

Issues: Arbitrary & Capricious Performance Evaluation and Retaliation; Hearing Date: 05/30/07; Decision Issued: 05/31/07; Agency: DCE; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 8593; Outcome: No relief – Agency upheld in full; **Administrative Review**: HO Reconsideration Request received 06/12/07; Outcome pending; **Administrative Review**: DHRM Admin Review Request received 06/12/07; Outcome pending.

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8593

Hearing Date: May 30, 2007
Decision Issued: May 31, 2007

PROCEDURAL HISTORY

The Grievant is employed by the Agency as a Regional Principal, and he has been employed by the state for approximately 30 years. On October 17, 2006, the Grievant received his 2006 performance evaluation, which rated his overall performance as “Contributor.” However, the Grievant received a “Below Contributor” rating for the category of “Administration, Accuracy and Timelines of Reports.” The Grievant appealed the evaluation, and finding the Third Step response to his appeal unsatisfactory, on March 16, 2007, the Grievant initiated a grievance challenging the evaluation as retaliatory, arbitrary and capricious, and a misapplication and/or unfair application of policy. The Grievant seeks reversal of the performance evaluation as it relates to the “Below Contributor” rating in Administration.

On April 26, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer.¹ Through a pre-hearing conference, the hearing was scheduled and held on May 30, 2007.

APPEARANCES

Grievant
Advocate for Grievant²
Four witnesses for Grievant (including Grievant)
Advocate for Agency
Representative for Agency
Two witnesses for Agency (including Representative and one of Grievant’s witnesses)

¹ This matter was previously assigned to another hearing officer, but the first hearing officer assignment was interrupted, with the hearing delayed, because of the hearing officer’s unavailability to complete the assignment.

² The Grievant’s advocate did not appear in person but participated through telephone speaker, by agreement of the parties.

ISSUES

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

BURDEN OF PROOF

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. 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.

FINDINGS OF FACT

The Grievant's evidence included exhibits from 1 to 17. All were introduced into the grievance record. Grievant's exhibits 4, 7, 8, 10, 11 and 15 were admitted over the Agency's objections. The Agency's evidence included exhibits from 1 to 13, and all were introduced into the grievance record, without objection. The Grievant requested six witness orders from the hearing officer, which were issued. Of the six, three did not appear for the hearing.

The Grievant challenged the merit of the "Below Contributor" rating on the Administration element of the performance evaluation. The Grievant testified that his deficiencies in handling his department's budget and in reporting were the result of his predecessor's actions in appropriating money and not keeping the proper records for it. The Grievant was previously demoted by the Agency and, through another, earlier grievance, the demotion was reversed with the Grievant being reinstated in October 2005. The Grievant challenged the merit of any other issues as it related to fiscal management and providing reports, the elements identified through the evidence as the bases for the "Below Contributor" rating in Administration.

The Grievant conceded that his evaluation with overall assessment of "Contributor" did not cause him any direct adverse employment action. With the overall assessment of "Contributor," the Grievant received a raise in salary.

Through the testimony of the Assistant Superintendent, the Grievant's direct supervisor, the Agency presented evidence of the Grievant's "Below Contributor" rating in Administration on his October 2006 performance evaluation. The Assistant Superintendent testified that throughout the evaluation period, he observed inadequacies in the Grievant's command of his budget, and that at the end of the fiscal year, the budget was overspent by \$2,000. The Assistant Superintendent also testified that there was a continuing problem or delay by the Grievant in completing reports, particularly the various, multiple Memorandums of Understanding the

Agency required with cooperating agencies. The Assistant Superintendent testified credibly, and the Agency's evidence and testimony supports documented deficiencies in the Grievant's job performance leading to the "Below Contributor" rating for Administration. The Assistant Superintendent gave the Grievant an overall assessment of "Contributor," and made positive comments about progress in various areas.

Additionally, two witnesses for the Grievant, both program support technicians (PST), testified credibly that when the Grievant was reinstated to his position, they were directed not to provide to or assist the Grievant with administrative duties. Both testified that, through implication or innuendo, they were given the message that the Grievant's reinstatement would be only temporary. The PSTs did not implicate the Assistant Superintendent as a participant in this directive.

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.³

³ § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

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.” “Retaliation” 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’).”⁴ The Agency’s witnesses, including the Grievant’s supervisor, credibly establish instances of conduct by the Grievant, prior to the October 2006 performance evaluation, that justify the “Below Contributor” rating in the one category of Administration.

