

Issues: Arbitrary/Capricious Performance Evaluation and Termination (Below Contributor Rating); Hearing Date: 06/02/09; Decision Issued: 06/03/09; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9063, 9096; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: EDR Ruling Request received 06/18/09; EDR Ruling #2009-2351 issued 08/10/09; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9063, 9096

Hearing Date: June 2, 2009
Decision Issued: June 3, 2009

PROCEDURAL HISTORY

Grievant was removed from employment pursuant to an annual evaluation of "Below Contributor and a 90 day re-evaluation of "Below Contributor". Grievant timely filed grievances to challenge the annual and the 90 day re-evaluation. On March 27, 2009, the EDR Director issued Ruling 2009-2240 consolidating the grievances. On April 20, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Agency's annual evaluation and re-evaluation of Grievant's work performance was arbitrary or capricious?
2. Whether Grievant was removed from employment in accordance 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 in accordance with State policy. 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 Social Services employed Grievant as an Information Technology Specialist III until his removal. The purpose of this position was:

This position is viewed as an internal technical or domain expert.

- Produces deliverables related to projects assigned and assists in post-implementation support and system enhancements.
- Responsible for gathering, compiling and synthesizing information with regards to technology processes or systems.
- Develop systems solutions requiring analysis and research.
- Responsible for using appropriate tools to develop systems and software.
- Possesses experience in multiple platforms.
- Works on one or more small to large complex projects as a project team member.
- May coach more junior staff.

May interface with Virginia Information Technologies Agency, other State agencies and DSS Program Managers, as required, on hardware, software, and capacity initiatives.

Grievant began working for the Agency as a contractor in 1999. He became a full time employee in 2003.

On August 1, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance. On September 30, 2008, Grievant received an annual performance evaluation with an overall rating of "Below Contributor". He was presented with a Workplan describing his expected performance over a 90 day time period.

Grievant's work performance over the 90 day time period was re-evaluated. On February 4, 2009, Grievant received an overall rating of "Below Contributor". He was removed from employment as a result of the re-evaluation.

CONCLUSIONS OF POLICY

Department of Human Resource Policy 1.40 governs Performance Planning and Evaluation. Under this policy, an employee who receives an overall rating of Below Contributor on an annual evaluation must be re-evaluated in 90 days. At the beginning of the 90 day period, the employee must be given a workplan describing the Agency's expectations of the employee's work performance during the 90 day period. When the employee is re-evaluated at the end of the 90 day period, the employee may be removed from employment if the employee's overall performance rating remains as Below Contributor.

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.

Upon consideration of the evidence presented during the hearing, the Hearing Officer concludes that the Agency has presented sufficient facts to support its opinion that Grievant's overall work performance was at a level of Below Contributor during the 2008 annual evaluation period.

Grievant received a Below Contributor rating on his annual evaluation for the Core Responsibility of Support Project Development Activities. This opinion is supported by the evidence. Grievant was responsible for production-level support of Adult Services/Adult Protective Services and the Virginia Newcomer Information Services computer systems. He was given one-to-one training for VNIS and training materials remain available for ASAPS. He continued to rely too much on staff who were no longer in a position to support the applications at the production level. Grievant was not able to maintain production support related documents such as system FAQ lists. He was not able to prioritize assignments, maintain the order work, or meet deadlines.

Grievant received a Below Contributor rating on his annual evaluation for the Core Responsibility of Analyze Assigned Projects to Develop an Understanding of Functional Needs Based on User Requirements. This opinion is supported by the evidence. Grievant did not apply analytic skills to service requests. Grievant assumed that he would always be available to rerun the requests and did not look for automated solutions. He did not produce documentation meeting the Agency's standards. Grievant did not complete requirements and obtain "sign-offs" before starting the next phase of the project.

Grievant received a Below Contributor rating on his annual evaluation for the Core Responsibility of Maintain Productive Working Relationships with Management, Peers, Customers, and Assigned Staff Using Good Communications Skills, Both Oral and Written. This opinion is supported by the evidence. Grievant was unable to effectively communicate either orally or in writing with management, peers, or business staff. His communications were often too verbose. What should have been knowledgeable responses were instead often evasive or paraphrase without true understanding of the subject. During group meetings, other attendees perceived Grievant as sleeping due to his body posture and closed eyes.

Grievant received a Below Contributor rating on his annual evaluation for the Core Responsibility of Support Production, On-call, Problem Resolution, and Evaluation of Projects After Migration to Production. This opinion is supported by the evidence. Grievant did not take responsibility for data warehouse work tickets. Adult Services staff complained about the level of service/response from Grievant.

During the annual performance cycle, Grievant reported to a different supervisor than the Supervisor who completed his annual evaluation. The other supervisor was consulted and had input into the annual evaluation as required by DHRM Policy 1.40.

Grievant received a Notice of Needs Improvement/Substandard Performance on August 1, 2008. This notice was a condition precedent to issuing an annual evaluation with an overall rating of Below Contributor.

