

Issues: Arbitrary/Capricious Performance Evaluation and Termination (poor performance); Hearing Date: 08/24/09; Decision Issued: 08/25/09; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No. 9143, 9153; Outcome: Full Relief. Fees Addendum issued on 09/14/09.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9143, 9153

Hearing Date: August 24, 2009
Decision Issued: August 25, 2009

PROCEDURAL HISTORY

Grievant received her 2008 annual performance evaluation with an overall rating of Below Contributor. She filed a grievance challenging that evaluation. Grievant received a 90 day re-evaluation with removal after receiving an overall rating of Below Contributor. Grievant filed a grievance challenging that re-evaluation with removal. The outcomes of the Third Resolution Steps were not satisfactory to the Grievant and she requested a hearing. On July 13, 2009, the EDR Director issued Ruling No. 2009-2235 qualifying the grievance regarding the annual performance evaluation for hearing and consolidating it with the second grievance. On July 28, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 24, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Attorney
Agency Party Designee
Agency Advocate
Witnesses

ISSUES

1. Whether Grievant's annual evaluation and 90 day re-evaluation were arbitrary or capricious?
2. Whether the Agency misapplied State policy?
3. Whether the Agency retaliated against Grievant?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its re-evaluation with removal was warranted and appropriate under the circumstances. Grievant has the burden of proof to show that the Agency's annual performance evaluation was contrary to policy and was arbitrary or capricious and that the Agency retaliated against her. 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 a Program Administrative Specialist II until her removal. She had been employed by the Agency for since 1999.

Grievant received an Employee Work Profile with an effective date of October 25, 2007.

Grievant filed a grievance on April 3, 2008 regarding a conflict she had with another employee. She complained that she sought help from the Supervisor but the Supervisor failed to properly respond. The Supervisor testified that she believed Grievant was the primary source of the conflict between Grievant and the coworker.

Grievant received a written counseling memo on April 7, 2008, August 28, 2008, September 8, 2008, and October 24, 2008.

On October 28, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance regarding her poor work performance. The form stated that Grievant "must make immediate improvement in the performance of your duties. Continued poor performance as described below may result in an overall 'Below Contributor' rating on the annual performance evaluation in this performance cycle."¹

¹ Agency Exhibit 9.

The Agency set forth an improvement plan in the Notice of Improvement Needed/Substandard Performance.

On November 17, 2008, Grievant received an annual performance evaluation rating her overall work performance as Below Contributor. Because of the poor annual performance evaluation, the Agency decided to schedule a 90 day re-evaluation. Instead of creating a separate improvement plan, the Agency used the improvement plan in the Notice of Improvement Needed/Substandard Performance as the improvement plan for a 90 day re-evaluation.

Grievant failed to comply with the terms of the improvement plan during the 90 day re-evaluation. She received an overall rating of Below Contributor on February 20, 2009. She was removed from employment based on the poor re-evaluation.

CONCLUSIONS OF POLICY

The Agency presented substantial credible evidence to show that its annual evaluation and 90 day re-evaluation of Grievant were not arbitrary or capricious with respect to the Agency's description of Grievant's work performance. Even though the Agency's evaluations of Grievant were not arbitrary or capricious, they were not issued in accordance with DHRM Policy 1.40 and must be reversed.

DHRM Policy 1.40 governs Performance Planning and Evaluation. Employees receive annual evaluations for the performance cycle usually beginning October 25th and ending on October 24th of the following year.

The effective date of Grievant's Employee Work Profile was October 25th 2007 and, thus, the performance cycle for her 2008 annual evaluation ended October 24, 2008.

Grievant received a Below Contributor rating on her annual performance evaluation. DHRM Policy 1.40 defines "Below Contributor Rating" as:

Results or work that fails to meet performance measures. To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle.

Effective July 10, 2007

A Written Notice (Standards of Conduct Policy 1.60) that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "Below Contributor".

Grievant received a Notice of Improvement Needed/Substandard Performance on October 28, 2008. This is after the end of the 2008 performance cycle. In other words, Grievant received a Notice of Improvement Needed/Substandard Performance for the 2009 performance cycle. In order for Grievant to receive an overall rating of Below Contributor for her 2008 performance evaluation, the Agency would have had to issue the Notice of Improvement Needed/Substandard Performance during Grievant's 2008 performance cycle.² The issuance of a Notice of Improvement Needed/Substandard Performance is a condition precedent to the Agency's ability to issue an annual evaluation with an overall rating of Below Contributor. Because the Agency failed to timely issue the Notice of Improvement Needed/Substandard Performance, the Agency was not authorized to issue Grievant an overall rating of Below Contributor on her 2008 annual performance evaluation. In order for the Agency to be in compliance with DHRM Policy 1.40, the Agency must re-issue Grievant's 2008 annual performance evaluation with an overall rating of at least Contributor.

The Agency conducted a 90 day re-evaluation of Grievant's work performance after the 2008 annual evaluation. The Agency concluded Grievant's work performance during the 90 day period was so inadequate as to justify the issuance of an overall rating of Below Contributor. With the issuance of an overall rating of Below Contributor for the 90 day re-evaluation, the Agency concluded Grievant should be removed from employment.

DHRM Policy 1.40 provides:

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below.

There was no basis in policy to issue Grievant a Below Contributor rating on her 2008 annual performance evaluation. Thus, Grievant must be deemed to have received at least a Contributor rating on her annual 2008 performance evaluation. An employee who receives an overall rating of Contributor on his or her annual performance evaluation is not subject to a 90 day re-evaluation. The Agency's issuance to Grievant of a 90 day re-evaluation is without effect. Because the Agency's 90 day re-evaluation is without effect, there exists no basis to remove Grievant from employment. Her removal must be reversed.

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he

² Grievant did not receive any Written Notices during the 2008 performance cycle. Grievant received counseling memos but only written notices may be used in placed of a Notice of Improvement Needed/Substandard Performance.

is to be re-instated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;³ (2) suffered a materially adverse action⁴; 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.⁵

Grievant engaged in protected activities by filing a grievance on April 3, 2008. Grievant suffered a materially adverse action because she received poor performance evaluations with removal. Grievant has not established a link between her protected activity and the materially adverse action. Grievant received poor performance evaluations because her work performance was lacking. The Agency did not understate her work performance as a pretext to retaliation.

DECISION

For the reasons stated herein, the Agency is ordered to re-issue Grievant's 2008 performance evaluation to show an overall rating of at least Contributor. The Agency is ordered to rescind Grievant's 90 day re-evaluation because it is without effect. The Agency is ordered to **reinstate** Grievant to Grievant's former position, or if occupied, to an objectively similar position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue. Grievant's request for relief from retaliation is **denied**.

³ 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.

⁴ 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.

⁵ 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).

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.⁶

⁶ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 9143 / 9153-A

Addendum Issued: September 14, 2009

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁷ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁸

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant is awarded reimbursement for attorney's fees in the amount of \$5,384.10 representing 41.1 hours at the rate of \$131 per hour.

AWARD

The grievant is awarded attorneys' fees of \$5,384.10.

⁷ Va. Code § 2.2-3005.1(A).

⁸ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the EDR Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

Carl Wilson Schmidt, Esq.
Hearing Officer