

Issues: Arbitrary and Capricious Performance Evaluation and Retaliation; Hearing Date: 09/29/08; Decision Issued: 10/06/08; Agency: VCU; AHO: Cecil H. Creasey, Jr.; Case No. 8896; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: HO Reconsideration Request received 10/21/08; Reconsideration Decision issued 11/05/08; Outcome: Original Decision Affirmed.**

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Case Nos. 8896

Hearing Date: September 29 & 30, 2008
Decision Issued: October 6, 2008

PROCEDURAL HISTORY

On November 13, 2007, Grievant filed her grievance alleging that her unsatisfactory performance evaluation of October 15, 2007, was retaliatory and discriminatory and in violation of the workplace harassment policy. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On June 24, 2008, the Hearing Officer received the appointment from the Department of Employment Dispute Resolution (EDR). This appointment followed a qualification ruling from EDR, issued May 28, 2008. The grievance hearing was originally scheduled for July 29, 2008, but the Grievant retained counsel who was unavailable on that date. Because the Grievant desired to be represented by counsel of her choice, without objection by the agency, the hearing officer found good cause to grant the motion for continuance and reschedule the hearing for August 7, 2008.

Because of the disputed scope of the grievance, at the parties' request, the hearing officer issued an interim decision on the scope of the grievance with the understanding the aggrieved party, the Grievant, would appeal to EDR. The hearing officer limited the scope of the grievance to the performance evaluation of October 15, 2007. The Grievant requested further continuances of the grievance hearing to allow more time in which to file the interim appeal to EDR. Ultimately, the Grievant did not appeal the interim decision to EDR. Over the course of one and one half days, on September 29 and 30, 2008, a hearing was held at the Agency's office.

At the hearing, both the Agency and Grievant were represented by counsel. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing, namely all exhibits in the Agency's binder (1 through 11) and all of the exhibits in the Grievant's binder (1 through 27). None were refused.¹ At the request of the Grievant, the hearing officer issued an order for

¹ References to the Grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

production of documents and for witnesses to appear for the hearing. No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

The parties, in their arguments to the hearing officer, referred to case citations in support of their view. At the hearing officer's invitation, both sides submitted a list of case citations relied upon.

APPEARANCES

Grievant
Counsel for Grievant
Representative for Agency
Counsel for Agency
A total of 13 Witnesses for Grievant and Agency (including Grievant)

ISSUES

- Whether the agency violated DHRM Policy 2.30, Workplace Harassment.
- Whether the Agency's evaluation of the Grievant was retaliatory or arbitrary and capricious.²

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she 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.

SUMMARY OF FACTS

The Grievant, a black woman, is, and has been at all relevant times, employed by the agency as a business manager of a department in a large state university. Part of the Grievant's job duties was to develop a multimillion dollar "zero based" budget for the department.

The Grievant was hired in August 2006, having been employed in another department of the university. Before that, the Grievant was employed in another large state university. The Grievant's immediate supervisor, Director of the department, a white male, chaired the search

² Because the scope of the grievance is limited to the performance evaluation of October 15, 2007, the events and exhibits related to events, conduct, and actions following October 15, 2007, are not considered relevant.

committee that made the hiring decision. The Director testified that the Grievant was his choice for the job. After about one year, the Director issued a Notice of Improvement Needed to the Grievant on August 29, 2007. GE 14; AE 1, 7. While several deficiencies were noted, the Director noted that the most significant involved the Grievant's lack of progress in developing the department's fiscal budget. Subsequently, on October 15, 2007, the Director evaluated the Grievant as an unsatisfactory performer. GE 16; AE 1.

The Grievant states that on or about December 2006, in response to complaints from the Grievant about her lack of respect among staff, the Director stated something to the effect that blacks or minorities have difficulty supervising other blacks or minorities, and this was especially so among black women. In response to that, the Grievant scheduled a meeting with the Director's supervisor, a Vice Provost, intending to complain about that comment as showing a discriminatory or hostile work environment. Ultimately, because the Vice Provost contacted the Director to inquire about the purpose of the meeting, the Grievant elected not to follow through on the meeting or complaint. The Grievant testified that the Director spoke to her about her scheduled meeting with the Vice Provost, and, under his breath, indicated something about remembering her evaluation. The Director testified that he did speak with the Grievant about his comments and what he felt was her misinterpretation, but did not mention or threaten anything about her performance evaluation.

Several of the staff members in the department are black. (The Grievant ultimately left the Agency in January 2008, and the interim replacement for the Grievant is black. According to the Director, the interim replacement has performed well, especially on the budget task.)

