

Issue: Termination (Below Contributor Rating on re-evaluation); Hearing Date: 07/11/08; Decision Issued: 09/17/08; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 8883; 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: 8883

Hearing Date: July 11, 2008
Decision Issued: September 17, 2008

PROCEDURAL HISTORY

On February 21, 2008, the Agency sent Grievant a letter notifying her that her employment with the Virginia Department of Transportation was being terminated effective February 21, 2008.

On March 21, 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 she requested a hearing. On June 11, 2008, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On July 11, 2008, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency's re-evaluation of Grievant's work performance was arbitrary or capricious?

2. Whether Grievant's removal from employment was consistent with 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 Transportation employed Grievant as an Administrative Assistant at one of its Facilities until her removal effective February 21, 2008. She had been employed by the Agency for approximately 17 years. The purpose of her position was:

Provide administrative support activities in accordance with State laws and regulations, the Construction and Professional Services Manual and VDOT policies, procedures, and guidelines. Performs duties associated [with] VDOT's Energy Program, VDOT's Real Property Management Lease Program, records management, procurement and special assignments.

Grievant had prior active disciplinary action. On January 25, 2008, Grievant received a Group I Written Notice for unsatisfactory attendance.

Grievant has a history of experiencing significant health problems. For example, in 2002 she had back surgery. In 2003 she had breast cancer and was out of work for six months. In 2004 she had back surgery and was out of work for three or four months. In 2005 she had a nervous breakdown and was seen by a mental health professional. On June 27, 2007, Grievant was involved in a car accident which caused her problems with her back. Grievant had been on Short Term Disability one time each year for the years 2002 through 2007.

On October 1, 2007, the Program Director sent Grievant a memorandum stating, in part:

Starting today, you will be expected to provide a medical note from your physician, to cover each day that you are absent. Please also be aware that you must call in during our normal work hours between the hours of 7

a.m. and 8 a.m. and personally speak with me or [the Supervisor]. If you do need to leave a message on the phone, you are expected to call back to ensure the message was received. We are asking for this so that we can schedule adequate staffing to meet our business needs during any absences. As for any future Personal Leave or Annual Leave time off that you need, please "OBTAIN PRIOR APPROVAL" from either me or [the Supervisor], prior to taking the time off.¹

On October 29, 2007, Grievant received an annual evaluation with an overall rating of "Below Contributor". On November 2, 2007, the Supervisor told Grievant that when she was at work, her work performance was adequate. He told her that she was absent from work too often and that her absences created difficulty for the Agency to perform its duties.

The Agency drafted a detailed Performance Re-Evaluation Plan effective from November 14, 2007 until February 12, 2008.

Under this plan, one of Grievant's Core Responsibilities was "Assists Section Managers with special projects." Her expected tasks/duties were:

Performs research, generates reports, researches problems regarding real estate transactions. Assist with TAMS license agreement, land acquisitions, easements surplus property and Stars Communication Towers as requested. Files and maintains documents related to those areas. Assists Section Managers with other special projects as required.

At the conclusion of the re-evaluation period, Grievant received a Below Contributor rating for this Core Responsibility. Grievant received this rating because:

[Grievant] did not satisfactorily assist or follow up with the completion of the following special assignments because of the unsatisfactory attendance: VDOT's 6-Year Facility Strategic Plan, locating responses to lease confirmation letter from 2004, assisting with the [project names] license agreements, assisting or following up with new [location] lease, Smart Tag Office Sublease, [Company name] Lease, Fiber Tower, CME registration, and compiling AHQ's addresses for MSD. When [Grievant] was absent, this work was completed by other employees.

One of Grievant's Core Responsibilities was, "Assists with maintaining VDOT's Real Property Management Lease Program". Her expected tasks/duties were:

Updates the Lease Accounting System on a regular basis. Sets action dates for leases. Makes folders and maintains lease files. Performs research and responds to customer inquiries.

¹ Agency Exhibit 4.

At the conclusion of the re-evaluation period, Grievant received a Below Contributor rating for this Core Responsibility. Grievant received this rating because:

[Grievant] was not able to satisfactorily accomplish tasks related to this core responsibility such as collecting FD-AP-01 forms from the districts to verify VDOT's income and expense rental accounts and to answer phone and e-mail inquiries about these tasks due to unsatisfactory attendance. She was unable to file lease/license correspondence or to enter lease/licenses information on the appropriate spreadsheets. Additionally, she was unable to work with the districts and others to assist in finalizing leases and licenses. Many ad hoc requests for lease and license information were not responded to within 24 hours or accomplished due to [Grievant's] unsatisfactory attendance.

