

Issues: Below Contributor Re-Evaluation and Termination due to poor performance;
Hearing Date: 08/21/07; Decision Issued: 10/25/07; Agency: DSS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 8670; Outcome: No Relief, Agency Upheld in Full.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8670

Hearing Date: August 21, 2007
Decision Issued: October 25, 2007

PROCEDURAL HISTORY

Grievant was removed from employment based on a performance re-evaluation dated March 29, 2007. On April 25, 2007, 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 she requested a hearing. On July 31, 2007, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 21, 2007, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

Whether Grievant's removal from employment was appropriate under State policy.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its removal of Grievant 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 Virginia Department of Social Services employed Grievant as a Program Administrative Specialist II until her removal effective March 29, 2007. She began working in the position in March 2006. The purpose of her position was:

To plan, develop, implement, manage and evaluate assigned projects and initiatives in support of the mission of the child support enforcement program. Serves as the primary contact for all technical and business issues and questions related to the project activity.¹

The Agency maintains several important computer systems. One of these systems is the Automated Program to Enforce Child Support (APECS) system. Another system is the Child Support Lien Network (CSLN) system. Grievant was responsible for making accurate entries into these systems.

On October 12, 2006, Grievant was issued an annual performance evaluation for 2006 giving her an overall rating earned of Below Contributor. Grievant was away from work while on Short Term Disability from October 4, 2006 through December 20, 2006.² She signed the evaluation on January 8, 2007.

October 12, 2006, Grievant's Supervisor³ drafted a Notice of Improvement Needed/Substandard Performance as follows:

This form documents that you must make immediate improvement in the performance of your duties. Continued poor performance as described

¹ Agency Exhibit 3. Grievant's Employee Work Profile effective October 26, 2006.

² Grievant Exhibit 2.

³ Ms. CW was Grievant's Supervisor at the time.

below may result in an overall "Below Contributor" rating on the annual performance evaluation conducted in this performance cycle.

Description of specific performance deficiencies and improvements needed:

The primary purpose of this position is to develop and conduct special projects to improve collections from the financial institution data match process. [Grievant] has not progressed significantly in her knowledge of the child-support program in general and the seizing of financial institution accounts in particular. She has also not gained the experience and APECS to allow her to effectively manage the FIDM⁴ process. Since beginning in a position in 3/06 she has not acquire the knowledge, expertise or experience to allow her to initiate special projects to assist child-support offices in this area.

[Grievant] is responsible for keeping contracts with financial institutions current. There are approximately 70 contracts that needed to be renewed. She has completed some work related to renewing contracts for financial institutions. This is time sensitive work with deadlines due to contract expirations that she is not able to meet. Work she is not able to complete must be assigned to other staff that already have full-time expectations. Staff who work with [Grievant] and are assigned to assist her in training report a lack of attention to detail – [a] skill critical to contracting and the FIDM process. [Grievant's] lack of progress is creating a burden on other unit staff.

[Grievant] also needs improvement and organizational skills. Stacks of files and contracts for financial institutions remain scattered on her desk from her last workday. Staff has been assigned to remove and file these important documents.

Improvement plan:

Schedule and complete DCSE training in FIDM

Increase skills in APECS

In coordination with supervisor, schedule time in district office to learn about FIDM process

Complete planned outreach to financial institutions not participating by ~~11/30/06~~ 3/28/07

Assume full responsibility for contracts/agreements with financial institutions who do not request payment for the match process⁵

⁴ Financial Institution Data Match.

⁵ Agency Exhibit 2.

The Agency drafted a Performance Plan effective October 26, 2006 listing four core responsibilities as follows:

Core Responsibilities	Measures for Core Responsibilities
B. Manages small projects and initiatives to improve the performance of the child-support enforcement program.	Demonstrates comprehensive knowledge of the child-support program in the assigned project area; plans, develops and delivers program initiatives, activities and services. Studies and researches subject matter. Provides technical programmatic assistance, guidance and support. Serves as technical expert in specialty areas. Accurately interprets and properly applies law and regulations. Make strategic, policy and procedural recommendations to management. Resolves and alerts management issues that may arise.
C. Develops and maintains effective working relationships required for project or initiative.	Develops and maintains productive internal and external relationships necessary to the success of assigned initiatives. Coordinates activities with other units within the agency. Serves as point of contact for other agencies and departments. Keeps management informed of project activities.
D. Prepares reports and presentations.	Prepares reports on program performance, needs, service information, demographic data, project status and final reports. Dress and delivers presentations. Written documents and presentations are clear and well organized.
E. Manages contracts and agreements with and in state financial institutions to support the financial institution data match process.	Serves as liaison/contact for in state financial institutions. Maintains files of contracts. Executes new agreements as required by due dates. ⁶

On December 28, 2006, Grievant wrote a memorandum to the Deputy Commissioner stating:

I received my Performance Evaluation and Notice of Improvement Needed/Substandard Performance form on December 21, 2006. I have reviewed the document and I have addressed my concerns in the

⁶ Agency Exhibit 3.

attached document I would like to appeal the evaluation and I have been advised of the need to notify you of my wishes in writing.

