

Issues: Arbitrary and capricious performance evaluation, and discrimination, retaliation and harassment; Hearing Date: 07/19/06; Decision Issued: 07/27/06; Agency: DCE; AHO: David J. Latham, Esq.; Case No. 8376/8377; Outcome: Employee granted partial relief



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Nos: 8376 & 8377

Hearing Date: July 19, 2006
Decision Issued: July 27, 2006

PROCEDURAL ISSUES

Grievant requested as part of his relief that disciplinary action be taken against those employees who had harassed him and treated him unfairly. A hearing officer does not have authority to take adverse action against any employee.¹

Grievant also requested that he be given the same workload environment as those in similar situations. It is impossible to guarantee that an employee will have precisely the same workload or environment as those in similar situations. Even if this was possible, a hearing officer has no authority to order an agency to comply with such a request.²

APPEARANCES

Grievant
Representative for Grievant

¹ § 5.9(b)6. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, August 30, 2004.

² § 5.9(b)7. *Id.*

Four witnesses for Grievant
Employee Benefits Manager
Attorney for Agency

ISSUES

Was the grievant's performance evaluation arbitrary or capricious? Did the agency harass grievant? Did the agency retaliate against grievant? Did the agency discriminate against grievant? Did the agency misapply or unfairly apply state policies?

FINDINGS OF FACT

The grievant filed two timely grievances. In the first, grievant asserts that: 1) he had received an arbitrary and capricious rating on an observation report conducted on August 3, 2005, 2) he had not received an Employee Work Profile (EWP) Work Description in April 2005, and 3) that these two factors amount to harassment.³ In the second grievance, grievant asserts that the agency has retaliated, harassed and discriminated against him. Although not specifically mentioned in the second grievance, grievant listed the date of his grievance as September 22, 2005, the date on which he received his annual performance evaluation; it is inferred from this date and grievant's testimony that this is part of his grievance.⁴ 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.⁵ Grievant has been employed by the Department of Correctional Education for 28 years. He is a regional principal.

Historical Background

Grievant's previous supervisor had allowed grievant to complete a self-evaluation form each year and used it as the basis for his annual performance evaluation. During those years, grievant's performance evaluation indicated that he was performing satisfactorily. Beginning in 2002, grievant's current supervisor (Deputy Superintendent), began to observe that grievant's performance was not satisfactory in certain areas. She gave him a Notice of Improvement Needed in September 2002, thereby giving him an opportunity to correct certain deficiencies prior to his annual performance evaluation.⁶ In 2003, grievant received another

³ Agency Exhibit 12. *Grievance Form A*, filed September 2, 2005.

⁴ Agency Exhibit 13. *Grievance Form A*, filed October 22, 2005.

⁵ Agency Exhibit 16. *EDR Qualification and Consolidation Ruling of Director Numbers 2006-1215 and 2006-1297*, June 2, 2006.

⁶ Agency Exhibit 7. *Notice of Improvement Needed/Substandard Performance*, September 20, 2002.

Notice of Improvement Needed.⁷ Grievant's annual performance evaluation overall rating for 2003 was Below Contributor.⁸ Grievant was placed on an Action Plan and given three months to correct deficiencies.⁹ A reevaluation in December 2003 rated grievant as a Contributor.¹⁰ Grievant was rated Contributor in 2004.¹¹

On December 16, 2004, grievant went on medical leave for hip replacement surgery and returned to work on April 5, 2005.¹² During grievant's absence, a program support technician discovered that approximately 40 old, uncashed checks that grievant should have sent to central office were still in his office.¹³ While investigating this, grievant's supervisor found other problems. One of grievant's employees had been falsifying her timesheet, grievant was closing classes without permission, and grievant was not following through on other required duties.¹⁴ In March 2005, grievant called his supervisor to update her on his medical status. During that telephone conversation, the supervisor said she had plans to reorganize grievant's region and wanted to discuss them with grievant. Grievant offered to meet with his supervisor and they met on March 11, 2005. During that meeting, the supervisor told grievant that his performance was unsatisfactory. She gave grievant the option to either take a voluntary demotion to assistant principal with no salary reduction or, receive a Group II Written Notice with the same demotion and a five percent salary reduction.

