

Issues: Misapplication of policy, arbitrary/capricious performance evaluation, retaliation;
Hearing Date: 02/12/07; Decision Issued: 06/04/07; Agency: DCE; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8513; Outcome: Agency upheld in full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8513

Hearing Date: February 12, 2007
Decision Issued: June 4, 2007

PROCEDURAL HISTORY

On September 15, 2006, Grievant timely filed a grievance alleging an unfair application or misapplication of State and Agency personnel policies and procedures. He also alleged he received an arbitrary and capricious reevaluation and that the Agency retaliated against him. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On January 8, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 14, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Representative
Agency Representative
Witnesses

ISSUES

- Whether the Agency misapplied policy.

- Whether Grievant was given an arbitrary and capricious re-evaluation.
- Whether the Agency retaliated against Grievant.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. 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:

Grievant worked as a Regional Principal with the Department of Correctional Education beginning in 1984. The purpose of his position was to, “provide educational leadership, supervision and guidance to facilitate cost effective quality educational programs in compliance with the standards of the Department of Correctional Education’s policies and procedures.”¹

The Deputy Superintendent was Grievant’s supervisor in 2004. Grievant stopped working in December 2004 and took medical leave. He returned on March 11, 2005. When he returned to work, he began working as a Regional Assistant Principal, a demotion. Although his title changed in March 2005, his duties did not change. In April 2005, Grievant began reporting to Ms. C. Grievant continued to report to Ms. C until September 2005.

On September 9, 2005, Grievant received a Notice of Improvement Needed/Substandard Performance. Ms. C issued the Notice. The Deputy Superintendent was the reviewer for the Notice. This document read in part:

Description of specific performance deficiencies and improvements needed:

- MOA’s² for [Facilities N, NWC, P, C, R, H, D] had not been completed as per memo of 4/11/05.
- Policies and Procedures Manual for [Facilities N, NWC, PH, C, R, H, D] had not been completed for memo of 4/11/05.

¹ Agency Exhibit 1.

² Many of the Agency’s employees work inside correctional institutions operated and controlled by another agency, the Department of Corrections. In order to finalize the DCE’s working relationship with DOC at particular facilities, the parties enter into a Memorandum of Agreement for each facility. MOAs are usually for a two year period.

- School inventories have not been completed for [Facilities N, NWC, P, C, R, H, D] as per memo of 4/11/05.
- Student records, screening in compliance/recruitment/enrollment in classes/orientation/documentation have not been completed.

Improvement plan:

- All improvements on the above have been requested in writing, in person, at meetings in an effort to see improvement in performance.

The April 11, 2005 memorandum referred to in the September 9, 2005 Notice of Improvement Needed/Substandard Performance was from Ms. C to Grievant. It stated, in relevant part:

Job Duties for [Grievant] at [Facility D]

The following [is a] list of some of the duties that are to be completed by the deadlines listed below. All completions/observations/agreements must be [in writing and] reviewed by [Ms. C] **before distribution to anyone.**

INVENTORIES

- Update all inventories – [Facility N] and Field Units
- - *FAACS
 - *Audio/Visual and Videos
 - *CD's and Computer Disks
 - *Computers/Printers
 - *Tools
 - *Library Books
 - *Classroom and Shop – Equipment/Supplies
 - *Administration Office
 - *Library
 - *Consumable Supplies

[Deadline May 15, 2005]

TEACHER OBSERVATIONS

- Observe all teachers in [Facility N] and Field Units
 - *Compliance with Teacher Observation Standards
 - *Three observations on each teacher written and signed
 - *Complete all three observations NLT [May 1, 2005]

MEMORANDUM OF AGREEMENT

- Update for each Field Unit
- [Facility N]
- Deadline [May 6, 2005]

POLICIES AND PROCEDURES MANUALS

- Update manuals for each Field Unit
- Manuals must be in compliance with DCE policy
- Manuals must be signed by Warden/Superintendent
- Deadline [May 6, 2005]³

On September 22, 2005, Grievant received an annual performance evaluation with an overall rating of “below contributor”.