I greatly appreciate your consideration of my request. Please let me know when we may meet to discuss this important matter.⁷

On January 5, 2007, Grievant wrote a memorandum to the Deputy Commissioner stating:

I greatly appreciate the information you provided during our meeting on January 5, 2007. I have taken the information to heart and I have made a personal commitment to "turn a corner" and resolve the deficiencies identified in the evaluation. I want to assure you that there will be a positive change in my performance. I will work closely with my supervisor and [Business Analyst] to ensure that I am living up to standards of program integrity that are expected in DCSE. I am determined not to fail myself, the Division, you or the children we are charged to serve.

Thank you for the opportunity to work with DCSE and for letting me know what your expectations are of me from both an individual and a team perspective. I will not let you down.⁸

As part of its re-evaluation process of Grievant, the Agency relied upon the findings of the Business Analyst. The Business Analyst had been employed by the Agency for approximately 19 years. She provided training to Grievant when Grievant began working in the Unit in March 2006. The Business Analyst explained to Grievant the importance of accurately entering information into the Agency's computer systems. She told Grievant that Grievant's error rate should not exceed 5%. The Business Analyst met with Grievant after her annual 2006 evaluation and prior to the beginning of the 90 day work plan re-evaluation. The Business Analyst reminded Grievant of her obligation to ensure that her error rate did not exceed 5%.

During the re-evaluation period, the Business Analyst would email claims to Grievant. Grievant was expected to timely contact the insurance company to determine if the claim is going to be closed. If the claim was not to be closed, Grievant was expected to ensure that the Agency's liens were in place to collect money to ensure payment of child support. Grievant was expected to accurately update the APECS and CSLN systems to enable Agency staff and social workers working in localities to know the status of child support enforcement cases.

⁷ Agency Exhibit 2. Grievant's appeal of her 2006 annual evaluation did not interrupt the Agency's re-evaluation process.

⁸ Agency Exhibit 2.

At the end of the re-evaluation period, the Business Analyst reviewed the claims she had assigned to Grievant. The Business Analysts concluded that 72 claims had been assigned to Grievant. Of the 72 claims, Grievant accurately completed 54. Grievant inaccurately completed 18 claims. Grievant's error rate was approximately 25% which exceeded the Agency's tolerance rate of 5%. In general, Grievant made three types of errors. First, Grievant wrote in the APECS system that she had updated the claim in the CSLN system when, in fact, the claim had not been updated in the CSLN system. Second, Grievant failed to update the APECS system when the CSLN system had been updated with a closure code. Third, Grievant failed to identify cases that did not require any action to be taken.

On March 29, 2007, Grievant received an Employee Performance Re-Evaluation giving her an overall rating earned of Below Contributor. In particular, with respect to the core responsibility of "Manages small projects and initiatives to improve the performance of the child-support enforcement program", Grievant received a rating of Below Contributor.⁹ In the comments section, Grievant's Supervisor¹⁰ wrote:

[Grievant] has completed an initial in-service training and has spent some time becoming familiar with the DCSE program manual. However, she began work in this position in 3/06 and should, at this time, have acquired much more depth and experience in the child-support program in the FIDM process. She has not been able to get to the point of being able to develop and/or initiate any special projects. The special projects envisioned for this position are critical to improving collections in the child-support program.¹¹

With respect to the core responsibility of, "Develops and maintains effective working relationships required for project or initiative", Grievant received a rating of Below Contributor.¹² In the comments section, Grievant's Supervisor wrote:

[Grievant] has established internal relationships, particularly in the APECS. More work is needed with establishing contacts with financial institutions in district office staff.¹³

⁹ According to her Employee Work Profile, Grievant was supposed to spend approximately 50% of her work time to this core responsibility.

¹⁰ Grievant's Supervisor at this time was Mr. JM.

¹¹ This language also appeared in Grievant's 2006 annual evaluation. The Hearing Officer gives little weight to this language as it appears in the re-evaluation. It is not clear the Agency has fully considered this item on re-evaluation.

¹² Under her Employee Work Profile, Grievant was to devote 20% of her time to this core responsibility.

¹³ This language also appears in Grievant's 2006 annual evaluation. The Hearing Officer gives little weight to this language as it appears in Grievant's re-evaluation. It is not clear the Agency has fully considered this item on re-evaluation.

With respect to the core responsibility of, "Manages contracts and agreements with in-state financial institutions to support the financial institution data match process", Grievant received a rating of Below Contributor.¹⁴ In the comments section, Grievant's Supervisor wrote:

To assist her in the area of increasing a skill set in APECS in transition into the FIDM processes, [Grievant] has been assigned to the task to contact insurers regarding the status of claims from the CSLN system and update the APECS system with the information. She has attached the "Seize It" training which is an in-depth training module for the CSLN and FIDM policy and procedures.