Grievant elected to take a voluntary demotion in order to avoid the disciplinary action and loss of pay. He subsequently grieved the agency's action. His grievance was adjudicated by a hearing officer who held that the agency failed to comply with state policy.¹⁵ The hearing officer ordered the agency to reinstate grievant to his former position; grievant was reinstated as principal on October 3, 2005.

Current history

When grievant was demoted, he was told that he would be assigned as assistant principal at another location within the region.¹⁶ He was also told that

⁷ Agency Exhibit 5. *Notice of Improvement Needed/Substandard Performance*, July 8, 2003.

⁸ Agency Exhibit 5. *Performance Evaluation*, September 11, 2003.

⁹ Agency Exhibit 6. *Corrective Action Plan*, 2003.

¹⁰ Agency Exhibit 6. *Performance Reevaluation*, December 1, 2003.

¹¹ Agency Exhibit 4. *Performance Evaluation*, September 17, 2004.

¹² The medical evidence regarding grievant's absence is contradictory. Grievant's orthopedic surgeon had submitted a note permitting grievant to return to work on January 24, 2005 (Agency Exhibit 20). Subsequently, the same physician submitted another note allowing grievant to return to work on April 4, 2005 (Agency Exhibit 23).

¹³ Grievant Exhibit 6. Deputy Superintendent's memorandum to file, March 11, 2005.

¹⁴ Grievant Exhibit 6. *Id.*

¹⁵ Grievant Exhibit 7. *Decision of Hearing Officer*, Case # 8084, September 26, 2005.

¹⁶ Agency Exhibit 3. Letter from Deputy Superintendent to grievant, March 15, 2005. Grievant avers that he never received this letter. However, the deputy superintendent verbally told him all of the pertinent information contained therein

the new regional principal and the deputy superintendent would meet with him to redevelop his EWP.¹⁷ However, a new EWP was never developed. Instead, grievant's work title on his existing EWP was changed to Regional Assistant Principal. Grievant neither received a copy of this changed EWP nor was he asked to sign it. The principal of another correctional facility was assigned as the new regional principal. On April 11, 2005, that principal (grievant's new supervisor) and the Deputy Superintendent met with grievant and gave him a detailed list of four duties to be completed on varying dates. Three of the tasks were to be completed not later than May 15, 2005; one (teacher observations) was due by July 1, 2005.¹⁸ The four duties are required of all regional principals and assistant principals on an annual basis. The Work Description portion of the EWP is virtually identical for principals and assistant principals.¹⁹ Grievant had been performing these duties for many years and was, therefore, experienced and knowledgeable about what was required. Grievant did not complete the required tasks by the deadlines. Of the four duties, grievant eventually completed the teacher observation reports. To date, however, grievant acknowledged that he has still not completed the remaining three tasks to the agency's satisfaction.

Agency policy provides that, during each annual performance cycle, the supervisor of a principal or assistant principal is to conduct three observations of the incumbent's performance. A list of 54 assessment standards²⁰ is used by the supervisor to conduct the observation and prepare a summary document known as an Observation Report.²¹ In August 2005, the Deputy Superintendent conducted an assessment of grievant's performance and found him to be Below Contributor on six standards. In early September, the new principal gave grievant a Notice of Improvement Needed because he had still not completed the four tasks requested in April.²² Two weeks later when grievant had still not completed the tasks, the new principal gave grievant an overall rating of Below Contributor on his annual performance evaluation.²³

Grievant maintained a set of hanging files in which he kept documentation throughout the year regarding his completion of assessment standards. He used this information to prepare his self-assessment prior to the annual performance evaluation and to document completion of elements whenever his supervisor conducted an observation report. At some point after grievant was demoted and moved to another location, the new principal at grievant's former location asked

¹⁷ It is assumed that EWP as used in the March 15th letter meant the Work Description portion of the EWP.

¹⁸ Grievant Exhibit 4. Memorandum from new regional principal to grievant, April 11, 2005.

