

Issue: Termination - Performance (Below Contributor Rating); Hearing Date: 07/15/08; Decision Issued: 01/08/09; Agency: Department of Environmental Quality; AHO: Carl Wilson Schmidt, Esq.; Case No. 8876; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8876

Hearing Date: July 15, 2008
Decision Issued: January 8, 2009

PROCEDURAL HISTORY

The Department of Environmental Quality removed Grievant from employment based on an unsatisfactory work performance re-evaluation on March 10, 2008. On April 8, 2008, 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 he requested a hearing. On May 29, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 15, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant's re-evaluation was arbitrary and capricious?

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:

The Department of Environmental Quality employed Grievant as an Air Inspector Senior at one of its Facilities. The purpose of his position was:

Conduct inspections, review records and permits, evaluate reports and investigate complaints to evaluate compliance with Air Pollution Control Law and Regulations and initiate and follow through on enforcement in cases of non-compliance in order to protect, enhance, and preserve environmental resources in Va.

Grievant reported to the Air Compliance Manager ("ACM"). The Air Compliance Manager supervised eight employees most of whom were senior inspectors.

In order to complete an inspection of a facility, an inspector must visit the facility and determine whether all environmental regulations have been met. Inspectors then write reports describing their findings including any necessary enforcement actions for the facility. The Agency has an automated system called CEDS in which an inspector enters information regarding a facility inspection. An inspector must submit a draft report to the Team Leader, Mr. P, and then have it approved. Once the draft is approved, the inspector must submit it to the Air Compliance Manager. Inspectors have 25 days from the date of inspection to submit a final report to the Air Compliance Manager. Timeliness is important to the Agency because the Agency must file reports with the Federal Government on a timely basis to secure Agency funding.

The Agency uses an automated system to assign facilities for inspection to inspectors. The amount of time necessary to inspect each facility is determined and then facilities are assigned based on region and so that the total amount of time for all facilities assigned to an inspector are approximately the same for all inspectors.

On October 1, 2007, Grievant received his annual performance evaluation rating his overall work performance as "Below Contributor". The Agency also issued Grievant a Written Notice, however, that notice is not an issue before the Hearing Officer.

On October 15, 2007, the Manager presented Grievant with a memorandum containing a work plan as follows:

The following outlines the work requirements expected of you upon your return to work at DEQ effective October 15, 2007. The Work Plan is established in response to the Written Notice issued October 1, 2007. These requirements are intended to be permanent unless specified otherwise in writing. Failure to adhere to any of these requirements may be grounds for termination as specified in the October 1, 2007 Written Notice.

1. Timesheets for the periods September 9, 2007 – September 24, 2007, and September 25 – October 9, 2007, are to be completed in OTL and submitted to the Air Compliance Manager no later than close of business Wednesday, October 17, 2007.
2. Your 2007 Performance Evaluation interview will be scheduled by the Air Compliance Manager during the week of October 15 – October 19, 2007.
3. Maintenance is currently due on your assigned vehicle, a Malibu 2006. Required maintenance is to be scheduled for this vehicle in accordance with your EWP no later than the close of business Friday, October 19, 2007. Notification that this vehicle's maintenance has been scheduled to be provided to the Air Compliance Manager by the close of business October 19, 2007. You are to continue to maintain your assigned vehicle according to the provisions of your EWP. This includes maintaining interior cleanliness.
4. You are required to adhere to your approved work schedule at all times unless a different period of time is approved in writing by the Air Compliance Manager. The approved work schedule requires you to be present at the [Facility] each day from 7:15 a.m. to 4 p.m., Monday through Friday. You do not have approval to telecommute. You do not have approval to access any DEQ systems remotely (i.e., CEDS).
5. You are to organize your work space in order to enhance your ability to perform your job functions by close of business Friday, October 19, 2007. You will work closely with the Air Compliance Team Leader to organize your working files in your work area, to update your carry out files, and to process any outstanding reports received. You are to maintain your work area in an organized manner.
6. You are not to remove any DEQ equipment from the [Regional Office] building including but not limited to desktop computer equipment without prior written authorization of the Air Compliance Manager.

