

Issues: Arbitrary and capricious performance evaluation, and retaliation & misapplication of policy; Hearing Date: 06/22/06; Decision Issued: 06/26/06; Agency: Dept. of Forensic Science; AHO: David J. Latham, Esq.; Case No. 8350/8351; Outcome: Agency upheld in full.



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case Nos: 8350 & 8351

Hearing Date: June 22, 2006  
Decision Issued: June 26, 2006

**PROCEDURAL ISSUES**

Grievant requested as part of her relief that she be transferred to a different supervisor. A hearing officer does not have authority to transfer an employee.<sup>1</sup> In a case such as this, the authority of the hearing officer is limited to issuing an order that the agency comply with applicable law or policy, if it is determined that the agency unfairly applied or misapplied law or a policy.<sup>2</sup>

Subsequent to the filing of her grievances, the grievant resigned from her position on January 17, 2006. Because the grievances were filed prior to resignation, grievant is entitled to pursue her grievances and to have a hearing.

**APPEARANCES**

Grievant  
Representative for Grievant  
Six witnesses for Grievant

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<sup>1</sup> § 5.9(b)3. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

<sup>2</sup> § 5.9(a)5. *Ibid.*

Forensic Evidence Manager  
Advocate for Agency  
One witness for Agency  
Observer for EDR

## ISSUES

Was the grievant's performance evaluation arbitrary or capricious? Did the agency retaliate against grievant? Did the agency unfairly apply policy, procedures or regulations?

## FINDINGS OF FACT

The grievant filed a timely grievance asserting that her performance evaluation was arbitrary and capricious.<sup>3</sup> She filed a second grievance alleging that the agency retaliated against her for participating in the grievance process, and that it had unfairly applied state policy, regulations and procedures.<sup>4</sup> When the parties were unable to resolve the grievances at the third resolution step, the agency head declined to qualify the grievances for hearing. Grievant appealed to the Department of Employment Dispute Resolution (EDR) which ruled that both grievances qualify for hearing and that the grievances should be consolidated for a single hearing.<sup>5</sup>

The Department of Forensic Science (Hereinafter referred to as agency) employed grievant for five years. She was a forensic evidence specialist when she resigned from employment on January 17, 2006.<sup>6</sup>

Grievant was first employed in 2001 as a security officer. A new Forensic Evidence Manager was hired in October 2004. In November 2004, the agency reorganized the security function and offered security officers the opportunity to become forensic evidence specialists in lieu of layoff. Grievant accepted the offer; her primary function as a forensic evidence specialist was to receive evidence submissions from law enforcement agencies, enter data into a computer system, and maintain the security of evidence. A secondary function is monitoring the security console.

The six security officers who accepted the offer to become forensic evidence specialists, including grievant, received eight weeks of training from December 2004 through January 2005.<sup>7</sup> The trainer was a higher-level evidence specialist with 21 years of experience. During her training period, when grievant made errors, she frequently asserted that no one had shown her the correct

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<sup>3</sup> Agency Exhibit 4. Grievance Form A, filed November 7, 2005.

<sup>4</sup> Agency Exhibit 2. Grievance Form A, filed November 7, 2005.

<sup>5</sup> Agency Exhibit 1. EDR *Qualification Ruling of Director* Numbers 2006-1221 and 2006-1222, May 3, 2006, and, *Consolidation Ruling of Director*, May 4, 2006.

<sup>6</sup> Agency Exhibit 3. Grievant's Employee Work Profile Work Description, January 2005.

<sup>7</sup> Agency Exhibit 7. Transition Training record and notes for grievant.

procedures, when in fact, the trainers had shown her the relevant procedures on multiple occasions. Grievant had difficulty remembering and retaining information given her during training.<sup>8</sup> Although other trainees learned their new functions within this training period, it was felt at the end of the two-month period that grievant required more training. Grievant's trainer during these two months found that grievant had significantly more problems in her work than any of the other trainees. He found that grievant had difficulty retaining instructions and information that he had repeatedly trained her on.

