

Issue: Non-Disciplinary Termination (below contributor rating); Hearing Date: 05/27/09; Decision Issued: 06/01/09; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9075; 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: 9075

Hearing Date: May 27, 2009
Decision Issued: June 1, 2009

PROCEDURAL HISTORY

Grievant was removed from employment on January 15, 2009 due to unsatisfactory performance following a performance re-evaluation. 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 April 16, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 27, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether the Agency's re-evaluation of Grievant's work performance is 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:

Virginia Tech employed Grievant as a Unit Administrative Assistant at one of its Facilities. Grievant reported to the Unit Coordinator.

On October 2, 2008, Grievant received an annual performance evaluation rating her overall work performance as Below Contributor. On October 17, 2008, the Unit Coordinator presented Grievant with a Performance Plan for the 90 day re-evaluation period. The Plan also established six meeting dates during which Grievant and the Unit Coordinator were to review Grievant’s progress. Grievant’s work performance during the re-evaluation period was not satisfactory to the Agency. On January 5, 2009, Grievant received a 90 day re-evaluation rating her overall performance as Below Contributor. On January 15, 2009, Grievant was advised that due to unsatisfactory work performance, she would be removed from employment effective January 15, 2009 at 5 p.m.

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.

On October 17, 2008, the Unit Coordinator presented Grievant with a Performance Plan for Grievant that identified the Agency's expectations for her performance for the time period from October 17, 2008 to January 15, 2009. The Plan established dates for six meetings between Grievant and the Unit Coordinator to review Grievant's progress. The Plan identified the Core Responsibilities of, Teamwork, Financial and Budget, General Clerical/Program Support, Adaptability/Flexibility, Dependability/ Initiative and Innovation. The Agency referred to these as Dimensions.

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. The Agency presented sufficient facts to support its opinion regarding Grievant's work performance for each of the Dimensions.

Grievant received a Contributor rating for the Dimensions of:

- Maintaining a Safe and Secure Work Environment.
- Diversity Commitment
- Office Management
- Clientele Contact

Grievant received a Below Contributor rating for the Dimension of Teamwork. This opinion is supported by the evidence because the Unit Coordinator received feedback from employees to whom Grievant was supposed to provide support. That feedback consisted of comments that Grievant was sometimes resistant to providing them with assistance. Some of these employees would perform support functions for themselves rather insisting on help from Grievant.

Grievant received a Below Contributor rating for the Dimension of Financial and Budget. This opinion is supported by the evidence. Grievant had been instructed by the Unit Coordinator to notify her upon the arrival of the bank statement and to notify her when the Banner report and local checking account were ready for review. Grievant did not do this on a timely basis.

Grievant received a Below Contributor rating for the Dimension of General Clerical/Program Support. This opinion is supported by the evidence. To assist with Grievant's skills with certain software programs that she used on a routine basis, Grievant was instructed to complete tutorials available on the Agency's intranet or spreadsheet and word processing software. Grievant was to notify the Unit Coordinator when steps were completed and to discuss what Grievant learned from the tutorials with the Unit Coordinator on a weekly basis. Grievant was unable to fully understand and implement the tutorial lessons.

Grievant received a Below Contributor rating for the Dimension of Dependability. This opinion is supported by the evidence because Grievant resisted taking directions from the Unit Coordinator and was sometimes argumentative when instructions were given. When the Unit Coordinator provided Grievant with constructive criticism, Grievant was reluctant to accept personal responsibility and attempted to blame others.

Grievant received a Below Contributor rating for the Dimension of Adaptability/Flexibility. This opinion is supported by the evidence. The Unit Coordinator had discussions with Grievant in anticipation of the arrival of a new Acting Unit Coordinator. The Unit Coordinator instructed Grievant to prepare transmittal slips that would be ready when the new Acting Unit Coordinator arrived in January 2009. Grievant was reluctant to comply with the instruction. Grievant was repeatedly questioned and prompted regarding her routine tasks during the re-evaluation period.

Grievant received a Below Contributor rating for the Dimension of Initiatives/Innovation. This opinion is supported by the evidence. Grievant was expected to utilize the Internet tutorials for software programs to enhance and improve her skills. She did not take the initiative to improve her skills.

When the Performance Plan 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 received a Below Contributor rating in the re-evaluation period, the Agency's decision to remove her from employment is supported by the record.

Grievant argued that she performed her duties as required. She presented evidence to support this assertion. Although it is clear that many aspects of Grievant's performance were consistent with the Agency's expectations, there were a sufficient number of instances in which Grievant's work performance was not consistent with the Agency's expectations.

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.¹

[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

¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.