

Issues: Hostile Work Environment, Arbitrary/Capricious Performance Evaluation and Retaliation; Hearing Date: 06/17/09; Decision Issued: 06/23/09; Agency: DOC; AHO: Carl Wilson Schmidt, Esq.; Case No. 9085, 9086; Outcome: No Relief – Agency Upheld in Full; **Administrative Review: Reconsideration Request received 07/08/09; Reconsideration Decision issued 07/09/09; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9085 / 9086

Hearing Date: June 17, 2009
Decision Issued: June 23, 2009

PROCEDURAL HISTORY

On September 14, 2007, Grievant filed a grievance challenging the Agency's issuance of a Notice of Improvement Needed/Substandard Performance, alleging a hostile work environment, and claiming retaliation. On February 1, 2008, Grievant filed a grievance challenging the Agency's issuance of an Employee Work Profile, a Written Notice, a Notice of Improvement Needed/Substandard Performance and her performance evaluation.

The outcome of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On April 2, 2009, the EDR Director issued Ruling 2009-2196 and 2009-2197 qualifying and consolidating the matters for hearing with the exception of the Written Notice. On May 19, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 17, 2009, a hearing was held at the Agency's regional office. On June 22, 2009, Grievant provided additional documents to the Hearing Officer.

APPEARANCES

Grievant
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether the Agency subjected Grievant to a hostile work environment?
2. Whether Grievant's evaluation and Notice of Improvement Needed/Substandard Performance were arbitrary or capricious?
3. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Grievant to show 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.

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 Corrections employed Grievant as an Account at one of its Facilities. The purpose of her position was:

To provide accounting assistance to the Unit's Manager and Senior Accountants by performing a variety of accounting duties related to various projects in the areas of the Unit's overall responsibility (Inmate Trust, Commissary, Inmate Pay, FAACS, LAS, etc.).¹

On February 12, 2007, Grievant received a Group II Written Notice for failure to follow a supervisor's written instructions.² Grievant did not timely appeal the issuance of this Written Notice.

On February 13, 2007³, Grievant received an updated Employee Work Profile. Under Personal Learning Goals the EWP stated:

Employee will be required to select training alternatives that enhance personal/professional development in the areas of 1) customer service

¹ Grievant Exhibit 10.

² Grievant Exhibit 2.

³ The EWP for the period October 25, 2006 through February 12, 2007 was not provided.

skills, 2) interpersonal relations skills, 3) English grammar and spelling skills, and 4) the Fixed Assets Accounting and Control System (FAACS).

On August 16, 2007, Grievant received a Notice of Improvement Needed/Substandard Performance.

On November 1, 2007, Grievant received an annual performance evaluation with an overall rating of Below Contributor. The Supervisor wrote in conclusion:

This performance year has been an unsatisfying and frustrating year. The central theme has been [Grievant's] inability to work as part of the [Unit's] team. The performance year has included instances of insubordination, misuse of time and disruptions within the work unit. Inordinate amounts of time have been consumed within formal and informal meetings designed to resolve perceived issues. Limited Unit resources have been further limited because flexibility and staff assignments have been negatively impacted due to personality issues. The single largest disappointment has been [Grievant's] unwillingness to recognize and accept responsibility for her contributions to the unit's problems. She failed to follow through on critical required training and other recommendations designed to help her improve in the area of interpersonal relations skills and more importantly help the unit function more efficiently and effectively. This failure coupled with a combative attitude contributed significantly to a sub-par performance rating.⁴ (Emphasis original.)

CONCLUSIONS OF POLICY

Hostile Work Environment

To prove her claim of hostile work environment, Grievant must show the conduct at issue was (1) unwelcome; (2) based on a protected status; (3) sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive or hostile work environment; and (4) imputable on some factual basis to the agency. "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."⁵

Grievant has not established that she was subject to a hostile work environment. Protected status includes such things as race, sex, color, national origin, religion, sexual

⁴ Grievant Exhibit 10.

⁵ See EDR Ruling 2009-2196, 2009-2197.

orientation, age, veteran status, political affiliation, or disability. Grievant has not established that any of the actions by the Agency of which she complains were based on her protected status. The Written Notice, Notice of Improvement Needed/Substandard Performance, and Below Contributor rating on her annual performance evaluation resulted from the Agency's concerns about Grievant's poor work performance. The actions taken by the Agency were not pretexts for discrimination against Grievant.

Arbitrary or Capricious Evaluations

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.

A Notice of Improvement Needed/Substandard Performance is a form completed by the immediate supervisor during the performance cycle to document substandard performance and the need to improve performance. This notice is much like a performance of violation in that it reflects a supervisor's opinion of an employee's work performance. The Notice of Improvement Needed/Substandard Performance may not be arbitrary or capricious.

