

Issue: Arbitrary and capricious performance evaluation, and retaliation; Hearing Date: 08/15/06; Decision Issued: 08/30/06; Agency: VDOT; AHO: Thomas P. Walk, Esq.; Case No. 8323; Outcome: Employee granted partial relief. **Judicial Review: Appealed to the Circuit Court in Bristol County on 10/13/06; Outcome: Parties settled out of court (11/22/06) [Case No. CL06-388].**

**COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT  
DISPUTE RESOLUTION**

**DECISION OF HEARING OFFICER**

**IN THE MATTER OF CASE NO. 8323**

**HEARING DATE: AUGUST 15, 2006**

**DECISION ISSUED: AUGUST 30, 2006**

**PROCEDURAL MATTERS**

The grievant initiated this matter by the filing of her Form A on November 10, 2005. The matter was qualified for a hearing on March 23, 2006. I was appointed as hearing officer on April 13, 2006. A pre-hearing conference was conducted by telephone conference call on April 21, 2006. Subsequent to that conference the parties requested that the scheduled hearing be cancelled in order to submit this matter, and related matters, to mediation. After giving the grievant a reasonable amount of time in which to pursue the mediation I scheduled this matter for hearing on August 15, 2006.

**APPEARANCES**

Grievant and counsel for grievant

Four additional witnesses for grievant

Agency Representative

Three witnesses for agency

**ISSUES**

1. Whether the 2005 performance evaluation of the grievant which assigned to her

a Below Contributor rating was the result of retaliation by one or more of her supervisors?

2. Whether the 2005 performance evaluation is arbitrary and capricious?

### **FINDINGS OF FACT**

The grievant is a Senior Transportation Engineer with the Virginia Department of Transportation. She has been employed by that agency for approximately twelve years. In 2004 the assistant district bridge engineer under whom the grievant had been working retired. The grievant and other employees in that unit became concerned that a certain individual had been “pre-selected” to replace the retiring employee in that position. They believed that the district bridge engineer had such a relationship with this employee that he (the district bridge engineer) was planning on basically rigging the interview and selection process so that this individual would be chosen to be his assistant. These employees expressed their concern to one or more district officials and one of the employees also made a complaint on the state employee hotline. An investigation of the pre-selection allegations was conducted. The district bridge engineer obtained knowledge of the names of the individuals who had made the allegations and expressed concern. The individual who was believed to be favored candidate was, in fact, selected as the assistant district bridge engineer in 2004.

Around that same time, the grievant made a hotline complaint with regard to another employee in the district office performing outside activities on state time. The allegations by the grievant were found, in large part, to be unfounded.

On September 10, 2004, the district bridge engineer issued his Employee Work Profile (EWP) for the grievant for that performance cycle. She received an overall rating as "Contributor." In the category of performance management she received a Below Contributor rating. It was stated that she had not been a team player and did not cooperate with supervisors resulting with conflicts and undermining the effectiveness of the unit activities. She initiated a grievance as to that evaluation. The grievance was not qualified for hearing because of her not having suffered the adverse effect on the terms, conditions or benefits of her employment.

From approximately 1996 through 1999 the grievant had been the supervisor over the new assistant district bridge engineer in the capacity he held then in the inspection unit. At that time, their relationship was not out of the ordinary. After his promotion, the relationship became strained. Her relationship with the district bridge engineer became even more strained.

During the 2005 evaluation cycle (commencing with the 2004 EWP), the grievant and her supervisors, the district bridge engineer and the assistant bridge engineer, had numerous problems in working together. A significant number of these problems resulted from the difficulties the grievant had adjusting to the hands-on management style of her direct supervisor, the assistant district bridge engineer. She and the supervisor clashed over how she was to handle the BARS analysis forms, the conducting of BARS training, and quality review inspections. On March 8, 2005 an interim evaluation was completed. The areas identified for improvement were in her willingness to participate as a

management team player, the conducting of BARS training and not having performed any quality review inspections. It was stated that she needed to take a more active role as manager of the bridge safety inspection unit.

In fact, the required quality review inspections had been performed. Those reports had not been provided to the supervisor. The prior practice of the grievant had been consistent with her not providing those reports to the supervisor. The grievant had not specifically been instructed that she was to conduct the BARS training and she believed that she was merely responsible for seeing that the training was conducted. She had made arrangements for another individual to conduct the training. The grievant and her supervisors had spent time in attempting to clarify her responsibilities and the manner in which she was to fulfill them.

On May 31, 2005 the supervisor issued to the grievant a Notice of Improvement Needed/Substandard Performance. This document cited the grievant for the same general shortcomings as was contained in the interim evaluation from approximately three months earlier. She again was alleged to not be a team player and was accused of making negative comments about management in front of other employees. With regard to the quality review inspections, it was stated that she should revert to the method used at the beginning of the performance cycle.