¹⁹ See Agency Exhibits 1 & 9, *EWP Work Descriptions* for principals and assistant principals, respectively. The core responsibilities for both positions are identical. The only difference in the two descriptions is special assignments, which appear to be unique for each individual.

²⁰ Agency Exhibit 2. *Assessment Standards*.

²¹ Agency Exhibit 1. *Observation Report* for grievant, August 3, 2005.

²² Agency Exhibit 1. *Notice of Improvement Needed/Substandard Performance*, September 5, 2005.

²³ Agency Exhibit 1. *Performance Evaluation*, September 22, 2005.

the secretary to open the locked file cabinet in which grievant kept his personal files. The new principal went through the file cabinet and later asked the secretary to relock it. Although the principal denies destroying grievant's files, the files are no longer in the file cabinet and cannot be found.

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 arbitrary and capricious performance evaluation, retaliation, harassment, or discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence.²⁴

EWP Work Description

Grievant's September 5th grievance requesting a new and fair EWP referred to the EWP he had been promised with his demotion to assistant principal. Now that grievant has been reinstated to his position as principal, his prior EWP as principal is again in effect. Therefore, this request for relief has become moot.

Travel to other locations

²⁴ § 5.8, Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, Effective August 30, 2004.

Grievant argues that he was not allowed to travel to the facility at which he had been principal. The deputy superintendent had told grievant not to go to that facility while an investigation was ongoing. However, grievant's new supervisor (principal) told grievant he could travel to that facility providing he told her in advance when he wanted to come there. Now that grievant has been reinstated as principal, he should have the same authority to travel to other locations as he had prior to this demotion. The agency should grant to grievant the same authority for necessary travel as other principals (example: for teacher observations). Of course, should circumstances require the agency to limit travel for all principals in the state, such restriction would apply equally to grievant. The Deputy Superintendent has already committed to allowing grievant to travel as necessary in accordance with rules and regulations.²⁵

Harassment

Grievant complained that he was hindered in his work as an assistant principal because he did not have online access when initially assigned to the new location. However, the agency provided un rebutted testimony that one of the responsibilities of a principal or assistant principal is to make the necessary arrangements with Department of Corrections administrators to have online access provided. Grievant eventually did this and obtained online access in August 2005.²⁶ In any case, grievant had access to a teacher's computer which had online access; therefore, grievant had access to utilize online communications if it had been necessary. The agency also offered un rebutted testimony that grievant did not need online access in order to accomplish the duties outlined in the principal's April 11, 2005 memorandum.

Grievant complains that the agency's Director of Legal and Internal Affairs told him that he could still be disciplined even if he prevailed in the first grievance. The Director acknowledged that, as a friend, he did tell grievant that the agency could discipline grievant with a Group II Written Notice even if he was reinstated as principal. It is technically correct that, if grievant failed to perform assigned work or follow supervisory instructions, he could be disciplined. If the Director had said or implied to grievant that he *would* be disciplined if he prevailed in the grievance, that would have been impermissible and would have constituted a threat. However, the evidence does not support a conclusion that the Director made or implied such a statement. Nonetheless, under these circumstances, grievant could reasonably *construe* the Director's statement as intimidation. Grievant's reasonable interpretation of the statement as intimidation, when viewed in conjunction with other agency behavior, suggests that grievant was being harassed.

Grievant complained that the Deputy Superintendent told him that he had filed his September 2, 2005 grievance untimely because it was received after the

²⁵ Agency Exhibit 12. Second Resolution Step Response, October 27, 2005.

²⁶ Grievant Exhibit 25. E-mail from principal to several including grievant, August 29, 2005.

30-day period. Subsequently, EDR ruled that grievant's filing was timely because grievant had mailed his grievance within the 30-day period, even though the agency received it after the 30-day period.²⁷ Although prior rulings affirming this principle have been available on the EDR website for some time, the agency apparently did not research them before refusing to qualify the grievance for a hearing. While grievant infers that this was deliberate harassment, he has offered no testimony or evidence to support his speculation.

In order to accomplish some of the work assigned to him, grievant requested his new principal to provide him with certain policies. She told him that he could get them from central office but said he could not use her set of policies. The agency did not satisfactorily explain why grievant was stonewalled on his reasonable request for policies.