7. You are not to take any DEQ/State vehicles home overnight. You are to come into the office according to your approved work schedule and check out DEQ vehicle for field work according to the [Regional Office] vehicle sign-out procedures. DEQ vehicles checked out by you are to be used for official State business only and are to be returned to the [Regional Office] by close of business each day. You are to accurately account for miles traveled on DEQ vehicle mileage logs in accordance with [Regional Office] procedures (i.e. recording miles actually traveled on the specific date, logging of specific locations/facilities visited).

8. You are to perform on-site field inspections [at] least one day per calendar week. An inspection schedule for the 90 days following your return to work will be provided for you in writing subsequent to this Work Plan. You are to inform the ACM in writing (email is acceptable) prior to leaving the office for any on-site inspections and upon your return to the office from any on-site inspection.

9. All on-site inspection reports are to be submitted to the Air Compliance Manager within 25 calendar days following any on-site inspection. All reports shall be accurate and substantially free of grammatical errors.

10. You are required to obtain and utilize a field log book or equivalent to record field notes for all on-site inspections or surveillance. A field log book will be provided to you by the Air Compliance Manager upon your request. All field notes are to be logged into the field log book or equivalent and should contain any on-site observations used to prepare the inspection report.

11. All other inspection reports are to be submitted to the Air Compliance Manager within the timeframes specified in your EWP. Inspection reports submitted shall be accurate and substantially free of grammatical errors. You are encouraged to develop your own system (spreadsheet, etc.) for tracking the reports received, official receipt dates, and date inspection reports are due to be submitted to the Air Compliance Manager.

12. You are to utilize your Outlook calendar, allow others to view your schedule, and keep it up to date. Your Outlook calendar should include any on-site inspections including estimated time out of office, surveillance, meetings, and any other planned time out of office.

13. You are to follow the attached inspection plan timetable until such time as you are notified in writing by the Air Compliance Manager that the timetable is no longer in force. You are to schedule meetings with the Air Compliance Manager on the review dates in order to provide updates on

your work progress: November 26, [2007] December 21, [2007] and January 18, [2008]. Alternative dates are acceptable if requested in writing.

14. You are to comply with all established DEQ policies and procedures.

15. This Work Plan remains in effect for 90 days following your return to work on October 15, 2007. This Work Plan may be extended beyond 90 days if done so in writing.

Prior to Grievant's beginning work on October 15, 2007, the Agency reassigned Grievant's work backlog to other inspectors. The Agency's objective was to enable Grievant to begin the re-evaluation period without any obligation to complete unfinished work duties.

On November 19, 2007, the Air Compliance Manager and Grievant met to discuss Grievant's work performance from the beginning of the re-evaluation period. The Air Compliance Manager asked Grievant to produce his field log book to record field notes for all on-site inspections or surveillance. Grievant was unable to produce a field log book. Grievant had not requested a field log book even though he was advised that one would be provided to him if he asked. Grievant provided "sparse field notes" that the Air Compliance Manager considered to be insufficient to determine what Grievant actually observed as part of his inspections. Grievant offered a blank worksheet for future use. The Air Compliance Manager agreed Grievant could use the worksheet so long as it contained the necessary contact information and "all observations made at the site". The Air Compliance Manager drafted a memo to Grievant dated November 21, 2007 and presented it to Grievant.

On December 21, 2007, the Air Compliance Manager and Grievant met to discuss Grievant's work performance. Although Grievant completed at least one on-site inspection per calendar week for the period November 20, 2007 through December 21, 2007, no field notes or field log book was presented to the Air Compliance Manager during that meeting. The Air Compliance Manger again instructed Grievant to submit field notes with his on-site inspections. The Air Compliance Manager drafted a follow up memo to Grievant dated January 7, 2008 which Grievant acknowledge receiving January 14, 2008.