Shortly after that document was issued the grievant and her immediate supervisor began having weekly meetings. The notes taken by the supervisor and the grievant from these meetings reflect open and spirited discussions of various issues. These issues

included not only the performance of the grievant as compared to the expectations of her EWP but also matters regarding employees under the supervision of the grievant. Prior to these weekly meetings being commenced the grievant and her supervisor tended to attempt to resolve matters largely through exchanging e-mails. In many of the instances in the record the supervisor failed to respond to direct questions raised by the grievant or took a defensive position.

Several individuals familiar with the situation in the unit described the morale as being low due to the tension between the grievant and her supervisors. The assistant district bridge engineer was described as exhibiting a change in his demeanor when around the grievant. He has been heard on multiple occasions raising his voice to the grievant. The district bridge engineer has admitted to having raised his voice to the grievant. The supervisors have attempted to collaborate with each other to deal with the grievant. The district bridge engineer was overheard speaking about the plaintiff as knowing “who the trouble maker is” and threatening to “take care of that problem.” The district bridge engineer has described every encounter with the grievant as being a confrontation.

In her 2005 EWP she was given a Below Contributor rating in three areas of the core responsibilities and as an overall rating. Those specific core responsibilities for which she was given the unsatisfactory rating were performance management, supervision of the bridge inspections teams including reviewing the inspection reports and conducting a minimum of four quality review inspections per team per year, and in

managing the BARS program. The specific areas noted in the EWP are discussed in greater detail below.

### **APPLICABLE LAW AND OPINION**

This matter is governed by the grievance procedure authorized by the Virginia Personnel Act, Virginia Code Section 2.2-2900, et seq. Section 5.8 of the Grievance Procedure Manual (GPM) provides that in actions other than disciplinary actions and dismissals for unsatisfactory performance the employee has the burden of proving her claim by a preponderance of evidence. This grievance of an unsatisfactory performance evaluation falls into this category in which the employee has the burden of proof. This matter was qualified for a hearing under Section 4.1 (B) of the GPM, the grievant having alleged that her performance evaluation was arbitrary or capricious or as the result of retaliation of her supervisors.

The GPM defines arbitrary or capricious as being a decision made “in disregard of the facts or without a reasonable basis.” That definition is elaborated upon in the Rules for Conducting Grievance Hearings in Section VI C (2). The Rules adopt the findings of a Virginia Circuit Court which finds an arbitrary or capricious performance evaluation “is one that no reasonable person could make after considering all available evidence.” An evaluation which is motivated by spite or ill will can be found to be arbitrary or capricious. EDR Ruling 2003-143. In keeping with the general policy of providing deference to the decisions made by supervisors, I have viewed the evidence from the standpoint of a “reasonable supervisor” as opposed to the more ambiguous standard of a

“reasonable person”.

The evidence is clear that the grievant was not a perfect employee during the evaluation cycle. It is also clear that neither of her supervisors dealt with her in a productive manner. Her direct supervisor, the assistant district bridge engineer, utilized a management style which left the grievant with the impression that he was micro-managing her unit. This approach resulted in her receiving mixed signals about how to respond and in confusion over her expectations. To resolve this grievance requires more than just the recognition of the shortcomings of the grievant and her supervisors. To determine whether the 2005 EWP was arbitrary or capricious I have compared the expectations for her core responsibilities with her actual performance. That analysis is as follows.

#### PERFORMANCE MANAGEMENT

The December, 2004 EWP for the grievant lists eight categories as being examples of measures for performance management. This Section is given a 10% estimate for the portion of the time of the employee dedicated to these duties. All of the eight examples given deal with the work of the grievant as a supervisor rather than her working with and under others. The 2005 EWP assigns two areas in which the grievant was found to be deficient.

The first area was in the completion of the EWPs for the employees working under her in November, 2004. The grievant has completed them in accordance with prior practices and with what she understood to be acceptable practice in another district. She

was criticized for asking reasonable questions regarding the changes being requested by the supervisors. In August, 2005 she inquired of the assistant district bridge engineer what other changes she should make to the current EWP's. He construed this as harassment by her, rather than a legitimate attempt to obtain useful information. In reviewing the e-mail from her to the supervisor I can find no basis for concluding that she was being incompetent or insubordinate in asking for clarification on this issue. Her problems in communicating with the supervisor are amply illustrated by a November 30, 2004 e-mail regarding the EWP's where she says "Please. I'm asking for your help, there is no need for this. Please answer the specific questions I asked." I view her approach to this matter as being cautious and reasoned. The approach by the supervisor, on the other hand, illustrates not only his frustration with the grievant but his desire to have things handled on his own terms.

