

Issue: Arbitrary and Capricious Performance Evaluation; Hearing Date: 03/18/08;
Decision Issued: 03/25/08; Agency: VPI&SU; AHO: Thomas P. Walk, Esq.; Case
No. 8791; Outcome: No Relief – Agency Upheld In Full.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT
DISPUTE RESOLUTION

IN THE MATTER OF CASE NO.: 8791

DECISION OF HEARING OFFICER

HEARING DATE: MARCH 18, 2008

DECISION ISSUED: MARCH 25, 2008

PROCEDURAL MATTERS

The grievant initiated these proceedings by filing his Form A on October 24, 2007. He challenged a Below Contributor rating on his annual evaluation which was issued on September 27, 2007. Because the evaluation (Form P112-PPE) did not contain any comments from the reviewing official, it was determined to be improper. The evaluation was reissued November 19, 2007. The grievant chose to continue with the pending grievance. The agency head qualified the matter for hearing on January 7, 2008.

I was appointed as hearing officer on January 30, 2008. I received formal notification on February 6, 2008. I conducted a pre-hearing conference was conducted on February 8 by telephone conference call. At that time, the grievant had no representative. I set the matter for hearing on February 27. Subsequent to the conference call, the grievant retained counsel and at his request the matter was rescheduled. The earliest date available and satisfactory to all parties was March 18. I conducted the hearing at the primary offices of the agency on that date. The hearing lasted approximately 3.50 hours.

APPEARANCES

Grievant

Counsel for grievant

Three additional witnesses for grievant

Agency Representative

Counsel for Agency

One additional witness for agency

ISSUES

1. Whether the 2007 performance evaluation of the grievant, which assigned to him a Below Contributor rating, was the result of retaliation by his supervisor?
2. Whether the 2007 performance evaluation was arbitrary and capricious?

FINDINGS OF FACT

The grievant is, and has been at all relevant times, employed by the agency in a management position in a University office. The agency is a large state university. The office is responsible for the administration and oversight of substantial sums of money to be used for the financial assistance of students at the school. The grievant holds the position of a financial services manager.

The supervisor of the grievant issued a Form P112 to the grievant on October 12, 2006. In that evaluation the grievant received an overall rating of

Extraordinary Contributor. On no component of that evaluation did the supervisor rate the grievant as being "Below Contributor." He issued an Extraordinary Contributor rating in three areas. Subsequent to that evaluation certain issues arose regarding the work performance of the grievant.

One of the issues was his relationship with an Administrative Assistant whose office adjoined that of the grievant. She did not work directly for the grievant. Nevertheless, in her interactions with him she found him to be rude, discourteous and condescending. She noted similar behavior directed toward other employees. She became concerned about the extent to which this was affecting her work environment. When a retreat was held in the summer of 2007 she requested to be placed on the same team as the grievant in an effort to improve their relationship. This effort failed.

The grievant also exhibited rude behavior toward a “dotted line supervisor” by challenging her pattern of tardiness before a group of co-workers.

The retreat mentioned above was conducted by an independent group of facilitators. When the group presented its invoice for payment to the USFA office the grievant challenged the manner in which payment was to be made. This challenge resulted in an exchange of communications between the grievant and other co-workers. The grievant sought a resolution of the question by the Vice-Provost. The supervisor of the grievant had previously made it clear to him that he should feel free to take the question of any perceived inappropriate action to the Vice-Provost. The Vice-Provost found that the grievant acted properly in

bringing the matter to him. He did not conclude that the approach by the grievant to the payment issue was correct.

On July 27, 2007 the grievant spoke with a co-worker regarding the meeting between himself, the supervisor and the Vice-Provost. The grievant made the comment that “I could have killed (the supervisor)”. The supervisor held a meeting with the grievant on August 6, 2007. At this meeting they discussed certain performance issues and inappropriate behavior of the

grievant. Among the issues discussed were the personal interactions of the grievant with other employees, his shortcomings in fund management and his failure to address broader risk management issues, as is required as part of his position. A follow-up meeting was held the next day. The grievant acknowledged the statement made on July 27 and indicated that it was not meant as a threat but was issued out of frustration.

The supervisor issued a Notice of Improvement Needed on August 21, 2007. In that document the supervisor cited six areas of deficiencies. He told the grievant that this was being done as a predicate to his issuing the grievant a Below Contributor rating on his next annual evaluation. Those deficits fall into the following categories: teamwork; diversity; fund management; risk assessment; quality assurance; and systems advisement. He imposed corresponding requirements as part of the improvement plan, including that the grievant seek counseling for anger management. The grievant spoke with a counselor on four

different occasions commencing August 27, 2007. The counselor found the grievant did not have any anger management issues.

As stated above, on September 27, 2007 the grievant received his performance evaluation that included the overall Below Contributor rating. This evaluation is identical, in all material respects, to the evaluation issued on November 19, 2007.

APPLICABLE LAW AND OPINION

This matter is governed by the grievance procedure authorized by the Virginia Personnel Act, Virginia Code §2.2-2900, *et seq.* Section 5.8 of the Grievance Procedural Manual (GPM) provides that in actions other than disciplinary actions and dismissals for unsatisfactory

performance the employee has the burden of proving his claim by a preponderance of evidence. This grievance of an unsatisfactory performance evaluation falls into the category in which the employee has the burden of proof. This matter was qualified for a hearing under §4.1(B) of the GPM, the grievant having alleged that his performance evaluation was arbitrary or capricious for the result of retaliation of his supervisor.

