted its services to adolescents, their parents, and the surrounding community.

advocacy, practical resource assistance, and coordination of care to patients and families. She was responsible for psychosocial assessments to determine personal, social, health, and economic needs of clients. She was to develop individualized service plans and to assist clients by identifying and referring them to needed resources. Coordinating client care and working as a member of the multidisciplinary clinic team were also her duties. Grievant's employee work profile described the purpose of her position as:

Provides guidance to clients by a knowledge of social and vocational case management and counseling methods to develop individualized service plans, perform psychosocial assessments to determine personal, social, health and economic needs. Assists clients by independently identifying and referring them to available federal, state, local, [and] private resources to assist with their needs. Educates clients on clinical, medical procedures and coordinates client care with [entity] and community resources.³

Grievant received the new employee work profile in October 2005, several months after her duties had changed.⁴

On October 13, 2005, Grievant received a Notice of Improvement Needed/Substandard Performance. The Notice described the specific performance deficiencies and the improvements that were needed. It also provided an Improvement Plan.⁵ The Improvement Plan required Grievant to:

- Follow your supervisor's directions including obtaining permission prior to taking any leave or accruing any comp time.
- Ask your supervisor for directions when you are unsure of how to do something.
- Keep all patient information in a secure location.
- Admit when you make a mistake so that it can be corrected.
- Communicate with [clinic] staff who work in the same clinics about the patient's needs for psychosocial services.
- Meet with your clinical supervisor ... once per week and with [the Supervisor] as often as you need to insure you have the resources and support your need to improve.⁶

On October 19, 2005, Grievant received her 2005 annual evaluation. Grievant's performance was rated for six core responsibilities. She received "below contributor"

³ Agency Exhibit 8.

⁴ Agency Exhibit 4.

⁵ Agency Exhibit 3.

⁶ Agency Exhibit 3.

ratings for three of those core responsibilities and an overall rating of “below contributor.”⁷ The evaluation covered Grievant’s work performance for the 12 month performance cycle.

On November 17, 2005, Grievant and the Supervisor meet to discuss Grievant’s performance re-evaluation.

On December 3, 2005, Grievant attended and participated in a Teen Culture Fest organized by a local government. She did not obtain prior approval from the Supervisor to receive compensatory time. On December 8, 2005, Grievant presented the Supervisor with her request to accrue compensatory time.

On December 20, 2005, the Supervisor met with Grievant to discuss her work performance and what she needed to do to be rated as a contributor in the re-evaluation.

On January 10, 2006, Grievant received her re-evaluation. Grievant was rated in five core responsibilities. She received “below contributor” for all five core responsibilities and an overall rating of “below contributor.” Because Grievant’s work performance did not improve, the Agency removed her from employment.

CONCLUSIONS OF POLICY

July 1, 2005 Reassignment

Grievant was reassigned to another program within the Agency effective July 1, 2005 because funding for her program ended. Agency executives ended the funding because the data originating from the RAP in which Grievant was involved was unreliable. The Agency’s decision to end the program and reassign Grievant was within its exclusive right to manage the Agency’s business. Grievant’s reassignment was not arbitrary or capricious or based on any impermissible reason. Grievant’s request for relief from reassignment cannot be granted.

2005 Annual 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

⁷ Agency Exhibit 3.

Improvement Needed/Substandard Performance form⁸ within the performance cycle.”⁹ A performance cycle is “[t]he annual cycle during which an employee’s supervisor documents performance, usually beginning October 25th of each year.”¹⁰

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 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.

The Agency’s opinion of Grievant’s work performance as expressed in her 2005 annual evaluation is not arbitrary or capricious.¹¹ During the evaluation period beginning July 1, 2005, Grievant failed to have the necessarily curricula approved by the local public school administration¹² and, thus, was unable to conduct school-based group meetings for the first two quarters of fiscal year 2005.¹³ Consequently, she was unable to serve in as many groups as would otherwise have been provided.¹⁴ Grievant’s Supervisor directed Grievant resolve complaints of the local school administration as quickly as possible. Grievant delayed in attempting to resolve the dispute.

Grievant and the employees under Grievant’s supervision prior to July 1, 2005 failed to properly collect data. Some of the data was collected untimely and some had to be corrected by the SERL. As a result of these problems, the Agency’s data

⁸ A Notice of Improvement Needed/Substandard Performance Form is defined as a “form completed by the immediate supervisor during the performance cycle to document substandard performance and the need to improve performance.” See DHRM Policy 1.40.

⁹ “An employee may receive a Notice of Improvement Needed/Substandard Performance form at any time during the performance cycle” See, DHRM Policy 1.40.

¹⁰ See DHRM Policy 1.40, *Performance Planning and Evaluation*.

¹¹ In addition, the Agency issued Grievant a Notice of Needs Improvement/Substandard Performance within the 2004-2005 evaluation cycle.

