

Issues: Counseling Memo, Notice of Improvement Needed/Substandard Performance, Arbitrary/Capricious Performance Evaluation, and Termination (poor performance on re-evaluation); Hearing Date: 06/22/10; Decision Issued: 06/28/10; Agency: GMU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9341, 9342, 9343, 9344; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9341 / 9342 / 9343 /9344

Hearing Date: June 22, 2010
Decision Issued: June 28, 2010

PROCEDURAL HISTORY

Grievant filed several grievances challenging Agency's actions against her. The outcomes of the Third Resolution Step for each grievance were not satisfactory to the Grievant and she requested a hearing. On May 5, 2010, the EDR Director issued Ruling No. 2010-2588, 2010-2589, 2010-2607, 2010-2608 consolidating the grievances for a single hearing. On May 24, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 22, 2010, a hearing was held at the Agency's regional office. Grievant did not appear at the hearing nor present any documents prior to the hearing as directed by the Hearing Officer.

APPEARANCES

Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether the Counseling Memorandum was properly issued?
2. Whether the Notice of Improvement Needed/Substandard Performance was properly issued?

3. Whether the Agency's annual performance evaluation of Grievant was arbitrary or capricious?
4. Whether the Agency's removal of Grievant was 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 consistent with State policy. The burden of proof is on Grievant with respect to the other issues. 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:

On September 10, 2009, the Supervisor gave Grievant a Counseling Memo as a result of Grievant's inappropriate behavior towards her coworkers in general and specifically towards the Supervisor and Ms. S on July 30, 2009.

On September 10, 2009, the Supervisor gave Grievant a Notice of Improvement Needed/Substandard Performance regarding Grievant's insufficient responsiveness and timeliness, customer service, insufficient knowledge of her responsibilities, insufficient flow through, and attendance. The Notice also included an Improvement Plan setting forth measures to evaluate Grievant's work performance.

On October 22, 2009, Grievant received an annual performance evaluation with an overall rating of Unsatisfactory Performer. She received a rating of Unsatisfactory Performer for each of her five job functions. A rating of Unsatisfactory Performer is the same as a rating of Below Contributor under DHRM Policy 1.40.

Because Grievant received an overall rating of Unsatisfactory Performer on her annual evaluation, Grievant was given a work plan on October 26, 2009 setting forth her Performance Goals during the three month re-evaluation.

On January 6, 2010, Grievant was given a three-month re-evaluation with an overall rating of Unsatisfactory Performer. The Agency was unable to reduce her duties or find another position within the Agency for her. She was removed from employment effective January 22, 2010.

CONCLUSIONS OF POLICY

Grievant filed four separate grievances. The first grievance relates to a Counseling Memorandum she received from the Supervisor. The second grievance relates to a Notice of Improvement Needed/Substandard Performance. The third grievance relates to her annual performance evaluation. The fourth grievance relates to her three-month re-evaluation.

Counseling Memorandum

DHRM Policy 1.60, Standards of Conduct provides, in part:

Counseling is *typically* the first level of corrective action but is not a required precursor to the issuance of Written Notices. Counseling may be an informal (verbal) or formal (written) communication which conveys that an employee's conduct or performance was improper and must be corrected. This level of corrective action would be appropriate for conduct and/or performance issues resulting in minimal impact to business operations, to the safety and well-being of others, or that involve minor infractions of policies or laws.

Counseling may be documented by a letter or memorandum, but not on the Written Notice form. Documentation regarding counseling should be retained in the supervisor's files, and not in the employee's personnel file, except as necessary to support subsequent formal disciplinary action.

On July 29, 2009, Grievant sent Ms. S an email that raised concerns regarding Grievant's behavior. On July 30, 2009, the Supervisor met with Grievant and Ms. S to discuss the email. During that meeting, Grievant's behavior was unprofessional and inappropriate for the workplace. Grievant was condescending and abrasive towards the Supervisor. When the Supervisor listened to Grievant's concerns and offer solutions, Grievant continually responded in a condescending manner. For example, each solution offered by the Supervisor was dismissed as Grievant as being "fake". Grievant was unable to constructively reconcile her problems with Ms. S. Several times during the meeting, Grievant called Ms. S a "Mad Woman." In addition, Grievant made unfounded accusations against Ms. U. Based on the evidence presented, it is clear that the Supervisor had sufficient facts upon which to form the opinion that Grievant should be counseled regarding her behavior during the meeting on July 30, 2009. Grievant's request for relief with respect to being counseled must be denied.

Notice of Improvement Needed/Substandard Performance

A Notice of Improvement Needed/Standard Performance is a form completed by the immediate supervisor during the performance cycle to document substandard performance and the need to improve performance.¹

¹ See, DHRM Policy 1.40.