The agency head told grievant that he was violating the grievance procedure by harassing the agency in pursuing his grievance.²⁸ He further opined that if EDR qualified the grievance for hearing, he considered such a qualification to be abuse of state funds. These statements are troubling. At best they suggest that the agency does not have a complete understanding of the purpose of the state's grievance procedure. When viewed in conjunction with the actions and statements of other management employees referred to in preceding paragraphs, and the coerced "voluntary" demotion, a reasonable conclusion is that grievant has been subjected to harassment.

The agency avers that grievant has now been given a new supervisor who feels that grievant should start with a "clean slate."²⁹

Arbitrary and capricious observation report

Grievant argues that the August 3, 2005 observation report was arbitrary and capricious. However, the preponderance of evidence demonstrates that the observations were accurate. By his own admission, grievant had not completed the tasks assigned to him on April 11, 2005, all of which were to have been completed not later than July 1, 2005. Grievant complains that there was no "formal investigation" to prove his alleged poor performance. However, grievant has not proffered any policy or procedure that requires a "formal investigation" to demonstrate poor performance. The agency has shown, and grievant has admitted, that he has not completed the tasks assigned to him; this is *prima facie* evidence of poor performance.

Grievant also argues that the fact that he was not given a new EWP and a task list to complete "amounts to an arbitrary and capricious observation." Although the agency contends it gave grievant a revised EWP, grievant never

²⁷ Agency Exhibit 14. EDR *Qualification and Consolidation Ruling of Director*, Numbers 2006-1215 and 2006-1297, June 2, 2006.

²⁸ Agency Exhibit 13. Agency head's response to request for qualification, February 7, 2006.

²⁹ Agency Exhibit 13. First Step response to October 22nd grievance, November 2, 2005.

received it. Since the agency did not obtain grievant's signature on the document, it has failed to prove that grievant received the EWP. However, the agency's failure to give him this document is moot. Until grievant received a new EWP, he knew that his existing EWP was the operative document. Since the EWPs for both principals and assistant principals are almost identical, grievant knew what his day-to-day responsibilities were. As discussed previously, the task list was part of his daily responsibilities and could have been completed within the time limits established by his supervisor. In any case, grievant certainly could have had the tasks completed before August 3, 2005. Therefore, the observation report was not arbitrary and capricious.

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.³⁰ To prove a claim of retaliation, grievant must prove that: (i) he engaged in a protected activity; (ii) he 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 March 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 his grievance and his performance evaluation. Grievant asserts (in his September 2nd grievance) that the observation report of August 3, 2005 was retaliatory. However, grievant has not shown any connection between the two events. Moreover, the agency has shown by a preponderance of evidence, that grievant's substandard performance warranted the unsatisfactory observation report.

Discrimination

To sustain a claim of discrimination, grievant must show that: (i) he is a member of a protected group; (ii) he suffered an adverse job action; (iii) he was performing at a level that met his employer's legitimate expectations; and (iv) there was adequate evidence to create an inference that the adverse action was based on the employee's protected status.³¹ Grievant is a white male. He did not identify himself a member of any particular protected group or cite, for example, his age as a protected class. Although he suffered an adverse job action (performance evaluation), he has not shown that he was performing at a level to meet expectations and, in fact, has acknowledged that he has yet to complete tasks that were assigned nearly 15 months ago. Because grievant has not satisfied either the first or third prongs of this test, it is unnecessary to address the fourth prong. Grievant has not demonstrated that the agency's actions constituted discrimination, as that term is defined in case law.

³⁰ § 9, EDR *Grievance Procedure Manual*.

³¹ Cramer v. Intelidata Technologies Corp., 1998 U.S. App Lexis 32676, p6 (4th Cir.1998) (unpub).

