

Issue: Termination due to unsatisfactory performance; Hearing Date: 06/14/06;
Decision Issued: 07/07/06; Agency: DOF; AHO: Carl Wilson Schmidt, Esq.; Case
No. 8348; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8348

Hearing Date: June 14, 2006
Decision Issued: July 7, 2006

PROCEDURAL HISTORY

Effective February 24, 2006, Grievant was removed from employment based on an unsatisfactory performance re-evaluation. On March 10, 2006, 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 he requested a hearing. On May 18, 2006, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 14, 2006, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUE

1. Whether Grievant's February 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 based on performance was warranted and appropriate under the circumstances. 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:

The Department of Forestry employed Grievant as National Resource Specialist II at one of its Facilities. In October 2005, Grievant received an overall rating of “Below Contributor” for his annual performance evaluation.¹ As a result, the Agency informed Grievant that he would be re-evaluated for a three month period. He was provided with an “Employee Performance Improvement Plan” identifying deficiencies, corrective action, and core measures for four core responsibilities.

Grievant’s re-evaluation period began November 7, 2005 and ended February 24, 2006.² During that time, Grievant’s performance was monitored through meetings and progress reports.³ On February 20, 2006, the Regional Forester sent Grievant a memorandum advising him that:

Looking at your full performance during the improvement period, you have not made significant improvements overall. In particular, you have significant issues concerning your administrative practices; submitting accurate paperwork; and enforcing the Commonwealth’s water quality and fire laws which encompass a major part of your job duties. Based on your entire performance, you are still rated a Below Contributor. Therefore, your employment is being terminated effective February 24, due to your performance rating and inability to improve your performance during the improvement period.⁴

¹ The 2005 annual performance evaluation is not in dispute as part of this appeal.

² The re-evaluation period was extended an additional two weeks because Grievant served jury duty and due to his taking family sick leave.

³ Grievant and his supervisor meet every two weeks to discuss Grievant’s work performance.

⁴ Agency Exhibit 1.

CONCLUSIONS OF POLICY

An employee who receives a rating of "Below Contributor" on his annual evaluation must be re-evaluated and have a performance re-evaluation plan developed. The employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three months. The supervisor must discuss with the employee the specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period. If the employee receives a re-evaluation performance rating of "Below Contributor", the Agency may remove the employee from employment.⁵

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. 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 performance re-evaluation was neither arbitrary nor capricious. The Agency's opinion that Grievant's work performance did not improve during the re-evaluation period is supported by the evidence. For example, Grievant was expected to recruit at least one new firefighter by January 1, 2006. He failed to do so. Grievant's weekly progress reports were often vague and incomplete. He did not report to work on time on at least six occasions.

One of Grievant's most important core measures was to:

Accurately inspect harvests so that no audits conducted on final inspection show likely or active water quality problems.⁶

To determine whether Grievant had complied with this measure, Grievant's supervisor asked the Environmental Compliance Engineer to audit several tracts for which Grievant had enforcement responsibility.⁷ The Environmental Compliance Engineer was not aware of the Agency's concerns about Grievant's work performance prior to his audit. His conclusions reflect the conclusions of an expert in the field and were not unduly influenced by anyone working for the Agency. With respect to tract number 18, the Environmental Compliance Engineer wrote:

On February 2, 2006, I conducted an audit of this harvesting operation. The objective of the audit was to determine if Department of Forestry

⁵ DHRM Policy 1.40, *Performance Planning and Evaluation*.

⁶ Agency Exhibit 4.

⁷ The Environmental Compliance Engineer took numerous photographs substantiating his assertions regarding the conditions of the track when he observed them. See Agency Exhibits 6, 7, and 8.

procedures [have] been adhered to in the enforcement of Virginia's Silvicultural Water Quality Law Code of Virginia 10.1-1181.2. During the course of this audit inspection I discovered numerous serious water quality concerns on skid trails, stream crossings, streamside management zones, and haul road. **These concerns were readily apparent and were in areas identified on a sketch map drawn by [Grievant] on the form 143 which was issued on 10/25/05. The water quality concerns were so egregious that an Emergency Special Order should have been issued on parts of the tract due to skidding activities in and adjacent to the stream channel.** Evidence was found that the recommendations by [Grievant] had been followed but only to a minimal degree and certainly not in appropriate measure or method to alleviate the sources of pollution on this tract. **The evidence supports a conclusion that [Grievant] did a final harvest inspection on this tract while serious active water quality problems existed and still exist to this day.** [Grievant's] harvest inspections show no increase in acres harvested from July 12, 2005 until the final inspection which was conducted on November 17, 2005. (Emphasis added.)

The Environmental Compliance Engineer conducted a similar audit of tract 53 for which Grievant had enforcement responsibility. The Environmental Compliance Engineer reached similar conclusions regarding Grievant's monitoring of tract 53.

Based on the evidence presented, there is no reason for the Hearing Officer to believe Grievant's work performance improved during the re-evaluation period. The Agency's decision to remove Grievant must be upheld.

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.
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.⁸

[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

⁸ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.