One of Grievant's Core Responsibilities was, "Prepares correspondence". Her expected tasks/duties were:

Prepares Lease correspondence and other correspondence as requested.

At the conclusion of the re-evaluation period, Grievant received a Below Contributor rating for this Core Responsibility. Grievant received this rating because:

[Grievant] was unable to file lease and license correspondence within two business days when she was absent from work. Additionally, correspondence for additional real estate transactions and other correspondence were not prepared or filed within two business days of receiving the assignment. A portion of this work was completed by another employee or not accomplished. Correspondence was not prepared with 95% accuracy due to [Grievant's] extensive absences, and therefore the necessary work was not completed.

One of Grievant's Core Responsibilities was, "Performs Records Management activities". Her expected tasks/duties were:

Establishes and monitors effective records management to ensure the preservation of permanent records in an orderly and timely manner. Effective records management will include updating all files related to real estate transactions, FAACS files and other files as requested. Maintains files by making file folders, organizing to prevent file drawers from being overfull and making labels for tabs, etc.

At the conclusion of the re-evaluation period, Grievant received a Below Contributor rating for this Core Responsibility. Grievant received this rating because:

[Grievant] has not satisfactorily completed activities associated with records management (in particular FAACS files.) FAACS files were to be reorganized and new file folders and labels/tabs were to be made. Since November 14, 2007, [Grievant] has only completed 1/2 of this task due to unsatisfactory attendance. This leaves only two weeks to complete the task which may not be accomplished due to other work we have to perform.

The Agency scheduled meetings for review and feedback to Grievant on November 27, 2007, December 13, 2007, and January 10, 2008. The Supervisor met with Grievant three times during the re-evaluation period. The Supervisor completed the re-evaluation on February 25, 2008. The Program Director reviewed the re-evaluation and signed it on February 25 2008.

For the period November 14, 2007 through January 31, 2008, Grievant was absent from work 47 workdays. Grievant brought notes from her medical provider to justify her absences. No evidence was presented showing the Grievant was absent from work for more than 14 consecutive days.

The Agency considered whether to demote or transfer Grievant in lieu of termination. Because no other positions were available, the Agency elected to remove Grievant from employment.

Grievant participates in the Virginia Sickness and Disability Program.

CONCLUSIONS OF POLICY

An employee who receives a rating of "Below Contributor" on her annual evaluation must be re-evaluated and have a performance re-evaluation plan developed. The employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three months. The supervisor must discuss with the employee the specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period. If the employee receives a re-evaluation performance rating of "Below Contributor", the Agency may remove the employee from employment.²

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

² DHRM Policy 1.40, *Performance Planning and Evaluation*.

sufficient facts upon which to form an opinion regarding the employee's job performance.

The Agency performance re-evaluation was neither arbitrary nor capricious. Grievant's absences from work during the re-evaluation period support the Agency's conclusion that she failed to meet her performance expectations as outlined in the work plan. Based on the evidence presented, there is no reason for the Hearing Officer to believe Grievant's work performance improved during the re-evaluation period. The Agency's decision to remove Grievant must be upheld.

During the hearing, the Hearing Officer raised the issue of whether Grievant's absences were protected under the Family Medical Leave Act. The Supervisor testified that Grievant had applied for and received family medical leave on prior occasions and was familiar with this process. The Supervisor testified that the Agency considered whether Grievant was eligible for family medical leave and concluded that Grievant was not eligible. Grievant did not present any evidence to rebut this testimony.³ Grievant testified that she had been on short term disability on several occasions. Family medical leave benefits run concurrently with short term disability under Virginia policy. Based on the evidence presented, there is insufficient evidence to conclude that Grievant's absences were protected under the Family Medical Leave Act.

DECISION

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

³ There is a difference between being a finder of facts and an advocate for a party. The role of the Hearing Officer includes identifying essential issues and initiating an exploration into those issues. A responsibility of the Hearing Officer is not to assume the role of a party and generate all of the evidence necessary to support that party's position.

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.⁴

[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

⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.