#### INSPECTION SUPERVISION

The next area on the EWP deals with her supervision of the bridge inspection teams, including the review of inspection reports and the conducting of quality review inspections. This category is shown as involving approximately 50% of the time of the grievant. She received a below contributor rating in this area as well. The first issue raised in this category in the 2005 EWP deals with the quality review reports by the grievant. The supervisor complained that she had failed to provide him with the inspection reports as he stated he had told her during his initial review of her EWP. He stated that the grievant had changed her process in this matter and that this change

happened after he explained to her “on two different occasions what I expected from her quality review reports. She has reverted back to the original process.” I find this statement to be illogical. In the EWP of September 10, 2004 the grievant was given a contributor rating with the notation from the district bridge engineer that the grievant supervises the quality and accuracy of the inspection reports and they are very good. In the Notice of Improvement given on May 31, 2005 the supervisor directed the grievant to “revert to the method of documenting quality assurance reports that she used at the beginning of the performance cycle.” At the beginning of the cycle the grievant was not supplying the reports to her supervisor. Therefore, the grievant was being downgraded in September, 2005 for what she was directed to do approximately three months earlier.

That section of the EWP also contains a quote from an e-mail from the grievant regarding the quality check forms. The quotation is taken out of the appropriate context. The comment made by the grievant in the e-mail was pointing out to the supervisor his wanting to control a lesser aspect of the duties of the grievant while insisting on her using her discretion on a decision having a fiscal impact of several thousand dollars. I view the request for input by the grievant from the supervisor to be entirely reasonable under those circumstances. Also, if the supervisor had requested that the grievant provide to him these reports on a quarterly basis, then he was deficient in his own duties by not broaching the subject with her prior to March 8, 2005. Nothing in the December 17, 2004 EWP specifically requires the grievant to provide copies of the reports to the supervisor but merely says that the inspections are to be “conducted as required.”

The other item specifically listed as a matter of concern in this category involved two inspectors who had been promoted to inspector senior. The EWP accuses the grievant of overriding the decision of an independent audit to promote one of these individuals and refusing to assign him to certain duties. The EWP gives a misleading picture of this situation. The grievant actually was reluctant to assign these responsibilities to this individual because of concerns about his ability to perform the work, given his recent return from medical leave. The legitimate concern over the ability of an employee to perform safety-related work, in short, is depicted as being another attempt by her to impose her desires and to re-write the decisions of those over her. Although I have no doubt that the grievant often believes that as the one closest to a situation she has a better grasp of the details and implications, I cannot find that she unnecessarily raised these issues or provoked confrontation with her supervisors. This is true of the other examples not specifically listed in the EWP but found in the attachments to it.

### BARS ANALYSIS

This category is given an estimate of taking 10% of the time of the grievant. The first aspect of the criticisms of the grievant in this area revolves around the level of checking or review of the analysis expected by her. This dispute is reflected in an exchange of e-mails beginning on January 27, 2005 and ending on the following day. In the EWP the expectation is for the grievant to see that “all BARS are checked to insure accuracy.” During the exchange of e-mails the grievant asked whether she needed to

“check in detail” or “give a general review.” The response of the supervisor (the assistant bridge engineer) was “whatever you feel comfortable with to sign you have checked them.” The grievant next asked whether the supervisor could confirm that by using the word “check” he meant the same as what the grievant meant when she used the word “review.” The supervisor refused to clarify whether there is a semantic difference between those two words and, if so, what is the difference in his viewpoint. He stated to the grievant that “this is a matter of safety which will not be compromised.” That comment, in light of the earlier direction and a statement made by him on January 7, 2005 that the “level of checking is up to you” shows an intent by him not to manage the grievant but to tend to set her up for failure.

The second aspect in this category deals with the BARS training. The grievant was criticized in her interim evaluation for not providing the training herself. As in other areas, the immediate supervisor had refused to provide the grievant with a direct, unambiguous answer as to how many sessions he expected her to personally conduct. The record contains an undated set of printed meeting notes which appear to be made by the supervisor. In those notes he recounts a discussion between himself and another employee regarding the BARS classes. He told the other employee that it was not true that the grievant had been written up for not teaching any BARS classes. Although this statement was technically true, it again was misleading as the grievant was subsequently downgraded for not having conducted the training herself.

In the other areas of her EWP the grievant received a rating of Contributor.

Although the evidence as presented is conflicting in many areas, I have resolved these conflicts in favor of the grievant. This resolution is based on my observation of the demeanor of the grievant, her supervisors, and the less-interested witnesses. I have also considered in resolving these conflicts the lack of candor exhibited by the primary witnesses for the agency. This lack of candor is also entitled to great weight in determining whether the evaluation of the grievant was motivated by spite or ill will. I find that to be the case. I cannot find, however, that the grievant has proven her claim that the evaluation was issued out of retaliation.

### **DECISION**

I find that the Employee Work Profile dated September 15, 2005 to be arbitrary and capricious for the reasons stated above. The agency is hereby directed to repeat the evaluation process and to provide a rating with a reasoned basis related to established expectations.

### **APPEAL RIGHTS**

As the Grievant Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing

officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.

2. **A challenge that the hearing decision is inconsistent with state or agency policy** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director's authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14<sup>th</sup> St., 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, One Capital Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **15 calendar** days of the **date of the original hearing decision**. A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,

2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

**Judicial Review of Final Hearing Decision:** Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code §17.1-405.

DECIDED this August 30, 2006.

---

Thomas P. Walk, Hearing Officer