The Air Compliance Manager completed a Probationary Progress Review form on January 7, 2008 reflecting his meeting with Grievant on December 21, 2007. The Air Compliance Manager wrote that:

[Grievant] continues to be deficient with respect to Work Plan Action Item 10. He was notified of this deficiency during the first monthly meeting on November 19, 2007, and again during the second monthly meeting on December 21, 2007. As of this writing, no field notes have been produced

for any on-site inspection and no field log book has been presented. Action item 10 requires the maintenance of field note for each on-site inspection in a field log book or equivalent. In addition, it requires the submission of field notes with each on-site inspection report to the ACM. While the reports have been submitted in a timely manner following the on-site inspections, no field notes have been submitted with any on-site inspection report.¹

On January 25, 2008, the Air Compliance Manager met with Grievant to discuss his work performance. On January 28, 2008, the Air Compliance Manager drafted a Probationary Progress Review regarding Grievant's work performance. He wrote, in part:

During the third meeting, it was determined that due to the holidays, there was not enough work submitted to make a fair performance evaluation. [Grievant] performed several on-site inspections during the period following December 21, 2007, monthly review meeting. However, at this time, none of the reports are yet due to be submitted and none have been submitted.

[Grievant] was notified during the meeting that because of the lack of material with which to evaluate his performance, the probationary period (and by extension, the October 15, 2007 Work Plan) would be extended until February 28, 2008. This will allow adequate time to review and evaluate the results of inspections performed during the month of January 2008.²

On February 28, 2008, the Air Compliance Manager drafted a Probationary Performance Review and stated as follows:

The Work Plan established for [Grievant] contained specific directions and deadlines for submittal of work products to the [Air Compliance Manager]. Among these are requirements to submit inspection reports for all on-site inspections within 25 calendar days of the inspection (Work Plan Item 9) and to submit field notes to the [Air Compliance Manager] with each on-site inspection report (Work Plan Item 10). Since December 21, 2007, [Grievant] has performed 10 on-site inspections. Based on a review of these 10 on-site inspections, [Grievant] has failed to adhere to Action Items 9 and 10 of the Work Plan for several of the 10 on-site inspections. They are as follows:

¹ Agency Exhibit 7. Grievant acknowledged receiving the Probationary Progress Review on January 14, 2008.

² Agency Exhibit 8.

[VBH] [Grievant] visited this facility on January 17, 2008. The inspection report was not signed in CEDS until February 25, 2008 (39 days) which exceeds the 25 calendar day requirement for submittal of on-site inspection reports established in Work Plan Action Item 9. In addition, this inspection report was submitted without field notes in violation of Work Plan Item 10.

[PC] [Grievant] visited this facility on January 24, 2008. According to the Employee Work Progress Report dated February 28, 2008, (attached), and this one-site inspection report has yet to be submitted to the [Air Compliance Manager]. As of February 28, 2008, 35 calendar days have passed without submission of this one-site inspection report or associated field notes in violation of Work Plan Action Items 9 and 10.

[CWF] [Grievant] visited this facility on January 16, 2008. This on-site inspection report was not submitted to the [Air Compliance Manager] until February 21, 2008 - an elapsed time of 36 calendar days from the date of inspection. This amount of time is in violation of Work Plan Action Item 9.

[ESH] [Grievant] visited this facility on January 24, 2008. According to the attached Employee Work Progress Report dated February 28, 2008, this on-site inspection report has yet to be signed by [Grievant] in CEDS or submitted to the [Air Compliance Manager] for review. As of February 28, 2008, 35 calendar days have passed without submission of this on-site inspection report or associated field notes in violation of Work Plan Action Items 9 and 10.

[CNU] [Grievant] visited this facility on January 17, 2008. The on-site inspection report was signed in CEDS by [Grievant] on February 25, 2008 (39 days from the on-site inspection date) and submitted to the [Air Compliance Manager] on March 4, 2008 (49 calendar days from on-site inspection date). This is in violation of Work Plan Action Item 9.

On March 10, 2008, Grievant was removed from employment based on poor work performance. He had been employed by the Agency for more than four years.

Grievant has an undergraduate degree in mechanical engineering. He passed the Professional Engineering exam on his first attempt.

CONCLUSIONS OF POLICY

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. 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.

DHRM Policy 1.40, Performance Planning and Evaluation sets forth the procedures for re-evaluating employees who receive a Below Contributor rating on their annual evaluations.

Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer. In this case, the Agency established a performance re-evaluation for the following three months but that period could be extended by the Agency. The Air Compliance Manager discussed the Agency's expectations with Grievant and how to meet those expectations prior to the beginning of the re-evaluation period.

"The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period. If an employee is absent for more than 14 consecutive days during the three (3)-month re-evaluation period, the period will be extended by the total number of days of absence, including the first 14 days." The Agency did not fully comply with this provision of the policy. The Agency extended the time frame for evaluation. In this case, the Agency's action was harmless error. The purpose of the DHRM time requirement is to promote the orderly resolution of performance re-evaluations. If the Agency had complied precisely with the DHRM Policy, it would have been unable to evaluate portions of Grievant's work begun but not completed during the first two months and two weeks of the re-evaluation period. In other words, the Agency would not have been able to accurately assess Grievant's work performance during the re-evaluation period. The Agency's motive in this case was for the purpose of an accurate evaluation as opposed to a pretext to give Grievant more time to make mistakes.

"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."

"An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period."

"As an alternative, the Agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation period to remain in his or her position,

and reduce the employee's duties. Such a reduction should occur following and based on the re-evaluation and must be accompanied by a concurrent salary reduction of at least 5%."

"If the Agency determines that there are no alternatives to demote, reassign, or reduce the employee's of duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period."

Grievant received a "Below Contributor" rating on his re-evaluation. Agency managers concluded there were no other positions appropriate for reassignment. No credible or detailed evidence was presented showing the Agency had open positions to which Grievant could be demoted. Agency managers concluded reducing Grievant's duties was not a viable alternative given the Agency's business needs. The Hearing Officer has no reason to disturb the Agency's decisions. The Agency's decision to remove Grievant was in accordance with DHRM Policy.

Grievant contends he was unfairly placed on a 90 day action plan. Grievant received a Below Contributor rating on his annual evaluation and, thus, it was appropriate to place him on a 90 day work plan and conduct a re-evaluation of his work performance. The Agency did not unfairly place Grievant on a 90 day work plan.

Grievant contends the work plan was unrealistic and drafted by a Deputy Director who had no real understanding of the work duties and who wanted Grievant removed from employment. It is not necessary for Agency managers to know every detail of an employee's job duties in order to establish reasonable expectations for that employee's work performance. In this case, the Air Compliance Manager had adequate knowledge of Grievant's work duties to establish a reasonable work plan. The work plan established for Grievant was not unrealistic. It was based on his existing duties. The Air Compliance Manager required Grievant to conduct one inspection per week and then allowed four days to permit him to write reports. This is a reasonable work expectation.

Grievant argues his workload was excessive. In particular, he contends he was required to complete work for the Y-Refinery, a major project. The evidence does not support this assertion. Grievant's work assignments were assigned in the same manner as they had been assigned to him in the past with one exception. As part of the work plan, Grievant's duties were reduced and the Y-Refinery was removed from his responsibilities. A co-worker who received the Y-Refinery from Grievant sought assistance from Grievant and Grievant chose to provide assistance to that employee. When Grievant provided the assistance, however, it was not at the direction of his supervisor. His decision to provide assistance was admirable on his part, but it was not required of him or expected of him by the Agency managers. In essence Grievant volunteered to do work he was not required to complete.³ When Grievant's workload is

³ In addition, Grievant conducted inspections of two facilities that were not assigned to him. He did so based on his own initiative.

compared to that of other inspectors, there is nothing to suggest his workload was excessive or unreasonable during the re-evaluation period. During the re-evaluation period, Grievant was assigned to the same area he had been assigned for several years.

Grievant was obligated under the work plan to complete all of the items listed in the work plan. Grievant failed to complete all of the items under the work plan and, thus, the Agency has presented sufficient to support its decision to remove Grievant from employment. There are several examples of how Grievant failed to comply with the terms of the work plan.

First, Grievant was expected to perform at least one on-site inspection per calendar week. He did not perform an on-site inspection for the week beginning November 5, 2007 and ending November 9, 2007.

