

Issue: Removal from Employment after Re-Evaluation; Hearing Date: 06/02/10;
Decision Issued: 06/09/10; Agency: Department of Rehabilitative Services; AHO:
Carl Wilson Schmidt, Esq.; Case No. 9327; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9327

Hearing Date: June 2, 2010
Decision Issued: June 9, 2010

PROCEDURAL HISTORY

Grievant was removed from employment based upon a re-evaluation. On February 26, 2010, 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 May 3, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 2, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's re-evaluation was arbitrary or capricious?
2. Whether the Agency failed to comply with State policy in its removal of Grievant?

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 warranted and appropriate under 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 Rehabilitative Services employed Grievant as a Disability Determination Analyst - Journey until her removal in January 2010. She began working for the Agency in 2002. The purpose of Grievant’s position was:

Evaluates initial requests for medical information completed by the DDS Development Center staff. Develops medical evidence on continuing disability reviews. Adjudicates assigned caseload of disability claims filed under Title II, Title XVI, and Title XIX of the Social Security Act, as amended, to include adult and childhood disability claims, and initial continuing disability review claims. Secures and objectively evaluates medical, vocational, and other relevant information in an accurate, timely and cost-effective manner according to applicable federal regulations.¹

Grievant’s Core Responsibilities included Productivity, Accuracy, Timeliness, Customer Service, and Cost.

On March 13, 2009, Grievant received a Notice of Improvement Needed/Substandard Performance which stated:

This form documents that you 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 conducted in this performance cycle.

Description of specific performance deficiencies and improvement needed:

Your production is below the expectations in the Employee Work Profile and the average production of coworkers receiving the same assignments of the same types of claims. Your productivity must show substantial

¹ Agency Exhibit B.

improvement in final claims dispositions and completion of necessary case actions.

The employee work profile of a journey level analyst defines minimal production standard as 149 claims dispositions per quarter to achieve a total production of 598 per year. A journey level analyst is expected to make 12-13 determinations per week over the course of 48 workweeks (48 weeks allows for absences due to State holidays and personal leave use). Your production has been 5-6 claims per week.

Routine checks of Electronic Workload Summary and worksheet display screens confirm a large number of claims in your caseload have significant delays in pending actions. For example, my 12/29/08 e-mail directed you to take actions on [Ralph] by 1/9/09. Ralph has continued to be named in work plans e-mailed to you on 1/12/09, 2/18/09 and again 3/5/09.

You have not followed the work plans sent to you. You have been provided with work plans that targeted 4-5 claims for substantial actions, i.e., development, consultative examinations or determinations, on a daily basis as an analyst must review a minimum of 5 claims daily in order to adjudicate 2-3. You have not taken all necessary actions on the claims identified in the work plan or on an equivalent number of claims of your own choosing.

Had the EWS checks not identified so many delayed actions, low case assignments may have accounted for the low number of final determinations. Current case actions would have shown that the claims could not be disposed because required documentation was still pending. Had a substantial number of current case actions been recorded in the EWS, more productive use of your time may have been inferred. However, these indicators were not present.

We have discussed the importance of increasing your production several times the last being 2/12/09. You have always indicated that you understood the performance expectations. You have stated you do not like working the claims identified for you because you knew of other more pressing claims you would prioritize differently. Although I have told you many times I would consider alternatives, you have not been able to provide another method that would work better for you. You have not discussed other claims to revise the priorities on the lists provided.