The Director testified that he is well-known among his staff for using "[Director's last name]-isms." The Director testified that he often uses stories and illustrations to make management points. The Grievant concurred, testifying that the Director often used "parables," as characterized by the Grievant. The Director stated he made no such comments about minorities as described or characterized by the Grievant, but that he recalls telling a story about earning respect involving twin black women students who worked in the department a few years ago who made similar complaints to him about lack of respect from other black students. The Director testified that he only used that story to explain that he has always held the view that respect has to be earned, and that he used the example involving the two black women students merely as illustration of how he has counseled others in his department on the subject of earning respect. The Director denied any racist or discriminatory intent in use of that story or in his management of his department.

The Grievant testified that the department's associate Director, a white woman, also heard the Director's comments, but the Assistant Director denied that in her testimony. The associate Director corroborated the Director's story about the student workers and earning respect. By contrast, a program coordinator in the department, a black male, testified that he had heard a general comment from the Director about minorities supervising minorities, but not specifically about women.

Evidence also showed, as part of the respect issue, that the Grievant generally did not enjoy a good working relationship with members of the department's staff. Without recounting

detailed examples of these encounters, testimony from all witnesses, including the Grievant, established the difficult working relationship many had with the Grievant. GE 10, 11; AE 5.

The Grievant and other witnesses testified to her capabilities and successes working with other agencies' staffs and budgets. However, to the extent expected at this department, the Grievant did not have the necessary experience and skill to develop zero based budgets.

The Notice of Improvement Needed, dated August 29, 2007, cited seven areas of deficiencies:

- Attention to detail
- Budget Tracking/Development
- Communication with other staff and customers
- Supervision of staff
- Attention to deadlines
- Document handling
- Consistent office hours

The Director told the Grievant that this notice was being given so as, hopefully, to avoid the Grievant receiving an Unsatisfactory Performer rating on her annual evaluation. The Director imposed corresponding requirements as part of the improvement plan, including:

- Proofing of work for spelling and grammar
- Use of forms developed for budget tracking and development
- Counseling and classes for improvement on supervisory skills
- Attention and planning for deadlines
- Improving filing systems and procedures

The Grievant contends that the Director issued the Notice of Improvement Needed because he learned that she (the Grievant) was preparing to issue a Written Notice to one of her subordinates. GE 13, 15. The Director admitted he had learned from a colleague that the Grievant was pursuing issuance of the Written Notice, that he did inquire of the Human Resources department about the correct procedure, and that he did not agree with the Grievant's intended disciplinary action. The Director testified, however, that the Grievant's intentions of issuing a Written Notice to a subordinate had nothing to do with his own issuance of the Notice of Improvement Needed. The Director testified that the issues involving the Grievant had persisted throughout her tenure in the department, and that the Grievant was not progressing.

The Director testified that over the course of the Grievant's employment in his department, she never was able to prepare the required budget for the fiscal year beginning July 1, 2007. The Grievant experienced many problems in gaining the respect of her staff and colleagues, and lacked communication skills. The Director testified that he offered the Grievant assistance, including assistance from third parties, for the budget development process, but that the Grievant, even after issuance of the Notice of Improvement Needed, did not progress in developing a budget for the department. The Director testified to exchanges of multiple drafts of budgets that were consistently unsatisfactory and sometimes without any substantive changes.

AE 4. The budget was actually needed before the fiscal year starting July 1, 2007, and it was still woefully incomplete in October 2007.

As stated above, on October 15, 2007, the grievant received her performance evaluation that included the overall unsatisfactory performer rating. GE 16; AE 1.

Other witnesses testified concerning the working relationships with the Grievant (some good and some bad), the Grievant's prior job requirements, good prior work performance in other jobs, and her overall efforts. See GE 2, 3, 4, 5, 6, 7, 8, 9, 12, and 17; AE 3.

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.

DHRM Policy 2.30, Workplace Harassment, specifically protects those employees who complain about possible workplace harassment by stating: “[t]he Commonwealth will not tolerate any form of retaliation directed against an employee or third party who either complains about harassment or who participates in any investigation concerning harassment.” Policy 2.30 goes on to state that: “[e]mployees and third parties who make complaints of workplace harassment, or provide information related to such complaints, will be protected against retaliation.”

An agency may not retaliate against its employees. To establish retaliation, a grievant must show he or she (1) engaged in a protected activity; see *Va. Code § 2.2-3004(A)(v) and (vi)*; (2) suffered a materially adverse action; see *EDR Ruling Nos. 2005-1064, 2006-1169 and 2006-1283*; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected

activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the grievant's evidence raises a sufficient question as to whether the agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See, EDR Ruling No. 2007-1530, page 5* (Feb. 2, 2007) and *EDR Ruling No. 2007-1561 and 1587, page 5* (June 25, 2007).

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')." ³

Having carefully considered and reviewed the evidence presented and the authorities submitted by each side, I find that the Grievant has not borne her burden of proof. The Agency's witnesses, including the Director, credibly establish instances of conduct by the Grievant, prior to the October 2007 performance evaluation, which justify the "Unsatisfactory Performer" rating. 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 she was not provided the necessary information on the budget and budgeting process, the Grievant did not detail sufficient effort on her part to obtain the financial records and prepare or progress on development of the department's budget. Because there is credible evidence to support the "Unsatisfactory Performer" rating on the performance evaluation at issue, I find the Grievant has not borne her burden of proof that her October 15, 2007, evaluation was retaliatory, arbitrary and capricious, or a misapplication of policy.