Another experienced higher-level evidence specialist was assigned to give grievant three more months of training from February through April 2005. This specialist covered all possible procedures and occurrences that could happen in forensic evidence receiving. If he detected errors in grievant's work, he corrected them only with grievant's full knowledge that he was making a correction. This experienced trainer had trained others, most of whom learned the process in three weeks or less. Grievant asked the same questions, and made the same errors repeatedly.<sup>9</sup> Grievant's workload was about the same as other specialists. During the last month of initial training and the first month of supplemental training for grievant, she signed a training record for each section of training she completed.<sup>10</sup>

In January 2005, grievant wrote a memorandum of complaint about the forensic manager to human resources.<sup>11</sup> The agency arranged for a mediator to meet with grievant and the manager. Following that meeting, the mediator met with grievant a second time but was unable to find that the manager was doing anything inappropriate.

In Mid-February, the supervisor gave grievant a performance evaluation, which grievant refused to sign.<sup>12</sup> This evaluation noted areas in which grievant needed to improve. In early March, grievant was given a Notice of Improvement Needed documenting that she was making an excessive number of administrative and procedural errors in processing cases.<sup>13</sup> Grievant's supervisor counseled grievant in writing regarding 30 errors made in a chain of custody situation.<sup>14</sup> During March and April 2005, grievant attended the agency's forensic science academy for additional instruction about forensic evidence procedure.<sup>15</sup> During the next few months, grievant was able to improve somewhat her data entry performance, but she continued to make more errors than others in the areas of evidence transfer, learning lab capabilities, and returning evidence to customer agencies.

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<sup>8</sup> *Id.* Corroborated by the testimony of two of grievant's witnesses.

<sup>9</sup> Testimony of grievant's witness, the trainer from February through April 2005.

<sup>10</sup> *Id.* See also Grievant Exhibit 5. Training documentation, January 2005.

<sup>11</sup> Grievant Exhibit 4. Grievant's memorandum of complaint.

<sup>12</sup> Agency Exhibit 6. Grievant's performance evaluation, February 14, 2005.

<sup>13</sup> Agency Exhibit 6. Notice of Improvement Needed/Substandard Performance, March 3, 2005.

<sup>14</sup> Agency Exhibit 6. E-mail from supervisor to grievant, March 15, 2005.

<sup>15</sup> Grievant Exhibit 7. E-mail from supervisor to grievant, January 11, 2005.

In September 2005, upon the recommendation of the manager, grievant's supervisor issued a disciplinary notice for errors made by grievant in the spring but which were not discovered until an inventory reconciliation conducted in August 2005.<sup>16</sup> Grievant filed a grievance; as a result, the second-step respondent rescinded the disciplinary action because it was determined that other employees had made the same error as grievant but had not been disciplined.<sup>17</sup> When the supervisor had initially issued the disciplinary action, he had not told the manager that other employees had made the same error as grievant. When this was discovered, the disciplinary action was rescinded.

Grievant's annual performance evaluation was the subject of very close scrutiny by the agency. Grievant's supervisor during most of the cycle (until the manager took over direct supervision of grievant in September 2005) wrote a draft evaluation and initially gave grievant ratings of Contributor on five of the six core responsibilities. The evaluation reviewer (manager) largely concurred with the supervisor's comments however she rated grievant a Contributor on only three of the six core responsibilities. Both the agency's human resource analyst and the Director of Laboratories reviewed the evaluation comments of both supervisor and manager and concurred with the manager. The performance evaluation was then sent to the Department of Human Resource Management (DHRM). The DHRM analyst does not know either grievant, the supervisor, or the manager. The DHRM analyst read the comments and concurred that the ratings properly reflect that narrative comments in the final evaluation.

After grievant appealed the performance evaluation, the Director of Laboratories analyzed the comments of both supervisor and reviewer and concluded that the ratings were consistent with the comments.<sup>18</sup>

### 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).

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<sup>16</sup> Grievant Exhibit 2. Group II Written Notice, issued September 12, 2005.

<sup>17</sup> Grievant Exhibit 3. Grievance Form A, filed September 16, 2005, and second-step response, September 29, 2005.

<sup>18</sup> Agency Exhibit 4. Memorandum from Laboratory Director to grievant, November 22, 2005.

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 arbitrary and capricious performance evaluation, unfair application of policy, regulations and procedures and, retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.<sup>19</sup>

#### Arbitrary and capricious performance evaluation

Grievant has not borne the burden of proof to show that her performance evaluation was arbitrary and capricious. The agency has shown that grievant made significantly more errors during the evaluation period than her similarly situated coworkers. This, despite the fact that grievant received much more training than her coworkers. While most were trained in three weeks or less, grievant received five months of training and still made more errors than her coworkers. Grievant's performance evaluation was prepared by both a supervisor and the reviewer. While this procedure is atypical, the procedure was suggested by and approved in advance by DHRM. Moreover, the evaluation was vetted by the Laboratory Director, the agency's human resource analyst, and by a DHRM analyst *before* issuance. All agreed that the ratings fairly reflect the evaluative comments.