On August 16, 2007, Grievant received a Notice of Improvement Needed/Substandard Performance describing her performance deficiencies as:

[Grievant] has poor interpersonal relationships with co-workers within the [Unit] and with field personnel outside the unit. She is perceived as being combative and personnel often avoid having any contact with her in order to avoid conflict. She has failed to recognize how her interactions affect others and therefore has not made acceptable progress in correcting this problem. This situation has become disruptive to the efficient and effective functioning of the unit.

On November 1, 2007, Grievant received an annual performance evaluation with an overall rating of Below Contributor. Grievant received a Below Contributor rating for the Core Responsibility of:

Effectively interacts with other [Unit] staff in completing the work of the unit. Provides support to staff by offering and/or accepting assistance with tasks when workloads demand help, offering and/or accepting training where needed, and presenting an image of teamwork and unity to the unit's internal and external customers.

The Supervisor wrote:

[Grievant's] interactions with her co-workers during the year have been significantly ineffective. It is the Unit Manager's determination that [Grievant] has been the controlling factor in determining the degree of unsuccessfulness of her interactions with co-workers. This performance factor impacted nearly every other core responsibility during the performance year.⁶

Grievant received a rating of Below Contributor for the Core Responsibility of:

Provide primary accounting-related support and policy/procedure interpretation in the areas of FAACS (Fixed Assets Accounting System) and LAS (Leased Asset System) to DOC users. The Accountant will be expected to be able to function independently by June 1, 2007.

The Supervisor wrote:

[Grievant] received several weeks of training in FAACS/LAS. In addition, in order to focus more on this training, she was excused from her duties of providing back-up support to Inmate Pay and Trusts systems users. There were some difficulties during this process between [Grievant] and the Trainer. After several weeks of the training (well after June 1, 2007), [Grievant] was asked on several occasions if she was ready to take over the FAACS/LAS duties and function on an independent basis. Her answer to this question was one of uncertainty (unsure about her ability to perform) and the FAACS/LAS duties are still split between her and another employee as of today (November 1, 2007).

Grievant received a rating of Below Contributor for the Core Responsibility of:

Provide back-up accounting-related support and routine policy/procedure interpretation in the areas of Inmate Payroll and Inmate Trust to system users. The Accountant will only be expected to address routine/less complex problems and occasionally communicate solutions directly to others.

The Supervisor wrote:

[Grievant] never quite felt comfortable performing this duty. Despite the fact that she actually performed Inmate Trust duties in the field for two years at a Field Unit, she continually complains about the lack of written

⁶ Compare this with Grievant's 2003 evaluation where the Supervisor wrote that Grievant had exceeded his expectations in her interactions with co-workers and others. Grievant's first joined the Unit in 2003.

procedures that prevented her from functioning (in her judgment) at an acceptable level. Even when it was explained to her that she would only be expected to "address routine/less complex problems" and that any problem she felt was beyond her capabilities could be deferred to the primary support person, she continued to complain. [Grievant] failed to display the personal initiative that others before her used to learn the system and perform at an acceptable level. It is also the Unit Manager's determination that [Grievant's] extreme dislike and distrust of her co-workers (the primary support person) was a determining factor in her failure to contribute to the unit's success in this area.

Grievant received a Below Contributor rating for the Unit Objective of:

Consistently prompt, courteous and accurate responses to internal/external customer requests for information/assistance. Evaluation will be based upon feedback from customers and observations of unit manager.

The Supervisor wrote:

In February 2007, [Grievant] was directed to select training in the area of customer service skills as part of her Employee Development Plan. In August 2007, [Grievant] was presented with a Notice of the Improvement Needed/Substandard Performance again requiring training in the area of customer service skills. Given the fact that [Grievant] was aware that she needed to improve her customer service skills with internal co-workers as well as external field personnel, she should have demonstrated more up personal initiative and a sense of urgency in scheduling the training on a timelier basis on her own to demonstrate a genuine desire to improve. (Emphasis added).

The Agency has presented sufficient evidence to support the Supervisor's opinion that Grievant should have been given a Notice of Improvement Needed/Substandard Performance and a Below Contributor rating for her annual performance evaluation.

Grievant presented credible evidence showing that there were many people "in the field" with whom she worked regularly and whom considered her to be very knowledgeable, approachable, and considerate. The Agency present credible evidence showing that there were several people "in the field" who found Grievant very difficult to work with, not approachable and not knowledgeable. For example, Ms. S, an Accountant Senior, testified she received numerous calls from people who are frustrated in their dealings with Grievant. They complained they did not receive the information they sought from Grievant. One individual, Ms. C, refused to deal with Grievant any longer. Ms. C told Ms. S that that she could not "get anywhere" with Grievant and felt Grievant was condescending. When the Supervisor spoke with Ms. C

on July 26, 2007, she told him Grievant “talked down” to people and often “talked in circles.” Ms. C described Grievant as rigid, inflexible, very demanding and demeaning.