The grievant has challenged the evaluation on both a subjective and an objective basis. The subjective argument is that the supervisor issued the evaluation in retaliation for the grievant having asked the Vice-Provost for his input and resolution of the question of the payment to the facilitators for the retreat. The evidence contradicts this argument. The grievant acknowledged that

the supervisor has always permitted, if not encouraged, him to report to the Vice-Provost any action of the supervisor perceived by the grievant to be inappropriate. Although the supervisor likely was not pleased with the steps taken by the grievant to resolve that matter, I find no evidence to establish that the evaluation was written and the rating given in retaliation for the actions of the grievant.

The grievant introduced into evidence his 2006 evaluation. The relevance of the document, as put forth by the grievant, is that it shows that in 2006 the supervisor found the grievant to be an Extraordinary Contributor. I agree with the grievant that the document has some value as being reflective of the attitude of the supervisor when compared with the 2007 evaluation. A careful review of the 2006 document, however, tends to support the position of the agency.

The supervisor testified that the rating for 2006 was given, in part, as positive reinforcement to the grievant. He testified that his managerial style emphasizes such positive reinforcement. Part XIII of that document contains statements that recognize, at least implicitly, certain deficiencies in the grievant. That section states that the grievant's:

“Attitude, performance and participation has contributed significantly to the success of USFA over the past year. His people skills have seen unqualified improvement as displayed in his superior performance and departmental relationships. As his knowledge of financial aid administration continues to expand, he will need to maintain a check on his own self-evaluation skills and approaches in order to maintain a high level of people skills. It is a joy to work with {grievant} and know USFA can count on him.”

This “mixed bag” approach is also reflected in the memorandum of the supervisor of the August 6 and 7 meetings. In that document he recognizes, in the first paragraph, an area of work in which the grievant had performed well. The grievant presented no evidence to establish that the supervisor does not take such a managerial approach with other employees. Therefore, I conclude that the 2006 evaluation is not indicative of any improper motive by the supervisor in his writing of the 2007 evaluation. I further reject the grievant's argument that an Extraordinary Contributor in 2006 could not reasonably be rated as a Below Contributor in 2007.

The next question I must answer is the objective argument that the evaluation is arbitrary and capricious. Section 9 of the GPM defines arbitrary or capricious as being “in disregard of the facts or without a reasoned basis.” Arbitrary or capricious has further been defined as being a decision “that no reasonable person could make after considering all available evidence.” An evaluation that is motivated by spite or ill will can be found to be arbitrary or capricious. DEDR Ruling 2003-143. In keeping with the general policy governing grievances in the

Commonwealth of Virginia for a hearing officer to give due efforts to the decisions made by supervisors, I have viewed the evidence from the standpoint of a “reasonable supervisor” as opposed to the more general standard of a “reasonable person.”

The 2007 evaluation contains seven Performance Dimensions. For five of those dimensions, the grievant received a Below Contributor rating. On the other

two dimensions the supervisor assigned a Contributor rating. The five dimensions on which a Below Contributor rating was given are among the six items shown on the Notice of Improvement Needed form issued on August 21, 2007.

The first dimension is that of teamwork. The supervisor cited the grievant for being a “team unto himself” with little concern for teamwork. The credible testimony of the supervisor supports the statements in the evaluation that the grievant failed in his duties regarding the development of policies and procedures and in working with other individuals in the USFA to share and implement these policies. Also, his derogatory comment directed to his “dotted line supervisor” shows a lack of a “team first” approach.

The next dimension in which the grievant was found to be less than a contributor is in the area of diversity. The grievant was stated to have “displayed a blatant disrespect for women...often being obstructive, confrontational and uncooperative.” With the exception of the relationship of the grievant with the one administrative assistant, I do not find this allegation to be sustained.

The next area mentioned involves reconciliation/financial management. The supervisor found that the grievant had made marginal progress and did not understand one basic area (financial need). He noted one instance in which the actions of the grievant resulted in unspent

funds being returned to the state. These funds were of a minimal amount. The supervisor further noted a pattern of the grievant to fail to complete assignments in a timely manner. I find that the

evidence presented supports these allegations, although the use of the minimal unspent amount to support the rating is questionable.

The next questioned dimension is that of risk assessment. Here, the supervisor again refers to the apparent inability of the grievant to understand the concept of various aspects of financial aid, including financial need. The supervisor further noted the failure of the grievant to create and implement certain controls necessary for the proper functioning of the office. The grievant is further criticized for frequent socializing with co-workers, which the supervisor believed impacted his job performance. As is true of certain of the other dimensions, I find that there was some credible evidence presented in support of these claims.

The last dimension for which the grievant received a Below Contributor rating is that of systems advisement. Little, if any, evidence was presented by the grievant to refute this allegation.

My job as hearing officer is not to determine whether I would have given the grievant the same evaluation as the supervisor gave. My job is to determine whether the grievant has shown the evaluation to be completely unfounded. I am not required to find whether a Below Contributor rating on any particular dimension would have been sufficient to sustain an overall rating at that level. I cannot, and do not, view the allegations as separate, devoid of any context,

in determining whether the grievant has met his burden of proof. In viewing the evidence as a whole, in this case I cannot find the burden has been sustained.

DECISION

I find that the evaluation dated September 27, 2007 not to be arbitrary, capricious or issued with any discriminatory or retaliatory motive. Therefore, I am sustaining that evaluation and denying any relief to the grievant.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th Floor, Richmond, VA 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 Capital Square, 830 E. Main St., 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**. 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 court shall award reasonable attorneys fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

DECIDED this March 25, 2008.

/s/ Thomas P. Walk

Thomas P. Walk, Hearing Officer