Grievant had hip replacement surgery in December 2004 and walks with a limp; on this basis he asserts that he is handicapped and raises this as a basis for his claim of discrimination. Pursuant to the Americans with Disability Act (ADA), employers must make reasonable accommodations for "individuals with a disability." In order to qualify as an "individual with a disability," the physical impairment must substantially limit one or more of the individual's life activities. In this case, the applicable life activity is walking. Grievant's job as principal is primarily done in a sitting position with moderate amounts of limited walking. Grievant has not shown that his impairment substantially limits his ability to perform his job. Grievant's primary complaint with regard to his physical problem was an objection to having to negotiate stairs at the location he was assigned to from April to October 2005. However, grievant was reassigned to his original location and has not complained of any problems at that location. Should grievant have any concerns, he must first request accommodation from the agency. That accommodation must not impose an undue hardship on the agency. If grievant cannot perform the essential functions of his job, he may not be qualified for the job. Grievant has not requested any accommodation at his current location and has not shown that he cannot perform his job without accommodation.

Arbitrary and capricious annual performance evaluation

Grievant contends that his evaluation was unfair. The agency responded that would reevaluate grievant but conditioned such reevaluation upon the grievance being concluded. The *Performance Planning and Evaluation* policy directs that, "The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period."³² Neither this policy nor the Grievance Procedure states that the agency can hold the re-evaluation process in abeyance during the pendency of a grievance.

Unfair application or misapplication of state policies

1. Travel expense for visits to other locations to conduct teacher observations. Grievant complained that the new principal denied him permission to travel to other locations for the purpose of completing teacher observations, a requirement directed by the new principal. However, grievant also complained that he made such travel but was told he would not be reimbursed for mileage expense because the budget was tight. At the same time, the new principal found there was excess money in the budget which she proceeded to spend for new furniture for her office. If grievant did, in fact, travel on agency required business to other facilities, he should have been reimbursed for his mileage expense. Denial of such out-of-pocket expense while excess money is being spent for other purposes is a misapplication of policy.

³² Grievant Exhibit 16. DHRM Policy 1.40, *Performance Planning and Evaluation*, revised August 1, 2001.

However, grievant has failed to show that such travel occurred within 30 days prior to filing his October 22nd grievance. Moreover, grievant has provided no specific dates of travel, locations, mileage, etc., that could provide a basis for relief. If grievant had filed a travel voucher promptly after the travel, and such voucher was denied, grievant could have grieved it within 30 days of the event. As he has not done so, no relief can be granted once the time limitation has expired. Moreover, grievant neither cited this issue in his written grievance of October 22nd nor requested any relief for such travel expense.

2. Travel expense for excess travel incurred during grievant's assignment to a different base location. During the period from April 5 through October 3, 2005, grievant was traveling to a base point approximately 24 miles further from his residence than his previous base point. Since the issuance of the hearing decision reinstating grievant to his former position as principal, grievant seeks reimbursement for the additional mileage he was forced to drive to reach his new base point. The State Travel Regulations provide that mileage traveled routinely by the employee between his residence and base point incurred on a scheduled workday is considered commuting mileage.³³ Commuting mileage is considered a personal expense and is not reimbursable.

Grievant argues that, but for the demotion which has been held out of compliance with policy, he would never have had to travel to a new base point. In order to restore grievant to the status quo as it existed before the demotion, he believes he should be compensated for having to drive excess mileage for six months. At the time grievant filed his grievance in March 2005, the deputy superintendent assigned him to a location that did not involve additional commuting mileage. Grievant did not know that the new principal would subsequently reassign him to a second location further away from his residence. Thus grievant could not have included in his first grievance a request for the excess mileage. However, once grievant began to incur such expense in April 2005, he could have filed another grievance about the excess mileage. This hearing officer is unable to grant relief when grievant failed to file his grievance about this issue within 30 days of the event.

The grievance in which grievant did raise this issue was the third grievance filed on October 22, 2005. Thus, grievant was entitled to grieve the excess commuting expense from September 22 (date of grievance) through October 4, 2005 (last day of excess commuting). Whether the agency can now reimburse grievant for such excess commuting expense is a matter that is best resolved between the agency and the Department of Accounts (DOA). DOA administers the state travel regulations and is therefore the agency which can advise whether an exception can be made in this very unique situation.

3. Overriding grievant's evaluation of a subordinate. Grievant cited as unfair the deputy superintendent's decision to overrule his evaluation of a subordinate.