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) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant's voiced complaint about the Director's comments is a protected activity. Grievant received an overall performance evaluation of "Unsatisfactory Performer," constituting an adverse employment action. However, assuming the first two elements are satisfied, in order to establish retaliation, the Grievant must show a nexus between the protected activity and her performance evaluation. While the Grievant asserts that the performance evaluation was retaliatory, she has not shown any connection between the two events. Moreover, the agency has articulated bases of the Grievant's specific conduct that support the "Unsatisfactory Performer" rating.

In claims regarding discrimination or retaliation where intent is critical to the outcome, the hearing officer must determine whether retaliatory intent played a role in management's action. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364-365 (4th Cir. 1985), abrogated on other grounds; *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) quoting

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

Morrison v. Nissan Motor Co., Ltd., 601 F.2d 139, 141 (4th Cir. 1979) (“[r]esolution of questions of intent often depends upon the ‘credibility of the witnesses, which can best be determined by the trier of facts after observation of the demeanor of the witnesses during direct and cross-examination.’”). Here, the hearing officer has the benefit of one and one half days of thorough testimony from a number of witnesses involved. Much testimony was offered by the Grievant and the Director, and the hearing officer had ample opportunity to consider the credibility of all the witnesses and the documentary evidence.

The Agency presented nonretaliatory reasons for the “Unsatisfactory Performer” rating. The Director credibly established instances of the Grievant’s conduct and performance that justify the evaluation rating. The hearing officer found the testimony of the Director to be credible, and not tainted by any improper motivation. The Director had multiple occasions to observe and interact personally with the Grievant, and performance evaluations necessarily involve a measure of subjective, discretionary opinion.

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.

While the Grievant may point to an instance of alleged discriminatory comments, the weight of the testimony from witnesses for both sides does not suggest a grudge or bias that 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.

Concerning all issues, the Agency has articulated and proven by the weight of the evidence legitimate, non-retaliatory reasons for its actions. The Agency’s actions with respect to the Grievant were not retaliatory or otherwise improper. Quite the contrary, the Agency exhibited measured restraint regarding the Grievant’s job performance, providing the Notice of Improvement Needed and giving the Grievant the opportunity to complete the budget process that had been stagnating for months. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth’s employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988). As long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a “super-personnel officer” and must be careful not to

succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.* In this proceeding, the Agency's actions were clearly consistent with law and policy and, accordingly, the exercise of his professional judgment and expertise warrants appropriate deference from the hearing officer. *Id.*

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. 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.

DECISION

For the reasons stated herein, I find that the evaluation dated October 15, 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 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

COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

**DECISION OF HEARING OFFICER
ON RECONSIDERATION**

In the matter of: Case No. 8896

Decision Issued: November 5, 2008

PROCEDURAL HISTORY

On October 6, 2008, the grievance decision was issued in the agency's favor. On October 21, 2008, the Grievant moved the hearing officer to reconsider the decision, based on error in not imposing an adverse inference against the agency. The request stated that an affidavit would be submitted. The affidavit referenced in the Grievant's request was not received. The agency responded in opposition to the Grievant's request for reconsideration.

ISSUES

- Whether the agency should suffer an adverse inference.

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief she 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.

SUMMARY OF FACTS

The facts will not be recited except to the extent necessary to explain this decision. Grievant asserts that the agency made a knowing choice not to recall a witness in rebuttal following the close of the Grievant's case. The witness at issue actually testified during the grievance hearing as the Grievant's witness, being questioned and examined by both sides. This

witness, a program coordinator in the department, a black male, testified that he had heard a general comment from the Director about minorities supervising minorities, but not specifically about women. Perhaps the witness was not examined to the fullest. However, that is no basis to impose an adverse inference.

Although a hearing officer does not have subpoena power, he has the authority to draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents or has failed to make available relevant witnesses as the hearing officer or the EDR Director had ordered. *Rules for Conducting Grievance Hearings* § V.B. Under such circumstances, an adverse inference may be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency fails to produce a witness who has been ordered to appear without just cause, and that witness's proffered testimony could resolve a disputed material fact pertaining to the grievance, the hearing officer may resolve that factual dispute in the Grievant's favor. Here, the Grievant did not make a request or motion at the grievance hearing to recall the witness, and neither did the agency. Further, the affidavit upon which the request for reconsideration was made was never submitted to the hearing officer. Under these circumstances, I find use of an adverse inference to be inappropriate.

DECISION

For the reasons stated herein, I deny the Grievant's request for reconsideration.

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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