Second, Grievant was obligated under the work plan to obtain and utilize a field log book or equivalent to record field notes for all on-site inspections or surveillance. Although the Agency offered to provide Grievant with a field log book he declined to utilize one. He made brief notes on existing permits that he took with him to conduct inspections. The Agency's expectation was that by using a field log book, Grievant would be able to write notes in sufficient detail to enable another person looking at Grievant's notes to determine how Grievant reached the conclusions he reached as a result of his inspections. Grievant's brief notes were not sufficient to enable a third party to reasonably assess how Grievant reached his conclusion. Grievant's failure to obtain a field log book from the Agency and utilize that log book shows that he did not comply with the work plan. In the November 21, 2007 work plan review, the Air Compliance Manager noted that the field notes for Grievant's November 14 and 16, 2007 inspections were sparse. In the January 7, 2008 work plan review, the Air Compliance Manager noted that Grievant did not submit any field notes for the review period. In the February 28, 2008 work plan review, the Air Compliance Manager noted Grievant did not submit field notes for one inspection. Although he met with the Air Compliance Manager four times, Grievant did not dispute the Air Compliance Manager's assertions that field notes were missing.

Grievant argued that he maintained more detailed notes on separate documents and that at the conclusion of each meeting he placed the notes on the desk of the Air Compliance Manager. Although Grievant sought copies of these documents following his removal, the Agency has not been able to locate the documents or otherwise independently determine whether they actually exist. The Hearing Officer has no reason to believe that the Agency has intentionally withheld any documents from Grievant for the purpose of defeating his grievance or for any other improper reasons. In the absence of such documents as part of the record, the Hearing Officer cannot conclude that they exist and, assuming they exist, whether their contents would be sufficient to show that Grievant satisfied the Agency's expectation for him to fully

document his inspections. The Hearing Officer will not draw an adverse inference against the Agency regarding documents that may or may not exist.

Third, Grievant was obligated to complete all reports and submit them to the Air Compliance Manager within 25 calendar days. Grievant failed to complete all of his inspections within the 25 calendar time period. The Air Compliance Manager described five of these facilities in his February 28, 2008 review.

Grievant argued that his timeliness was affected by the requirement that he submit a draft inspection to Mr. P, an Environmental Specialist II.⁴ If Mr. P was tardy in correcting the draft reports, the final reports could not be submitted to the Air Compliance Manager on a timely basis. Although Grievant's concern is realistic, the evidence is insufficient to show that Grievant's untimeliness resulted from slow turnaround time by Mr. P. Grievant knew that he would have to submit his drafts to Mr. P and should have prepared his draft reports within sufficient time to allow for Mr. P to review them. Mr. P was absent from work on some occasions, but his absences do not appear to be so excessive as to materially affect the timeliness of Grievant's report submission. It appears that the delays were due to Grievant's failure to timely process reports rather than any substantial inaction by Mr. P. For one inspection, Grievant failed to submit a report at all.

Grievant testified that he wrote the VBH and CNU reports on the 25th day and submitted them to Mr. P. Grievant contends one of the original figures was wrong in the CNU narrative and he had to correct that information. He contends he completed the report and submitted it in 25 days. There is no way for the Hearing Officer to verify these assertions.

Grievant contends he conducted the ESH inspection and completed the requirements. For some reason the inspection was never found in the key file and, thus, Mr. P never signed it. Grievant did not know what happened to after he gave it to Mr. P. The fact remains that the report was not submitted to the Air Compliance Manager and, thus, his conclusion that Grievant did not timely submit all of his inspections is supported by the evidence.

Grievant argued that it was common practice for the Agency to reduce inspections at the beginning of the calendar year and for inspectors to focus on report writing during that time period. This argument fails. Grievant was obligated to comply with the work plan regardless of the Agency's prior practice. When an employee is placed on a work plan, that action is not a common practice. Grievant should have recognized that he was not operating under the Agency's common practice.

DECISION

⁴ Mr. P served as the Team Leader for the inspectors including Grievant.

For the reasons stated herein, the Grievant's request for relief must be **denied**. The Agency's removal of Grievant from employment is 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
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
600 East Main St. STE 301
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.⁵

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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