Working in the APECS production system requires attention to detail and [Grievant] has experienced some difficulty in this area during the review period. She has inadequately documented the APECS system to indicate that the CSLN system was updated to indicate a closure. Upon review of the CSLN systems a closure action had not been completed; yet the APECS system had been updated and set action was completed. On the converse, [Grievant] has updated the CSLN system with a closure code and failed to document the information in the APECS system. She has failed to identify cases that do not require an action be taken. Cases that have no obligation or cases that the absent parent is also a custodial parent do not require an action in the CSLN or FIDM processes. [Grievant] has also worked-listed caseworkers to take an action, when in fact, none can be taken. This inattention to detail as required caseworkers to spend valuable time reviewing cases which require no additional actions.

After considering whether to demote or re-assign Grievant to another position, the Agency decided to remove Grievant from employment based on the re-evaluation.

CONCLUSIONS OF POLICY

DHRM Policy Number 1.40, Performance Planning and Evaluation, sets forth the Commonwealth's policy governing employees' performance plans and the procedures for evaluating employees' performance. An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed. The performance re-evaluation plan sets forth the performance measures for the following three months. It must be approved by the reviewer.

The Agency drafted a performance plan dated October 26, 2006 outlining Grievant's performance expectations. The Agency did not clearly indicate on the

¹⁴ Under her Employee Work Profile, Grievant was to devote 15% of her time to this core responsibility.

document that the performance plan was for the re-evaluation. The Agency did not obtain all of the signatures expected under policy. The Agency's failure to do so, however, was harmless error. These errors were harmless for two reasons. First, the performance re-evaluation plan restated the core responsibilities written in Grievant's performance plan for her 2006 annual evaluation. Grievant was aware of her core responsibilities described in her 2006 Employee Work Profile. Second, the Agency made it clear to Grievant that she was expected to comply with a performance re-evaluation plan during the reevaluation period. The Hearing Officer finds that Grievant had adequate notice of her work responsibilities for the re-evaluation timeframe.

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." 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.

Grievant was expected to have an error rate that did not exceed 5%. Instead, her error rate was 25% during the re-evaluation timeframe. Grievant's computer system entry errors created several problems for the Agency. First, the errors undermined the reliability of the APECS system. Second, errors could create additional work for social workers working in different localities. Some errors placed social workers in the position of having to verify information that was unnecessary to verify. Third, the Agency was charged \$44 for every unclosed case in the CSLN system. And fourth, errors could cause delays to families expecting to receive child-support money. By maintaining a 25% error rate Grievant failed to meet the Core Responsibility to manage, "contracts and agreements with in-state financial institutions to support the financial institution data match process." It was appropriate for her to receive a Below Contributor rating for that Core Responsibility. During the re-evaluation period, employees are expected to achieve at least a Contributor rating for all relevant Core Responsibilities. Failure to obtain at least a Contributor rating in each Core Responsibility is sufficient to support an agency's conclusion that the employee should receive an overall re-evaluation performance rating of Below Contributor. In this grievance, the Agency has presented sufficient evidence to support its opinion that Grievant's work performance during the re-evaluation period was at a Below Contributor level.

"If the employee receives a re-evaluation rating of 'Below Contributor', the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period." The Agency carefully evaluated whether Grievant could be reassigned to another open position within the Agency. Agency managers concluded no open positions were available to be filled by Grievant. Agency managers concluded Grievant could not be demoted with lesser duties because the duties of her existing position needed to be performed. Accordingly, the Agency's decision to remove Grievant from employment must be upheld.

Grievant argued that the Agency's assessment of her work performance during the re-evaluation period was flawed because the Business Analyst only reviewed a

portion of the claims she worked on as part of her re-evaluation. Grievant contends that she actually worked on 144 cases and made only 16 errors during the re-evaluation period. The Business Analyst and the Agency dispute Grievant's assertion. Even if the Hearing Officer assumes for the sake of argument that Grievant worked on 144 cases and made only 16 errors, this rate of error is approximately 11%. That percentage exceeds the Agency's 5% tolerance standard.¹⁵ Thus, under Grievant's assertion of the facts in this case, there remains a sufficient basis to support the Agency's opinion regarding Grievant's work performance.

Grievant argued that she was taking medication during the re-evaluation period that contributed to her error-making. She no longer takes that medication. Although this fact helps explain why Grievant was making errors, it does not serve to reverse the Agency's action. Mitigation is a concept that applies to disciplinary actions and is not applicable to whether an employee evaluation is arbitrary or capricious.

DECISION

For the reasons stated herein, the Agency's removal of Grievant for receiving a Below Contributor rating on her re-evaluation performance evaluation must be **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

¹⁵ Grievant argued that the 5% standard should have been written in her Employee Work Profile if it was so important that she was obligated to meet that standard. Although writing the 5% standard in Grievant's Employee Work Profile would have been the preferred practice, the Business Analyst adequately informed Grievant of the standard on at least two separate occasions. Grievant knew or should have known that the Agency had high expectations for accuracy with respect and entries into its computer systems. The Notice of Improvement Needed/Substandard Performance issued in October 2006 informed Grievant that attention to detail was a "skill critical to contracting and the FIDM process."

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.¹⁶

[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

¹⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.