On September 29, 2005, the Deputy Superintendent sent Grievant a letter stating, in part:

For the reasons stated in [the hearing officer’s] summary, effective Monday, October 2, 2005, at 7:30 a.m. You will be re-instated to your former position of regional principal for the [Region] assuming all duties and responsibilities identified by the agency employee work profile. Effective October 2, 2005, you will be responsible for submitting all agency documentation within the already established timelines and guidelines.

During your demotion period, only the cover page of your EWP was altered to reflect your new job title and the effective date. There was no change to the actual core responsibilities and assessment standards, consequently, the new performance period cover page will reflect the change back to regional principal. The date that will be on this page is the actual date for the new state performance period.⁴

On September 30, 2005, the Deputy Superintendent sent Grievant an email stating:

Per our meeting on 9-29-05 regarding your reinstatement to the [regional principal], which will be effective Monday, October 2, 2005 you were informed that all principal duties, functions and responsibilities are being

³ Grievant Exhibit E.

⁴ Agency Exhibit 6.

re-instated. They are your duties and responsibilities. The support staff will not be used to perform administrative duties.

Although Grievant was reinstated to his former position of Regional Principal, his job duties did not change. The wording of Grievant's Employee Work Profile did not change materially from 2004 to the time he was reinstated as Regional Principal.

At some point in September 2005, Mr. Co became Grievant's supervisor. Mr. Co reported to the Deputy Superintendent. Mr. Co was Grievant's supervisor in October, November, and December 2005.

In Hearing Decision 8376 & 8377 issued July 26, 2006, a Hearing Officer wrote, 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."⁵

On August 1, 2006, the Agency's Employee Benefits Manager sought the advice of a policy expert, Ms. OM, at the Department of Human Resource Management. The Employee Benefits Manager sent Ms. OM an email stating,

In accordance with the decision made by a hearing officer on July 26, 2006, the agency must do a re-evaluation on an employee who received an overall rating of "below contributor" on a September 2005 annual evaluation. A few weeks before the employee received the below contributor rating on his evaluation, the employee was given a needs improvement form which outlined what he needed to do to improve in those areas. The employee received a new supervisor in December 2005 and the re-evaluation was never given to the employee.

My question is this – can the employee be simply re-evaluated at this time or do we have to give him a corrective action plan with a later date for the re-evaluation? The manager feels as if the employee has had ample time to meet expectations in the areas that were below contributor in September but she doesn't want to do anything that may be construed as retaliation. Also this employee now has a new supervisor and the new supervisor has been counseling this employee in the same areas.

On August 1, 2006 at 2:35 PM, Ms. OM responded, in part, "Is there yet another new supervisor since the new one in December?"

On August 1, 2006 at 2:50 PM, the Employee Benefits Manager responded, in part, "no. The employee received a new supervisor in December only. Which leads me to another question that we have –should the former supervisor do the re-evaluation for the 2004 through 2005 cycle? Or should we let the new supervisor complete the re-evaluation?"

⁵ Grievant Exhibit D.

On August 2, 2006 at 3:07 PM, Ms. OM replied in part, "If the issue is the lack of the three-month re-evaluation, I'd say the supervisor who is there for most of that time should do it, or both old and new is the time was split. *** By failing to re-evaluate at that time, the agency has pretty much lost its right to terminate the employee based on problems identified in the 2005 evaluation any way. He still there.

On August 14, 2006, the Deputy Superintendent wrote Grievant a letter stating, in part:

For the reasons stated in [the hearing officer's] summary, I am required to immediately conduct the three-month re-evaluation which should have been completed in December 2005. Therefore, I will meet with you on Thursday, August 17, 2006 at 9:00 a.m. to address all items identified on your needs improvement letter and the EWP for the 2005 year end period. Please have all official documentation available at the scheduled time.⁶

On August 17, 2006, the Deputy Superintendent completed a performance evaluation covering the three month period ending December 31, 2005. She gave Grievant an overall rating of "below contributor". She evaluated Grievant in three core responsibilities. She did not rate Grievant with respect to the remaining core responsibilities because those core responsibilities were satisfactory to the Agency as part of Grievant's 2005 annual evaluation.