Grievant testified that she attempted to get along with her co-workers but they were not responsive to her. She pointed out that she is good at communicating and has interests in such organizations as Toastmasters, which helps its members gain communication skills. The Agency presented credible evidence that Grievant did not get along well with Ms. S and Mr. R who worked in Grievant's unit. For example, Ms. S testified she would not go to talk with Grievant because Grievant would "jump down my throat or roll her eyes" during many of their conversations. Ms. S felt uncomfortable talking with Grievant. Grievant would sometimes "hover over" Ms. S in an intimidating manner during their conversations. Mr. R would frequently complain to the Supervisor about Grievant's demeanor towards him. For example, on July 25, 2007, Mr. R wrote an email to the Supervisor reporting that Grievant had refused to read his emails because he had sent her too many. As he was leaving for lunch, he again asked Grievant to read his emails, but Grievant began “talking over me”, acting rudely, and refusing to listen to what Mr. R was saying.⁷ Grievant told the Supervisor she did not like Mr. R.

When the Hearing Officer asked the Supervisor why he believed the Grievant was the source of the conflict instead of Ms. S and Mr. R, the Supervisor said initially he did not believe Grievant was the source of the conflict. He spoke with Ms. S and Mr. R as well as Grievant to attempt to resolve the conflict. At some point he began noticing that Grievant was engaging in behavior in front of him that was the same as the behavior complained about by Ms. S and Mr. R. At that point, he realized Grievant was the greater cause of the conflict in the Unit. The Supervisor's comment shows that he did not form his opinion in disregard of a material fact or without a reasoned basis.

It is not necessary for the Agency to show that every person Grievant dealt with objected to her. It is sufficient for the Agency to demonstrate that some of the individuals Grievant dealt with found her behavior objectionable. The Agency has met this standard. The Agency's conclusion that Grievant had poor interpersonal skills with field personnel is not in disregard of the facts or without a reasoned basis.

Grievant was instructed in February 2007 to obtain training regarding her customer service skills. She took no initiative to find training until the lack of initiative was pointed out by the Supervisor in the Notice of Improvement Needed/Substandard Performance. Even after this was pointed out to Grievant, she did not complete all of the required training. The Agency had authorized to pay for Grievant's training. Grievant's failure to obtain required training supports the Agency's rating of her work performance as Below Contributor.

⁷ Mr. R was responsible for training Grievant at the time of their confrontation.

When the facts of this case are considered as a whole, the Agency's issuance of a Notice of Improvement Needed/Substandard Performance and Below Contributor evaluation were not arbitrary or capricious.

Employee Work Profile

Grievant contends that the Agency added duties to her Employee Work Profile thereby justifying an increase in her compensation. Grievant believes her duties reflected the duties of a Senior Accountant. Based on the evidence presented, it is clear that the Agency added some additional duties to Grievant's Employee Work Profile and the Agency's Employee Relations Compensation staff reviewed her request for increased compensation to reflect her duties.⁸ The Hearing Officer has no credible evidence to show that the conclusions reached by the Agency's Employee Relations Compensation staff were in error. Grievant has the burden of proof to show mistakes were made in that assessment. She has not met that burden of proof.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;⁹ (2) suffered a materially adverse action¹⁰; 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 shows by a preponderance of the evidence that 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.¹¹

Grievant engaged in protected activities because she filed grievances and complained about her co-workers. Grievant suffered materially adverse actions

⁸ The Deputy Director asked the Compensation Manager to determine if Grievant's duties were at the Senior Accountant or the Accountant level. He concluded that Grievant's position was operating at the Account level but he suggested some changes in the wording of the EWP.

⁹ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

¹⁰ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹¹ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

because she received a Written Notice, a Notice of Improvement Needed/Substandard Performance, and a Below Contributor annual evaluation. Grievant has not established any connection between her protected activities and the materially adverse actions. Grievant has not established that the Agency took action against her as a pretext for retaliation.

DECISION

For the reasons stated herein, the Grievant's requests for relief are **denied**.

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.¹²

[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

¹² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9085 / 9086-R

Reconsideration Decision Issued: July 9, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

The hearing was held on June 17, 2009. Because of the Agency’s delays in sending information to Grievant, the Hearing Officer permitted Grievant to submit additional documentation following the hearing date. The original deadline was Friday, June 19, 2009. Grievant sought an extension until Monday, June 22, 2009 and the Hearing Officer granted that request. Grievant submitted her remaining documents on Monday June 22, 2009. The Hearing Officer reviewed all of the documents submitted by Grievant following the hearing and drafted a decision. Grievant’s evaluation was not arbitrary or capricious.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer