Issues: Arbitrary and capricious evaluation, retaliation, misapplication of policy; Hearing Date: 07/21/06; Decision Issued: 07/24/06; Agency: DOC; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8337/8373; Outcome: Employee granted partial relief

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8337/8373

Hearing Date: July 21, 2006
Decision Issued: July 24, 2006

PROCEDURAL HISTORY

The Grievant was employed by the Agency as a Correctional Officer Senior, and he had about ten years of service. On October 19, 2005, the Grievant received his 2005 performance evaluation, which rated his performance as "Below Contributor." On November 16, 2005, the Grievant initiated a grievance challenging the evaluation as retaliatory, arbitrary and capricious, and a misapplication and/or unfair application of policy.

In January 2006, the Grievant's performance was re-evaluated, and he received another "Below Contributor" rating. The Grievant states that he was subsequently terminated from employment for unsatisfactory job performance on January 11, 2006. The Grievant, on January 23, 2006, initiated a grievance challenging his termination, and on April 11, 2006, the Agency head qualified the January 23rd grievance for hearing.

On June 1, 2006, the Department of Employment Dispute Resolution consolidated the two grievances for one grievance hearing. The Hearing Officer received the assignment from the Department of Employment Dispute Resolution on June 9, 2006.

A pre-hearing conference was held telephonically on June 23, 2006. Because of extenuating unavailability of the parties and their representatives and the intervening two-day Independence Day holiday, a hearing could not be scheduled within the prescribed 35 calendar days. For this good cause shown, the schedule for convening the grievance hearing and rendering the decision was extended. The hearing was scheduled and held on July 21, 2006.

The Grievant has an active Group II Written Notice.

APPEARANCES

Grievant
Advocate for Grievant
Ten witnesses for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
Four witnesses for Agency (including Representative)

ISSUES

Was Grievant's annual performance evaluation either retaliatory, arbitrary and capricious, or misapplication of policy? Was Grievant's three-month performance re-evaluation either retaliatory, arbitrary and capricious, or a misapplication of policy? Did Grievant's removal from state employment comply with policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence. GPM § 9.

The burden of proof is on the Grievant to show by a preponderance of the evidence that his performance evaluations were either a misapplication of policy, retaliatory, or arbitrary and capricious.

By agreement of the parties, the Agency presented its evidence first in this consolidated grievance hearing.

FINDINGS OF FACT

The Agency's evidence included exhibits from 1 to 9. All were introduced into the grievance record, with the exception of a printed e-mail, dated January 2, 2006, from W, an officer superior to Grievant. The Grievant objected to introduction of the document on grounds that it had not been provided to him during the evaluation process, prior to his termination. The objection was taken under advisement, and the Grievant was allowed until July 24, 2006, at noon, to provide authority in support of his objection. The Grievant's documentary support was received for the record.[1]

[1] The classification of the document under the records management policies is unclear. However, this decision is made without the necessity of specifically considering the disputed document.

The Grievant's evidence included exhibits from 1 to 10, all of which were admitted into the grievance record without objection.

The Grievant requested "W" as a witness for the grievance hearing, and an order for his appearance at the hearing was issued. W was the reviewer on both pertinent performance evaluations leading to the Agency's termination of Grievant. Prior to and at the hearing, the Agency advised that W was on "leave" and not on duty. As the grievance hearing was beginning, at the hearing officer's initiation, a telephone call was placed to W at his home. W answered the call, and we presented the option for him to participate in the grievance hearing by telephone, but W refused to participate. W indicated that because he was not on duty, he would not participate, even by telephone call. The type of leave W was on was not established.

W had much involvement in the Grievant's performance evaluations and the Grievant's claims of retaliation. While evidence and documentation of incidents involving W were admitted at the hearing, no affidavit from W was offered, W was not available for cross-examination, and his credibility could not be assessed.

The Agency presented evidence of the Grievant's "below contributor" rating on his October 2005 performance evaluation. The Agency's evidence and testimony supports documented deficiencies in the Grievant's job performance leading to the "below contributor" rating.

The Agency established that, during the October 2005 evaluation and review period, the Grievant at one time refused to honor a superior officer's request for supplies (gloves from the medical department), inappropriately engaged an inmate to be a "witness" to the gloves incident, refused to carry out an ordered and required inmate search, exhibited less than desired or appropriate communication skills with inmates and superiors, and used less than effective supervisory skills with inmates. These incidents were essentially un-rebutted by Grievant's testimony and evidence.

The Grievant asserts his active participation in the employee union and his assistance to other employees with grievances and complaints has led to him being singled out for adverse employment reviews and action. The Grievant also asserts that his assistance with a co-worker's sexual harassment complaint against W is cause for W's retaliatory evaluation of Grievant's employment performance.

As to the three-month re-evaluation period, the Agency presented evidence of two instances of the Grievant's improper conduct and, thus, failure to improve his work performance. The Agency presented one documented instance of a "Notice of Improvement Needed/Substandard Performance," regarding an incident in which the Grievant engaged in laughter during muster on December 20, 2005. During this incident, W was reviewing policy, asking officers present questions about it. When W questioned two officers, neither could correctly answer the questions, leading W to comment on the officers' deficiencies. W's comment garnered laughter from those assembled, including the Grievant.

While the Agency presented supervisory level witnesses who characterized the Grievant's laughter as disruptive and disorderly, causing W to interrupt his presentation, the Grievant, along with at least five other witnesses, testified that the Grievant's laughter was no more than the other officers present, and was not boisterous or disruptive.

Also during the three-month re-evaluation period, the Agency identified another incident, reported by W, of the Grievant contacting W on December 29, 2005, regarding an insect bite on an inmate's face and the referral for medical attention. The Agency asserts the Grievant should not have contacted a supervisor to handle the inmate medical issue. The Grievant testified that the inmate claimed he had a spider bite. The Grievant and an Agency nurse both testified to their understanding that a supervisory level officer should give approval for non-emergency medical attention for an inmate.

The Agency's exhibit 7 included an e-mail sent by W describing the incident in which the Grievant telephoned W regarding an inmate's apparent insect bite on his face and authorization for medical treatment. (This is the disputed document noted above.) W was critical of the Grievant contacting him for this kind of occurrence. The Grievant testified he knew nothing of the e-mail or management's consideration of this conduct as inappropriate.

Evidence from the Agency's witnesses, all supervisory personnel, indicated the Grievant's overall performance did not match the Grievant's prior level of competence. The supervisors remarked about the Grievant's inappropriate sarcasm.

In addition to the Grievant's witnesses testimony about the December 20, 2005, muster incident, the Grievant's witnesses testified to the Grievant's good work, good reputation, and assistance with other employees' grievances.

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 retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.[2]

Annual performance evaluation

The Grievant bears the burden of proving the annual performance evaluation was retaliatory, arbitrary and capricious, or a misapplication of policy. The Grievance Procedure Manual defines "arbitrary and capricious" as "in disregard of the facts or without a reasoned basis." "Retailation" is defined as an "adverse employment 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')."[3] The Agency's witnesses, including the Grievant's supervisor, credibly establish instances of conduct by the Grievant, prior to the October performance evaluation, that justify the "below contributor" rating for the October 2005 evaluation. The deficiencies and instances described by the Agency in its evaluation and at the grievance hearing were essentially unrebutted by the Grievant's evidence.

Here, the Agency presented nonretaliatory reasons for the "below contributor" rating. The Agency's witnesses, including the Grievant's supervisor, credibly establish instances of conduct by the Grievant, prior to the October performance evaluation, that justify the "below contributor" rating for the October 2005 evaluation. The deficiencies and instances described by the Agency in its evaluation and at the grievance hearing were essentially unrebutted by the Grievant's evidence.

Management is reserved the exclusive right to manage the affairs and operations of state government. The grievance statute and procedure reserve to management the exclusive right to establish performance expectations and to rate employee performance against those expectations.

While the Grievant may point to circumstantial evidence that some Agency witnesses and supervisors might have grounds to have a grudge against him, based on the evidence presented, I cannot find that any such grudge or bias, if it exists, negates the actual instances presented of unsatisfactory job performance. Because there is credible evidence to support the "below contributor" rating, I find the Grievant has not borne his burden of proof that his October 19, 2005, evaluation was either retaliatory, arbitrary and capricious, or a misapplication of policy.

Under the EDR Director's Rules for Conducting Grievance Hearings, the Hearing Officer is not a "super-personnel officer." Therefore, the Hearing Officer should give the appropriate

[2] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.
[3] § 9, EDR *Grievance Procedure Manual*, effective August 30, 2004.

level of deference to actions by Agency management that are found to be consistent with law and policy. In this case, the Agency's actions are consistent with law and policy.

Re-evaluation and Agency decision to terminate employment

Since the re-evaluation and termination of the Grievant is a disciplinary action, the Agency bears the burden of proof that its actions were warranted.

Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered. Under such circumstances, an adverse inference may be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer may resolve that factual dispute in the Grievant's favor.

I find that W's involvement in the Grievant's performance evaluation, especially the re-evaluation that resulted in termination, is critical to the determination of whether the Agency has acted in accordance with policy. While no one can compel W's participation in the grievance process, as a supervisory officer and reviewer of the Grievant, I find it appropriate to impose an adverse inference regarding W's refusal to participate in the grievance hearing. The Grievant was not allowed the opportunity to cross-examine W with respect to his bias or lack thereof, and the hearing officer did not have the opportunity to evaluate W's credibility.

Accordingly, applying the adverse inference, I find the re-evaluation process is based on tainted information since the only documented evidence during the re-evaluation period came from W, and the re-evaluation was largely based on W's information, I find the Agency has failed to carry its burden of proof of establishing the Grievant's failure to improve his work performance.