With respect to the core responsibility of "the administration, accuracy and timelines of reports", Grievant's work performance was evaluated as "below contributor". In the comment box, the Deputy Superintendent typed⁷, "[Grievant] has failed to meet deadlines for the following core responsibilities: establishing local policies and procedures; and school inventories/FAACS inventories." She wrote in hand, "provide⁸ me with 2006 information for inventories & [FAACS]. Do not have the copies for my review. They are at the work center. Started developing the policy for [facility NWC] and [Facility D]. Not complete."

With respect to the core responsibility of "student services", Grievant's work performance was evaluated as "below contributor". In the comment box, the Deputy Superintendent typed, "directives have not been followed for reopening the school that [Facility D]. Core responsibilities for student orientation, student assignments, student recruitment, inmate aides, class scheduling and other items have not been completed

⁶ Agency Exhibit 5.

⁷ The typed information first appeared in Grievant's 2005 annual evaluation.

⁸ The Deputy Superintendent intended to write the word "provided". She intended to indicate that Grievant had provided her with information for 2006 instead of the information for 2005 that she had requested.

as requested.” She wrote in hand, “approval given 8/05 to fill the [Facility D] position. As of 8/17/06 the position is not filled.”

With respect to the core responsibility of “interagency coordination”, Grievant’s work performance was evaluated as “below contributor”. In the comment box, the Deputy Superintendent typed, “memorandums of agreement for field units not completed as per the memo of 4/11/05 consequently, affecting the ability to develop the local school policies and procedures Manual.” She wrote in hand, “documents not completed within the three months time period for reevaluation of 12/05”.⁹

On September 19, 2006, Ms. OM, sent the Employee Benefits Manager that an email stating,

- Be sure that whoever conducts any evaluation he either has firsthand knowledge of the employee’s performance or obtains information from a supervisor or manager who does have such knowledge.
- Be sure the employee has been told clearly the performance objectives he needs to meet and has been given any necessary resources (computer, training, etc.) to meet them.
- Be sure the supervisor has provided ongoing feedback to keep performance on track and to avoid surprises. This is true for the re-evaluation and the annual evaluation. I guess it’s too late now to make this happen, but I sure hope that has been happening.

CONCLUSIONS OF POLICY

Grievant contends the Agency failed to comply with policy when it re-evaluated Grievant. DHRM policy 1.40 governs performance planning and evaluation. Grievant has not identified any policy provision that the Agency violated. Prior to conducting the re-evaluation, the Agency contacted a policy expert at the Department of Human Resource Management and obtained guidance regarding how to complete the re-evaluation. The Agency substantially complied with the instructions it received from DHRM. The Agency did not act contrary to any identified policy.

The Deputy Superintendent was an appropriate person to conduct the re-evaluation.¹⁰ The Deputy Superintendent was Grievant’s supervisor at the beginning of his annual performance period beginning November 2004. She remained his supervisor until March 2005 when Ms. C took over. Ms. C reported to the Deputy Superintendent. The Deputy Superintendent was involved in and reviewed the Notice of Improvement Needed/Substandard Performance issued to Grievant by Ms. C.

⁹ Agency Exhibit 4.

¹⁰ The Deputy Superintendent was not the only one who could have conducted the re-evaluation. Ms. C could also have conducted the re-evaluation.

Grievant's re-evaluation was not based on a daily observation by a supervisor of an employee. It was based on deliverables. In other words, Grievant was expected to produce certain documents and evidence of tasks being completed to the person conducting the evaluation. Since the Deputy Superintendent was involved in the establishment of the improvement plan described in the Notice of Improvement Needed/Substandard Performance, it was appropriate for her to be the person conducting Grievant's re-evaluation.¹¹

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. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the Agency to re-evaluate the employee. GPM § 5.9(a)(5). 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 benchmark for re-evaluating Grievant is the September 9, 2005 Notice of Improvement Needed/Substandard Performance.¹²

The Notice of Improvement Needed/Substandard Performance required Grievant to complete the MOA's for Facilities N, NWC, P, C, R, H, D. As of August 2006, Grievant had not completed the MOAs for the Facilities N, P, NWC, and C.

The Notice of Improvement Needed/Substandard Performance required Grievant to complete policy and procedures manuals for several facilities. On August 17, 2006, Grievant did not present the Deputy Superintendent with all of the completed policies and procedures manuals as was required. Grievant had begun work on the policies for Facility NWC and D, but he had not completed these policies as of August 2006.