An objective evaluation of the testimony and evidence in this case suggests that grievant may not be suited for the position of forensic evidence specialist. Even grievant's own witnesses testified that she had difficulty remembering instructions that they had repeatedly given her. They also testified that grievant made significantly more errors than her coworkers. Despite evidence that grievant was trained on specific aspects of her duties, she denied having received such training.

Grievant believed that since the disciplinary action had been rescinded, the fact that she had made errors in her work could not be reflected in her annual performance evaluation. As mentioned above, the disciplinary action was rescinded only because it was determined that others had made the same error

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<sup>19</sup> § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

but not been disciplined. Therefore, it would have been inequitable to discipline one person while not disciplining others for the same reason. However, the fact remains that grievant made errors in her work during the year. Errors are part of one's performance; it is appropriate and reasonable to make comments about such errors in the annual performance evaluation because that document is supposed to reflect one's entire performance during the performance cycle. Thus, while the errors may not have risen to a level to warrant disciplinary action, they nonetheless constitute performance deficiencies that are subject to mention in a performance evaluation.

Grievant complained that a part-time security officer who initially trained as a forensic specialist was allowed to transfer to another position in the agency. However, that person had recognized on his own that he was not able to successfully perform the responsibilities of forensic evidence specialist. He learned of another opening, applied for it, and was accepted for the position. Grievant did not seek or request transfer to any other vacant position.

It is interesting to note that, when grievant complained about her performance evaluation, she told the Laboratory Director and the human resource analyst on November 7, 2005 that she wanted the Forensic Evidence Manager to perform her reevaluation.<sup>20</sup> The following day she changed her mind and instead asked the Laboratory Director to reevaluate her. His reevaluation affirmed the ratings on the performance evaluation.

### Retaliation

Retaliation is defined 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.<sup>21</sup> To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant had filed a grievance in September 2005; this is a protected activity. Grievant received a performance evaluation of "Below Contributor;" this constitutes an adverse employment action. Accordingly, grievant has satisfied the first two prongs of the test. However, in order to establish retaliation, grievant must show a nexus between filing of her grievance and her performance evaluation.

Grievant has not established any such connection between the two events. She claims that the work environment is stressful and unhealthy but has not offered any evidence to support this allegation. She also objects to the person assigned as her supervisor because she wants to be directly supervised by a person on the managerial staff. Employees cannot pick and choose their own supervisor; such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part,

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<sup>20</sup> Agency Exhibit 2. Second-step response to grievance.

<sup>21</sup> § 9, EDR *Grievance Procedure Manual*.

“Management reserves the exclusive right to manage the affairs and operations of state government.” Nonetheless, the agency did grant grievant’s request because it coincided with an internal reorganization and on November 15, 2005 moved grievant under the direct supervision of the Evidence Section Manager.<sup>22</sup> However, even if such a nexus could be found, the agency has established nonretaliatory reasons (unsatisfactory performance) for its evaluation. For the reasons stated previously, grievant has not shown that her performance evaluation was retaliatory.

#### Unfair application of state policies, procedures and regulations

Grievant complained that certain documents relating to her September 2005 grievance were present in her personnel file after the disciplinary action had been rescinded. Those documents were subsequently removed and therefore the issue is now moot.<sup>23</sup>

### DECISION

Grievant has not borne the burden of proof to show that her performance evaluation was arbitrary and capricious, that the evaluation was motivated by retaliation, or that the agency unfairly applied policy, procedures or regulations. Grievant’s requests for relief are 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 14<sup>th</sup> St, 12<sup>th</sup> floor  
Richmond, VA 23219

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<sup>22</sup> Agency Exhibit 2. Second-step response to grievance.

<sup>23</sup> Agency Exhibit 2. Deputy Director’s *Qualification Determination*, December 9, 2005.



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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.<sup>24</sup> 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.<sup>25</sup> You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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/David J. Latham*

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David J. Latham, Esq.  
Hearing Officer

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<sup>24</sup> 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).

<sup>25</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.