¹² Grievant claimed she had difficulty contacting school officials thereby resulting in the delay. The Supervisor testified he called and spoke with the school principal without much difficulty.

¹³ Grievant should have obtained approval by school administrators of the materials she intended to take into the local schools. Prior approval was especially important given the sensitivity of the issues addressed such as teen sexual activity.

¹⁴ Fewer students participated in the first few months of the program compared to the number participating in the prior year.

oversight unit chose not to grant permission to Grievant and her unit to continue collecting student data.¹⁵ Grant funding for Grievant's program was eliminated.

When all of these factors are considered, the Agency's issuance to Grievant of a below contributor rating on her 2005 evaluation must be upheld.

2006 Re-Evaluation

"An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed"¹⁶ On January 10, 2006, Grievant received a re-evaluation covering the three month re-evaluation period. The Supervisor reviewed Grievant's psychosocial assessments and progress notes. He observed that Grievant failed to include psychosocial problems readily identifiable in the medical record. Grievant's progress notes failed to show that she consistently took action to ensure that high risk behaviors of patients were reduced. Her progress notes did not show consistent communication with the local clinic staff about the patient's psychosocial difficulties such as nonadherence with taking their medication as prescribed. Grievant did not consistently develop and implement outcome oriented plans to complement medical staff or provide counseling regarding high risk behaviors. She had control over her caseload, yet her caseload was too low.¹⁷ Grievant failed to keep her caseload information and statistics in a secure location.¹⁸

Grievant failed to follow the Supervisor's instructions by attempting to accrue compensatory time without first obtaining the Supervisor's permission. Grievant worked on a weekend at a Teen Culture Fest. The Supervisor learned of her attendance only when she first submitted her request for compensatory time accrual.

¹⁵ Ms. G worked in the Agency's central office as part of the Adolescent Sexual Health Programs. She sent the Supervisor an email stating, "Given the violations associated with the data collection it was our recommendation that in order to maintain funding for the teenage pregnancy prevention effort in [the locality] that there be significant restructuring and that [Grievant] not maintain a leadership role nor perform data collection and management functions." See, Agency Exhibit 7.

¹⁶ It does not appear that the Agency complied with DHRM Policy 1.40 by developing a separate re-evaluation plan. Instead, the Agency relied upon the improvement plan contained in the October 13, 2005 Notice of Needs Improvement/Substandard Performance. The Agency's failure to comply with policy is harmless error. The purpose of the re-evaluation plan is to notify the employee of the behavior expected over the three month re-evaluation period. The behavior the Agency expected from Grievant during the three month re-evaluation period was identified in the October 13, 2005 Improvement Plan and communicated to Grievant. In other words, Grievant was not surprised regarding what was expected of her during the three month period.

¹⁷ Patients in clinics spend a lot of time waiting to see medical professionals. Grievant could have met with as many patients as she wished while they were waiting for other services. She could have examined patient files to determine which patients needed her services the most.

¹⁸ For example, the Supervisor asked Grievant for certain confidential patient information. Grievant could not locate the information thereby showing she did not store it in a secure location.

Grievant contends she was not given sufficient formal training to perform her duties. For example, she requested training on November 3, 2005 to attend the Virginia HIV/AIDS Resource and Consultation Training scheduled for December 14 and 15, 2005. Her request was denied. Grievant's Supervisor responded that the training was not best suited for Grievant¹⁹ and that Grievant has a master's degree in social work and was providing social work. Grievant already had sufficient training to perform her duties, according to the Supervisor. In addition, the Supervisor identified several other employees Grievant could contact with questions and encouraged Grievant to rely on those resources as needed. There is no reason to believe anyone refused to assist Grievant when she requested assistance.

Grievant presented testimony of other employees who viewed her work as valuable. The Office Services Specialist testified that Grievant was helpful in interviewing patients and answering telephone calls. Grievant spent a lot of time having to learn her new job, according to the Office Services Specialist. Grievant volunteered to help the Office Services Specialist. The Office Services Specialist, however, did not read Grievant's progress notes.

Upon review of the entire hearing record and consideration of the witness testimony, the Hearing Officer concludes that there were sufficient facts upon which the Agency's relied to formulate its opinion of Grievant's work performance during the re-evaluation period. The objective of the Hearing Officer is not to determine whether he would have developed the same evaluation as did the Agency; but rather to determine whether the Agency has presented sufficient facts to support its conclusion and drawn its conclusion based on those facts. In this case, the Agency's re-evaluation of Grievant was not arbitrary or capricious and must be upheld. The Agency has presented sufficient evidence to support its removal of Grievant from employment.

DECISION

For the reasons stated herein, Grievant's requests for relief are **denied**. The Agency's decision to remove Grievant from employment is **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.

¹⁹ The Supervisor believed the training did not relate directly to Grievant's duties.

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

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 all of your appeals to the other party and to the EDR Director. 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.²⁰

[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

²⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