Improvement plan:

Continue to identify 5 claims to handle daily for thorough completion of all necessary case actions. Record all calls and case actions taken on the electronic worksheet with appropriate follow-up tickle dates.²

On October 30, 2009, Grievant received an annual performance evaluation with an overall rating of "Below Contributor". Grievant received a rating of Below Contributor for the core responsibility of Productivity. The Supervisor wrote:

[Grievant] failed to develop a work plan that resulted in a positive contribution toward the agency's budgeted workloads. [Grievant] was unable to follow the work plans outlined by her supervisor. Claims were often handled far past the dates identified by the Supervisor, while other claims were worked out of order. [Grievant] was directly assigned 405 claims but only disposed of 361. [Grievant] started the work year with 65 claims in her caseload and ended the year with 92. During the second and third quarters, she had very low case assignments and "lost" Medicaid claims when they were reassigned to other analysts to work a joined SSA claim. [Grievant] work independently in her decision-making and was accurate in her final forms completion.

Grievant received a rating of Below Contributor for the core responsibility of Timeliness. The Supervisor wrote:

[Grievant's] overall MPT averaged 70.6 days per claim for the year. MPT on her one initial SSA claim determination was 50.0. She had not yet adjudicated her one recon claim. Supervisory case reviews found accuracy below 90% in three consecutive quarters. Regular checks of her electronic worksheet screens found delayed case actions. Although case scroll data contained notes in the remarks section [, it] was not clear the display was utilized as an organizing tool. In a prolonged situation of low assignments, the claims assigned should have been adjudicated properly and efficiently.

As a result of Grievant's Below Contributor rating on her annual performance evaluation, the Agency informed Grievant that she would be subject to a 90 day re-evaluation period. On November 6, 2009, Grievant was given a Re-evaluation Work Plan for the period October 30, 2009 to January 31, 2010. The Work Plan stated:

Performance:

This work plan is effective immediately. It will be used during the three-month evaluation period that follows the below contributor performance evaluation discussed 10/30/09. It may be amended based on changes in your work performance. It may also be amended to include directives to the unit as a whole. The work plan will remain in effect

² Agency Exhibit D.

pending satisfactory work performance. Two weeks before the end of the evaluation period, you will receive another performance evaluation. You will be rated as either contributor or below contributor. If you are ranked below contributor, this agency must take one of three personnel actions: reassignment of duties with a decrease in pay, demotion with a decrease in pay, or termination.

Purpose:

Productivity is a core responsibility of an analyst's job. It is the result of independent application of your knowledge of the disability process and documentation requirements. It reflects your caseload management because it shows your awareness of the claims in your caseload and your ability to appropriately prioritize claims for necessary actions. It shows you achieve time management as you follow-through with required actions. Productivity is closely linked to your attention to accuracy as you avoid diverting time from working some claims in order to rework others. Successful productivity should also improve ratings in the other core responsibilities of timeliness and customer relations when the number of claims with the late case actions remaining in the caseload decreases.

The purpose of this work plan is to identify cases and actions most likely to increase your productivity to minimal expectations. The structure of the work plan should also serve as a model for your own independent caseload management. Flexibility is important and specific directives may be revised following consultation with your supervisor. However, deliberate deviation from the work plan will be viewed as failure to follow supervisor's directives and may be dealt with under the Standards of Conduct.

Structure:

The supervisor will provide weekly list of cases to be worked. The list will be comprised of claims identified by regular review of Examiner Summary Display and Case Worksheet Display screens. Cases may also be prioritized for attention based on QA feedback[,] Supervisory Case Reviews and claimant contacts.

You must handle enough claims to generate a weekly flow of 13+ decision ready claims. To this end, substantial actions on a minimum of four claims identified by the supervisor will be handled daily. You may negotiate substituting claims on the list to accommodate signed CE reports, critical information on age claims or the expiration of failure to cooperate deadlines. However, citing unapproved substitutions as explanation of failing to follow supervisor's directives will not be accepted. In the supervisor's absence, the case consultant is available to help you prioritize your work.

You are expected to demonstrate independent caseload management. In addition to the structure provided by the supervisor's list, you are expected to review all new cases daily. Within three days of receipt, new cases should have subsequent development undertaken to include decisions and referrals to medical consultants. CE reports should be read and acted upon within 3 days of receipt. QA and referral returns from SAMC/PC's will be handled within 24 hours.