The Notice of Improvement Needed/Substandard Performance required Grievant to complete certain school inventories. As of August 2006, Grievant had partially completed inventories but not completed all of them for the re-evaluation time period.¹³

¹¹ In Ms. OM's August 2, 2006, she appears to say that Grievant's immediate supervisor should conduct the re-evaluation. That person would have been Mr. Co. In Ms. OM's email of September 19, 2006, she clarifies that she believes the best person to conduct the re-evaluation would be someone with "firsthand knowledge of the employee's performance." In this case, the Deputy Superintendent would be the one with first hand knowledge of Grievant's work performance. She was a knowledgeable person regarding what Grievant should have been doing during the re-evaluation period to meet the performance expectations established by the Notice of Improvement Needed/Substandard Performance.

¹² Although the Agency did not develop a re-evaluation plan as required by DHRM policy 1.40, the Agency could not do in 2006 what it did not do in 2005. In order to comply with the hearing officer's order the Agency used the contents of the September 9, 2005 Notice of Improvement Needed/Substandard Performance. The Agency's action was reasonable.

¹³ Grievant submitted some inventories for 2006 and 2007, but 2006 and 2007 were not the time period of the re-evaluation.

Grievant was supposed to present the completed inventories to the Deputy Superintendent but failed to do so. Grievant indicated some of the inventories were at another location, but he never provided those inventories to the Deputy Superintendent at a later time.

Although there may have been some inaccuracies in the Agency's judgment regarding Grievant's re-evaluation, those inaccuracies were not sufficiently severe as to make the Agency's re-evaluation of Grievant's work performance arbitrary or capricious. There are sufficient facts upon which the Agency relied to form its opinion regarding Grievant's work performance from October through December 2005.

Grievant argues he was not aware of his obligation to hire a new part time teacher and that none were available. He contends there was sufficient confusion regarding the transition of duties from Ms. C to him when he was reinstated to Regional Principal that his failure to fill the position was understandable. The evidence showed, however, that Grievant had been asked to fill a part time teacher position for many months and he had not done so as of August 2006. The Agency's judgment that he failed to comply with that task is supported by the evidence.

Grievant argues that once he was reinstated to Regional Principal his clerical staff was informed by Ms. C that they were not to provide him with administrative assistance. Based on the evidence presented, it appears that Ms. C intended to instruct clerical staff working with Grievant to refrain from doing work Grievant was expected to perform as part of his job duties. They interpreted Ms. C's instruction, however, to mean they could not help Grievant. It is not clear that Grievant's clerical staff actually complied with the instruction as they understood it and refused to provide Grievant with any clerical assistance. The evidence is insufficient for the hearing officer to conclude that Grievant's work performance was materially and adversely affected by the absence of needed clerical support.

Grievant argues that he did not have computer access during the re-evaluation period and this caused his performance to suffer. The evidence showed that Grievant had computer access during the re-evaluation period.

Grievant argues the evaluation was inappropriate because the Agency only evaluated three of his several core responsibilities. With respect to Grievant's 2005 annual evaluation, Grievant was not rated for the core responsibility of "Performance Management" and "Program Management". He received a "contributor" rating for the core responsibility of "Safety and Security." The Agency argues that it was not necessary to re-evaluate core responsibilities other than the three evaluated because the other responsibilities were not of concern. If the Hearing Officer assumes for the sake of argument, that the core responsibilities that the Agency failed to evaluate were at a contributor level, there remains sufficient evidence to support the Agency's conclusion that Grievant's work performance in the re-evaluation period was "below contributor."

An Agency may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual 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 (e.g. 'whistleblowing')." To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹⁴ (2) suffered a materially adverse action; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the Agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence raises a sufficient question as to whether the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.

Grievant has engaged in protected activities such as filing a grievance that ultimately lead to his reinstatement as a Regional Principal. He suffered a materially adverse action because he received a "below contributor" rating of his 2005 re-evaluation. Grievant has not established any link between his protected activities and the materially adverse action. The Agency gave Grievant a "below contributor" evaluation because it believed his work performance was inadequate. The Agency did not give Grievant a poor performance evaluation in order to retaliate or harass him.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management

¹⁴ See Va. Code § 2.2-3004(A)(v). Only the following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.