On September 10, 2009, the Supervisor gave Grievant a Notice of Improvement Needed/Substandard Performance addressing concerns regarding Grievant's work performance. The Supervisor had received feedback from Center Directors and other employees at the Agency that Grievant's work was slow and inefficient, her communication was not effective, her follow-through was lacking, and that other employees had difficulty working with Grievant. For example, several Center Directors told the Supervisor that when they asked Grievant to initiate the hiring of employees, Grievant did not begin the first steps in the process until several weeks after the initial request was made. Grievant should have more timely and initiated the hiring process on several occasions. As a result of Grievant's slowness, two Center Directors refused to work with Grievant. They began doing for themselves as much of the work that would otherwise be assigned to Grievant in order to avoid asking Grievant to help.

Grievant's position was "customer driven". She was expected to provide outstanding customer service to both internal and external customers. All of the Center Directors Grievant was responsible for supporting told the Supervisor that when they gave Grievant work, she was not responsive and gave the impression that she was being burdened by being given work. Grievant was rude and abrasive towards many coworkers. Many of her coworkers refused to work with her.

Grievant's position included the responsibility to answer faculty questions regarding Grant fund and indirect fund management and provide guidance on university policies and procedures. Several Center Directors reported to the Supervisor that when they assigned tasks to Grievant, Grievant expected the Center Directors to tell her step-by-step how to process their requests.

On February 5, 2009, the Supervisor asked Grievant to begin tracking her tasks in a spreadsheet and to email the task log to the Supervisor on a weekly basis. Grievant only produce five logs out of the 28 weeks she should have provided logs.

Grievant was absent from work often. She used all available annual and sick leave and went on to leave without pay status for 20 hours during the July 24 to August 9 pay period.

Based on the evidence presented, the Supervisor had sufficient facts to support the conclusion that Grievant should be given a Notice of Improvement Needed/Substandard Performance. Grievant's request for relief with respect to this Notice is denied.

Annual Evaluation

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.

Grievant received an overall rating of Unsatisfactory Performer for her annual performance evaluation. She received a rating of Unsatisfactory Performer for Job Function 1 regarding serving as an expert on budget related issues for the Center Directors.

The Supervisor's evaluation of Grievant with respect to Job Function 1 is supported by the evidence because Grievant did not demonstrate initiative or ownership of being the budget expert for various Centers. Despite additional training that was given to Grievant, she was unable to correctly or efficiently reconcile grants or process expenditures. She did not show follow through or timeliness on her work.

The Supervisor's evaluation of Grievant with respect to Job Function 2 is supported by the evidence because Grievant did not take Human Resource actions on a timely basis. Her actions resulted and late payments to employees, under payments to employees, and late processing of hiring paperwork.

The Supervisor's evaluation of Grievant with respect to Job Function 3 is supported by the evidence because Grievant did not timely process payments. For example, Grievant was occasionally late paying a credit card bill. She was slow to purchase items requested by Center Directors and did not process them within two business days of the request.

The Supervisor's evaluation of Grievant with respect to Job Function 4 is supported by the evidence because Grievant poorly informed Center Directors about sponsored projects and the overall management of grants.

The Supervisor's evaluation of Grievant with respect to Job Function 5 is supported by the evidence because Grievant was expected to provide faculty with direction, advice and information about grants and indirect fund management. Instead, Grievant expected faculty to understand the process for managing grants and inform her of the processing needs.

The Agency has presented sufficient evidence to support its opinion regarding Grievant's work performance as expressed in the annual evaluation.

Three Month Re-Evaluation

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 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.

Grievant's overall rating of Unsatisfactory Performer for her three month re-evaluation is supported by the evidence. Grievant received a rating of Unsatisfactory Performer for Job Function 1 because her monitoring of sponsored project budgets had not significantly improved. She continued to make errors and failed to properly reconcile grants. Grievant received a rating of Unsatisfactory Performer for Job Function 2 because hiring paperwork was not completed accurately, efficiently or independently. Grievant received a rating of Unsatisfactory Performer for Job Function 3 because Grievant continued to process credit card statements untimely. Grievant received a rating of Unsatisfactory Performer for Job Function 4 because Grievant did not complete files for all faculty. Grievant failed to submit weekly task logs as directed. Grievant received a rating of Unsatisfactory Performer for Job Function 5 because she was not providing direction, advice, information and assistance as needed. She failed to provide the assistance needed to Center Directors. Questions posed to Grievant were met with unresponsiveness and endless emails asking vague questions.

The Agency evaluated whether Grievant could remain in her current position with reduced duties, be demoted, or be reassigned to another position. The Agency concluded that no such positions existed and chose to remove Grievant from employment. The Agency's decision to remove Grievant from employment was in accordance with DHRM Policy 1.40 and must be upheld.

DECISION

For the reasons stated herein, Grievant's requests for relief regarding a Counseling Memorandum, Notice of Improvement Needed/Substandard Performance, and Annual Evaluation are **denied**. The Agency's decision to remove Grievant based upon a three month 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.