Support:

The supervisor and case consultant are available to answer questions and direct you to available resources. Additional training for reconsideration and best practices will be provided.

Re-evaluation:

A finding of contributor at the end of the re-evaluation period, will be based on demonstrated independence in successful performance of all core responsibilities outlined in the Employee Work Profile for Journey Analyst. Supervisory Case Reviews, Case Worksheet Display and Examiner Summary Display screens, as well as QA feedback will be considered.³

On January 29, 2010, Grievant received a re-evaluation of her work performance. This re-evaluation stated, in part:

Reviews of your work since 11/6/09 have shown that you have consistently performed at Below Contributor level. Your work has not met the minimal standards for core responsibilities of the position.

You have failed to follow supervisor's directives because you have not worked the cases identified in the work plans by the deadlines given. Cases were cited at work plan after work plan often going months without necessary case actions being taken. For example, several cases were cited 09/28/09 work plan for handling on 10/1/09 and 10/2/09. In same cases were still awaiting actions by 1/20/10: [GM] [GG] and [RM].

You have not provided timely customer service due to seriously delayed case actions. Routine reviews of workload summary scroll and case worksheet display screens have consistently found cases which had all requested information in file or indication that requests has expired and other actions were necessary. Thirty Medicaid only claims had to be pulled for handling by others on 1/12/10. On that date you had a 118 claims remaining in your caseload. Of these, at least 75 required necessary actions be taken.

³ Agency Exhibit F.

You have not demonstrated the ability to manage a caseload. You have not prioritized your work in order to make timely decisions. Your case receipts have been steady. You have been assigned less SSA claims than other DDS analysts. (You have only been assigned SSA claims that were joined to Medicaid claims already assigned.) In the 13 weeks of the last performance quarter you cleared 74 claims which averaged only 5.7 claims a week showing no improvement in production. The minimal number of cases a journey analyst should have disposed of was 164. You did not clear half that number.

You have not demonstrated the ability to read and concisely summarize large amounts of information. Reviews of your caseload have routinely found medical evidence of record has not been summarized. Reviews electronic worksheets for SSA claims finds that evidence has not been opened to be read.

You have failed to attempt to work claims that would have provided you an opportunity to acquire necessary computer and program knowledge each DDS analyst is required to utilize. Claims such as [VH] [CC] [MC] and [SF] were listed a work plans. The Disability Determination Explanation has been started and in some cases completed for you, but you did not attempt to finalize the claims. By refusing to attempt to work the claims, you avoid the opportunity to obtain help to learn what you did not know.⁴

Agency Managers considered whether Grievant could remain in her current position but with fewer duties or to be transferred to another position. When Agency and Managers concluded that another position was not available for Grievant, Grievant was removed from employment effective February 1, 2010.

CONCLUSIONS OF POLICY

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.

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed. Within 10 workdays of the

⁴ Agency Exhibits C.

evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.

- Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- The supervisor should develop an entire performance plan including, "Employee Development."
- If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form, which will be used for re-evaluation purposes. The form should clearly indicate that it is a re-evaluation.
- The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period.
- The employee's reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- If the employee transfers to another position during the re-evaluation period, the re-evaluation process will be terminated.

The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period. If an employee is absent for more than 14 consecutive days during the three (3)-month re-evaluation period, the period will be extended by the total number of days of absence, including the first 14 days.

If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period.

An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period. When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the re-evaluation period, the action is considered a Performance Demotion and the agency must reduce the employee's salary at least 5%.

As an alternative, the agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation period to remain in his or her position, and reduce the employee's duties. Such a reduction should occur following and based

on the re-evaluation and must be accompanied by a concurrent salary reduction of at least 5%.

If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's of duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.