The Grievance Procedure Manual defines "arbitrary and capricious" as "in disregard of the facts or without a reasoned basis." I find that the incidents used to re-evaluate the Grievant as "below contributor" are without sufficient reasoned basis. Examining the laughter incident in the light most favorable to the Agency, the best evidence of how disruptive the Grievant might have been, by necessity, needed to be presented by W. The surrogate evidence, alone, when weighed against the contrary evidence, was not convincing in demonstrating a significant or material incident, and the Agency failed to meet its burden of proof.

In this case, the evidence is preponderant that Grievant's supervisor wrote an evaluation that was based almost entirely on documented deficiencies noted by W. Put in the best light for the Agency, complaining about the incident regarding an inmate's medical treatment is picayune if not disingenuous. Again, without direct testimony from W, the surrogate evidence on this issue is not convincing in demonstrating a significant or material incident. While the Grievant may lack the best supervisory skills, is it insincere to fault the Grievant for exercising

supervisory consultation on an issue that, at least conceivably, justifies supervisory notification. Without any objective measure for it, this is a matter involving subjective discretion by the Grievant. Being critical of the Grievant's request for supervisory approval is especially unwarranted during the Grievant's three-month re-evaluation period when he is supposedly following a re-evaluation plan requiring supervisory input. Again, the Agency failed to meet its burden of proof on this point.

Thus, I conclude the re-evaluation process and bases for termination were so deficient as to be arbitrary and capricious. **Accordingly, for this reason, I will reverse the termination, reinstate the Grievant, and order the Agency to repeat the three-month re-evaluation process.**

Grievant also asserted in his grievance that the Agency failed to comply with DHRM Policy 1.40 (Performance Planning and Evaluation). Policy 1.40 permits an Agency to exercise one of three options when an employee receives a re-evaluation of "Below Contributor"; it may demote, transfer or terminate the employment of the employee. DHRM Policy 1.40 outlines Performance Planning and Evaluation for State employees. This policy provides:

> **RE-EVALUATION** An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below.
>
> **Re-Evaluation Plan** Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.
>
> • Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
>
> • The supervisor should develop an entire performance plan including, "Employee Development."
>
> • If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form, which will be used for re-evaluation purposes. The form should clearly indicate that it is a re-evaluation.
>
> • The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period.
>
> • The employee's reviewer, and then the employee, should review and sign the performance re-evaluation plan.
>
> • If the employee transfers to another position during the reevaluation period, the re-evaluation process will be terminated.

DHRM Policy 1.40 also states that, "An employee whose performance during the re-evaluation period is **documented** as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band

that has lower level duties if the Agency identifies another position that is more suitable for the employee's performance level." (Emphasis added).

Further, the policy provides that, "If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's [of] duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period."

Because, on substantive grounds, the Agency is ordered to repeat the three-month re-evaluation process, I need not make a ruling on this procedural matter of the performance re-evaluation plan. However, I recommend the Agency pay close attention to the requirement to provide the Grievant with an entire performance re-evaluation plan so that compliance or non-compliance may be clearly documented. DHRM Policy 1.40 is developed to provide a reliable process on which an employee may rely to improve and preserve his employment.[4] DHRM Policy No. 1.40 requires that performance measures, "should be specific, *measurable*, attainable and relevant." The more quantitative a measurement can be made, the more clearly an employee can determine whether he is achieving the expectation. An employee should have clear, specific, measurable yardsticks that he can use to evaluate his own progress.

If the Agency's procedure is ambiguous as to its compliance with Policy 1.40, it may not sufficiently notify the employee of the required elements of a distinct and discrete Performance Re-Evaluation Plan.

DECISION

For the reasons stated herein, the Hearing Officer Orders that the annual performance evaluation issued on October 19, 2005, is upheld and the relief sought by the Grievant is denied.

For the reasons stated herein, because the three-month re-evaluation was arbitrary and capricious, the termination and removal of the Grievant from state employment is reversed. The Grievant is reinstated, pending a repeat of the three-month re-evaluation process, and the Hearing Officer Orders the Agency to repeat the three-month re-evaluation process and provide a rating with a reasoned basis related to established expectations. Grievant is **reinstated** to his former position of Correctional Officer Senior or, if occupied, to an objectively similar position. The Agency is Ordered to provide Grievant with **back pay** (from which interim earnings, including unemployment compensation, must be deducted) and **benefits** representing the amount of pay and benefits Grievant would otherwise have received had the Agency not terminated him.

[4] The Agency has presented substantial evidence supporting its conclusion that Grievant had valid performance issues as established in the October 2005 performance evaluation. Even if the Hearing Officer assumes the Agency's re-evaluation conclusion to be correct, this does not mean that the Agency can disregard the procedural requirements of DHRM Policy 1.40.

APPEAL RIGHTS

As the Grievance 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** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 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 Capitol Square, 830 East Main Street, 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.** (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). 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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

I hereby certify that a copy of this decision was sent to the parties and their advocates by certified mail, return receipt requested.

_____

Cecil H. Creasey, Jr.
Hearing Officer