³³ State Travel Regulations Topic No. 20335, July 1, 2004. [This policy was revised January 17, 2006 but the section on Commuting Mileage remains the same.]

Grievant had rated the subordinate as a Contributor overall, however, the deputy superintendent amended portions of the evaluation and rated the subordinate as a "Strong Contributor."³⁴ State policy provides that a reviewer has the authority to change an employee's evaluation.³⁵ The policy provides that the reviewer should discuss the disagreements with the supervisor. Preferably, the reviewer and supervisor should discuss and resolve differences of opinion between themselves before the final evaluation is presented to an employee. This results in supervision/management presenting a unified front to the employee.

In this case, the reviewer changed the ratings on the supervisor's evaluation without having a revised evaluation prepared. Grievant asserts that the reviewer did not discuss her changes with him before presenting the amended evaluation to the employee. Policy states that reviewer *should* discuss disagreements with the supervisor; it does not say *must*. Therefore, technically, the reviewer did not violate policy. However, giving the employee an amended rather than revised evaluation allowed the employee to see how both her supervisor and the reviewer rated her. Unfortunately, this allows the employee to see the rift between supervisor and reviewer, and can ultimately result in the employee exploiting this division to their own advantage. The decision to handle the evaluation in this way effectively undercuts grievant's authority with his subordinate and amounts to an unfair application of policy.

4. Directing grievant to teach a GED class. Grievant is a test proctor for general equivalency diploma (GED) testing. The law prohibits test proctors from teaching GED and adult basic education classes because the students in those classes will later take the GED test. The new principal directed grievant to teach GED classes. Grievant reminded her that he was a test proctor and was not permitted to teach. The principal talked with the deputy superintendent who said that it was permissible for grievant to teach the class as a temporary measure. The new principal then told grievant to teach the GED classes. Neither grievant nor the agency proffered the relevant law or regulations as evidence in this case. Therefore, it is unclear whether this was a misapplication of policy.

Summary

Grievant's request for a new and fair EWP for the six months he was demoted has become moot; grievant is again operating under the principal's EWP he had prior to demotion. The agency has agreed to allow grievant to travel to outlying locations as necessary to fulfill his responsibilities. Grievant has not borne the burden of proof to show discrimination. Grievant has not demonstrated that either his observation report or his annual performance evaluation was arbitrary and capricious. The agency has shown, and grievant has admitted, that he did not satisfactorily complete specific assignments given to him on April 11, 2005. These were routine tasks which he had performed for

³⁴ Grievant Exhibit 1. Performance evaluation of grievant's subordinate, September 28, 2004.

³⁵ Grievant Exhibit 16. DHRM Policy 1.40, *Id.*

years and which he could have completed before the August 2005 observation report. The agency has not yet conducted the three-month reevaluation which should have been completed in December 2005; that should be done as soon as possible.

The evidence supports a conclusion that, notwithstanding grievant's substandard performance during the six months as assistant principal, some of the agency's actions constituted harassment. The improper actions began with the coerced "voluntary" demotion when the agency violated policy by telling grievant he could be demoted with a Group II Written Notice. Subsequently, an agency official made an intimidating statement to grievant, grievant's new principal made his job more difficult than necessary by refusing to grant his reasonable request for copies of policies, the agency refused to reimburse him for necessary travel expense, and the agency embarrassed grievant by overriding his evaluation of a subordinate in an inappropriate manner. The agency avers that it has corrected some of these problems by allowing grievant necessary travel and giving him the tools needed to perform his job.

However, the evidence in this case suggests that more is needed to assure that grievant is treated with respect and not harassed or retaliated against. Even though grievant's performance was demonstrably in need of improvement during his six months as an assistant principal, he must be given every opportunity to correct performance deficiencies without being treated inappropriately.

DECISION

Grievant's request for relief is GRANTED in part.

The agency is ORDERED to assure that grievant is not harassed or retaliated against. He is to be given all reasonable opportunity to demonstrate whether he can perform his duties to the standards expected of a principal.

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 14th St, 12th floor
Richmond, VA 23219

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.³⁶ 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.³⁷ 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]

David J. Latham, Esq.
Hearing Officer

³⁶ 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).

³⁷ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.