After receiving an overall Below Contributor rating on his annual evaluation, Grievant was presented with a workplan for a 90 day re-evaluation as required by DHRM Policy 1.40. The Supervisor let Grievant establish the dates for them to meet to discuss his work performance.

Upon consideration of the evidence presented during the hearing, the Hearing Officer concludes that the Agency has presented sufficient facts to support its opinion that Grievant's overall work performance was at a level of Below Contributor during the re-evaluation period.

Grievant received a Below Contributor rating on the re-evaluation for the Core Responsibility of Support Project Development Activities. This opinion is supported by the evidence. Grievant did not demonstrate an adequate level of understanding of the ASAPS and VNIS systems. Most of his activities and assignments were not completed. Grievant did not follow the general priorities as determined by the Supervisor related to production support and daily tasks and application issues. Once tasks were prioritized, Grievant was unable to maintain the order work.

Grievant received a Below Contributor rating on the re-evaluation for the Core Responsibility of Analyze Assigned Projects to Develop an Understanding of Functional Needs Based on User Requirements. This opinion is supported by the evidence. Grievant did not complete most of his activities and assignments during the re-

evaluation period. Grievant did not successfully complete the necessary documentation that would provide support to the help desk and to technical production support staff.

Grievant received a Below Contributor rating on the re-evaluation for the Core Responsibility of Maintain Productive Working Relationships with Management, Peers, Customers, and Assigned Staff Using Good Communications Skills, Both Oral and Written. This opinion is supported by the evidence. Grievant's written and verbal communications were insufficient. He continued to ramble and provide extraneous information in emails and written notes. Grievant's status reports were due daily but an average of two reports were missing or late each week.

Grievant received a Below Contributor rating on the re-evaluation for the Core Responsibility of Support Production, On-call, Problem Resolution, and Evaluation of Projects After Migration to Production. This opinion is supported by the evidence. Grievant did not show improvement in the processing of VNIS and ASAPS work tickets.

When the workplan and Grievant's work performance during the 90 day re-evaluation period are considered as a whole, the Agency has presented sufficient evidence to support its opinion that Grievant's overall rating for the re-evaluation time period should be Below Contributor. Because Grievant receive a Below Contributor rating in the re-evaluation period, the Agency's decision to remove him from employment is supported by the record.

The Agency considered moving Grievant into another position to which he might have been more successful, however, no other positions existed in the Unit that Grievant could fill. The Agency did not have any beginner level systems analysts positions and did not wish to create one.

Grievant presented a statement from a Licensed Clinical Social Worker stating as follows:

My client, [Grievant], to the best of my knowledge and understanding is medically able to perform his essential job functions; however, he does have some diagnostic conditions that may qualify as disabilities under the Americans with Disabilities Act that can limit him in one or more life activities. Reasonable accommodation of these conditions could remove barriers for him.

Reasonable accommodations could contribute to [Grievant's] success in the workplace. You will find attached an outline that lists examples of limitations on life activities that often accompany [Grievant's] conditions, along with some suggestions for reasonable accommodations that might be appropriate to address those limitations. This attachment is in no way intended to be a prescription or a comprehensive list. Any

accommodations that might be implemented should be the result of discussions between [Grievant] and his supervisor.¹

The limitations/barriers attached to the LCSW's letter addressed such things as:

- Difficulty handling stress
- Fatigue
- Maintaining concentration
- Time management
- Memory
- Concentration
- Organization and prioritization
- Hyperactivity
- Multi-tasking
- Paperwork
- Oral communications

The Agency reviewed the LCSW's letter and attempted to accommodate all of the items listed to the extent it could. For example, the Agency moved Grievant to an office work cube that was isolated from other employees in order to minimize distractions and enhance Grievant's concentration on his work duties. During meetings, the Manager would remind Grievant to stay awake and he would do so. The Agency attempted to reduce Grievant's stress by simplifying the tasks given to him. The Agency made schedules for Grievant and encouraged him to follow the schedules. The Agency attempted to send Grievant one email at a time instead of placing many documents on his desk at one time. When viewed as a whole, the Agency's accommodations were reasonable and consistent with the LCSW's expectations.

Grievant contends that he was sometimes given tasks which could not be completed on a timely basis because of the nature of the task and not because of Grievant's work performance. To some extent, Grievant's assertion is true. When the evidence is viewed as a whole, however, those examples were the exception and did not represent the majority of tasks Grievant was supposed to complete but failed to timely complete.

Grievant argued he should not have been put in his former position by the Agency. This argument is irrelevant. In 2007, Grievant was asked by the Manager if he wanted to be a Systems Analyst or a Business Analyst. Grievant responded that he would follow the Manager's guidance. The validity of that decision is not an issue before the Hearing Officer. Once Grievant agreed to be a Systems Analyst, he was obligated to comply with the requirements of his position.

¹ Grievance Exhibit 2.

DECISION

For the reasons stated herein, the Agency's removal of Grievant based on an unsatisfactory 90 day re-evaluation 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.²

[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

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.