The Agency substantially complied with the provisions of DHRM Policy 1.40, Performance Planning and Evaluation. Grievant received an annual evaluation with an overall rating of Below Contributor. She was given a re-evaluation work plan that identified the work she was expected to perform over the following three months and how her performance would be judged. The Agency's two primary concerns regarding Grievant's performance during the evaluation were Productivity and Timeliness. Grievant knew that she was expected to have productivity at the level of at least 11.5 claims for week.⁵ During the re-evaluation period, her productivity was 5.7 claims per week. Grievant knew that her timeliness was expected to be at the rate of 66 days per year or lower. Grievant's Mean Processing Time was at the rate of 147 days. The Agency's opinion that Grievant's work performance during the re-evaluation period should be rated as Below Contributor is supported by the evidence presented during the hearing. Following the re-evaluation, Agency Managers evaluated whether Grievant could remain in her current position with reduced duties, or be demoted or reassigned to another position. Agency Managers concluded that the Agency's business needs, in the absence of an available position, meant that the Agency's only option was to remove Grievant from employment.

Grievant argued that the Agency failed to properly train her to use the ECAT electronic processing system required to process SSA claims. As of October 26, 2009, Grievant had 107 claims pending. Of those claims, approximately 34 were Social Security claims that had to be processed using the electronic system. The evidence showed that in April 2009, Grievant and the four other analysts received training on the ECAT system. Grievant was introduced to ECAT in mid-August 2009. Part of Grievant's training was intended to be on-the-job. As she encountered problems or had questions with the ECAT system, she was expected to ask for guidance from the Supervisor or other employees who had more expertise with the system. During the re-evaluation period, Grievant did not ask the Supervisor any questions about the electronic system. Although evidence was presented that other analysts asked for assistance from system trainers, no evidence was presented that Grievant asked for assistance from anyone. To the extent Grievant was not properly trained regarding the electronic system, she was partially responsible for the inadequacy of that training because she did not seek information from anyone else regarding the system. There is no basis for the Hearing Officer to conclude that the Agency's re-evaluation was arbitrary or capricious because of the lack of training.

⁵ An Agency witness testified that the minimal expectation was 11.5 claims per week.

Grievant argued that Grievant's timeliness was affected by the cases selected by the Supervisor for Grievant to process. The Supervisor selected four cases of the eight cases Grievant was expected to "touch" during the day. Grievant was free to select four or more additional cases as she wished. The Supervisor's treatment of Grievant was consistent with her practice for the other analysts working in the unit. There is no reason to believe that the Supervisor selected more difficult cases or otherwise attempted to undermine Grievant's work performance. Several of the cases Grievant was instructed by the Supervisor to process, Grievant chose not to process. By failing to process those cases, Grievant adversely affected her timeliness. When the facts of this case are considered as a whole, it does not appear that Grievant was unfairly denied an opportunity to process her claims on a timely basis.

Grievant presented evidence of other analysts who believe they did not receive adequate training on the ECAT system and were unable to meet the Agency's timeliness expectations. Grievant argued that this evidence showed that the Agency's expectations of her were unreasonable. Grievant, however, also presented testimony from an analyst who received the same training and was subject to the same expectations as was Grievant but that analyst was able to meet the Agency's expectations during the same three month period of Grievant's re-evaluation. The fact that Grievant held a difficult job and the Agency's expectations for her work performance were strict does not show that the Agency's evaluation of her work performance was arbitrary or capricious.

Grievant argued that the Agency could have placed her in a trainee position rather than removing her from employment. The Agency developed a training program for new employees to learn how to process disability claims. A new employee would begin as a trainee 1, then advance to a trainee 2 and then to a trainee 3. An employee who was no longer considered in training would then advance to a journey analyst position like the one held by Grievant. The Agency's practice was never to return an employee who achieved the status of journey back to the status of a trainee. DHRM Policy 1.40 does not require agencies to find positions for employees receiving Below Contributor re-evaluation ratings when doing so would result in a change in the Agency's existing practice.

DECISION

For the reasons stated herein, the Agency's re-evaluation of Grievant with removal 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.⁶

[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

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