The deficiencies and instances described by the Agency in its evaluation and at the grievance hearing were not entirely rebutted by the Grievant’s evidence. While the Grievant contended he was not provided the necessary information on the budget and the expenditures that pre-dated his reinstatement, the Grievant did not detail sufficient effort on his part to obtain the financial records and reconcile his department’s budget. The Grievant also testified that he did not have the administrative support he needed from his PSTs.

In *Norman v. Dept. of Game and Inland Fisheries* (Fifth Judicial Circuit of Virginia, July 28, 1999) (Delk, J.), the court indicated that an arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence, and that if an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to sustain an arbitrary or capricious performance evaluation claim as long as there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations.

With this stated, the hearing officer is mindful of and troubled by the testimony of the two PSTs who testified they were directed not to provide administrative support to the Grievant, creating a “quandary” regarding their job responsibilities. The PSTs testified credibly to this situation, and the Agency’s witnesses did not address this evidence. While this could be viewed as a retaliatory action by the Agency, the required nexus between this situation and the evaluation complained of is not proved by the evidence.

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. 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 previous grievances; this is a protected activity. Grievant received an overall performance evaluation of “Contributor,” with one element of the evaluation rated as “Below Contributor.” However, there was no adverse employment action. Accordingly, the Grievant has not satisfied the elements to show retaliation. However, assuming the first two elements are satisfied, in order to establish

⁴ § 9, EDR *Grievance Procedure Manual*, effective August 30, 2004.

retaliation, the Grievant must show a nexus between the protected activity and his performance evaluation. While the Grievant asserts that the performance evaluation was retaliatory, he has not shown any connection between the two events. Moreover, the agency has articulated bases of the Grievant's specific conduct that support the "Below Contributor" rating on the element of Administration.

Here, the Agency presented nonretaliatory reasons for the "Below Contributor" rating on the single element of Administration in the performance evaluation. The Grievant's supervisor, the Assistant Superintendent, credibly established instances of conduct by the Grievant, prior to the October 2006 performance evaluation, that justify the "Below Contributor" rating in Administration for the October 2006 evaluation. The Assistant Superintendent did not start his supervision of the Grievant until after the Grievant was reinstated to his position in October 2005. There is no indication that the Assistant Superintendent was involved in the improper direction to the PSTs not to assist the Grievant in the performance of his duties. The Grievant has good reason to complain of the Agency's conduct in directing the PSTs, however the issues of the performance evaluation fall squarely within the conduct and intentions of the Assistant Superintendent. The hearing officer found the testimony of the Assistant Superintendent to be credible, and not tainted by any improper motivation. The Assistant Superintendent has multiple occasions to observe and interact personally with the Grievant, and performance evaluations necessarily involve a measure of subjective, discretionary opinion.

Grievant also asserted in his grievance that the Agency failed to comply with or misapplied policy, but the specifics of any such breach were not advanced at the grievance hearing. Thus, the hearing officer is without any evidence of a specific policy at issue. If the misapplication of policy is deemed to be the allegedly arbitrary and capricious performance evaluation, that issue is discussed and resolved above.

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 negates the actual instances presented of unsatisfactory job performance. The party asserting the complaint has a burden to show convincing information beyond equipoise. When there are conflicting, credible accounts regarding a situation or issue, a charging party needs to show a reliable basis on which to conclude one way or the other. Because the evaluation at issues is "fairly debatable," the Grievant has not shown the necessary proof to find it reversible. *See Norman*, cited above.

Under the EDR's Rules for Conducting Grievance Hearings, the Hearing Officer is not a "super-personnel officer." Therefore, the Hearing Officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. In this case, the Agency's actions are consistent with law and policy.

Because there is credible evidence to support the “Below Contributor” rating of that one element of the performance evaluation at issue, I find the Grievant has not borne his burden of proof that his October 17, 2006, evaluation that provided an overall rating of “Contributor” was either retaliatory, arbitrary and capricious, or a misapplication of policy.

DECISION

For the reasons stated herein, the annual performance evaluation issued on October 17, 2006, is upheld and the relief sought by the Grievant is denied.

Further, I recommend the Agency investigate the improper direction given to the PSTs regarding the performance of their duties relative to the Grievant, and consider corrective action to stem any such improper activity and interference in the Grievant’s job duties.

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