

Issues: Group II Written Notice (failure to follow instructions/policy), Removal Due to Poor Performance, and Retaliation (other protected right); Hearing Date: 05/17/10; Decision Issued: 07/22/10; Agency: VDH; AHO: Carl Wilson Schmidt, Esq.; Case No. 9247, 9321; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 08/06/10; Outcome pending; Administrative Review: DHRM Ruling Request received 08/06/10; Outcome pending.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9247 / 9321

Hearing Date: May 17, 2010
Decision Issued: July 22, 2010

PROCEDURAL HISTORY

On July 20, 2009, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow supervisor's instructions and failure to follow policies and procedures. On August 18, 2009, Grievant timely filed a grievance to challenge the Agency's disciplinary action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing.

On December 18, 2009, Grievant was removed from employment following a three-month reevaluation resulting in an overall rating of Below Contributor. On January 15, 2010, Grievant timely filed a grievance to challenge the Agency's removal. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing.

On January 22, 2010, the EDR Director issued Ruling Number 2010-2516 consolidating the two grievances for a single hearing. On April 19, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 17, 2010, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether Grievant's removal from service 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 disciplinary action against the Grievant was warranted and appropriate under the circumstances. The burden of proof is on the Agency to show by a preponderance of the evidence that complied with State policy with respect to Grievant's removal. 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 Virginia Department of Health employed Grievant as a Family Support Worker in one of its service areas. She has been employed by the Agency for over 30 years with 10 years of experience in a Healthy Families program.

The Healthy Families America (HFA) Initiative is a national initiative to help parents of newborns get their children off to a healthy start. Participation in HFA services is voluntary. HFA offers home visiting and other services to families in over 450 communities with a 90% acceptance rate. In 1992, Prevent Child Abuse America launched Healthy Families America in partnership with a charity. The initiative promotes positive parenting and Child health and development, thereby preventing child abuse, neglect and other poor childhood outcomes. Home visiting minimizes barriers to service delivery. Staff have the opportunity to engage the entire family in the process.

Earning the trust of parents and establishing relationships with family members in order to build on family strengths and address needs requires a unique skill set. The key to effective home visitation lies in the training, supervision, skills and personal strengths of home visitors. There are approximately 38 Healthy Families programs in Virginia.

Healthy Families America provides at least six months of weekly home visits to new clients. This is considered Level 1. After six months of weekly home visits, families may move to Level 2 where they received two visits per month. Level 3 clients receive one visit per month. Level 4 clients receive one visit per quarter. Level X clients receive creative outreach.

The purpose of Grievant's position was:

Provides guidance to clients by a knowledge of social and vocational case management and counseling methods to develop individualized service plans, performs psychosocial assessments to determine personal, social, health and economic needs. Assists clients by independently identifying and referring them to available federal, state, local, private resources to assist with their needs. Educates clients on clinical, medical procedures and coordinates client care with PHN and community resources.¹

Under Grievant's Employee Work Profile, she had the Core Responsibility of Workload Management. The Performance Measure for this Core Responsibility was:

Home visitation, using strength-based approach, follows the criteria outlined for "level" requirements. Monthly reports will reflect that an accurate an acceptable number of home visits were attempts have been made for each level. The home visitor should focus on three important areas: the parent, the child, and the parent-child relationship. The FSW will use prenatal or child development curricula, structured parent-child activities, developmental screening tools, and will promote the family's use of community-based services.

For the Core Responsibility of Documentation, the Performance Measure was:

Documentation of home visits is completed within 24 hours of participants encounter. Documentation is reported accurately and reflects a non-judgmental approach. Documentation that reflects of the HF² timeline tracking system is kept current, reflecting the timeliness of HF assessment tools, i.e. ASQ, Home Safely, Home Inventory, NCAST, IFSP, immunizations, well-child checkups, etc. Documentation will address any concerns that the preceding may demonstrate.

¹ Grievant Exhibit 4.

² HF refers to Healthy Families.

For the Core Responsibility of Program Implementation, the Performance Measure was:

HF participant will demonstrate long-term commitment to the program because the FSW's ability to build trusting, nurturing relationships, teach problem-solving skills, improve the family support system, promote positive parent-child relationships, and promote healthy childhood growth and development.

For the Core Responsibility of Planning and Decision Making, the Performance Measure was:

Decisions/planning reflect independent analysis and timely interventions. Decisions are well reasoned. Decisions can be explained and substantiated. Supervisory guidance is sought in complex situations. Provides accurate and timely documentation.³

On September 25, 2008, the Supervisor gave Grievant an annual performance evaluation with an overall rating of Contributor. The Supervisor made several comments regarding Grievant including:

She continues to work long hours to maintain her caseload. Daily activity logs were used this past year to assist her with time management, and appeared to be beneficial. [Grievant] willingly assisted with caseload coverage, during other FSW's leave.

She worked very hard to be more timely.

She has access to the electronic home visitation record, but as of yet has not implemented its use.⁴

On April 30, 2009, Grievant received a Notice of Improvement Needed/Substandard Performance. This Notice described the specific performance deficiencies and improvements needed as:

HV⁵ rates are not meeting level requirements and outreach is not being done. Activities being used with family showed no creativity or diversity. The HF⁶ Program is not being implemented as required by program

³ Agency Exhibit E. Grievant also had responsibility for special assignments, objectives, and behavioral competencies.

⁴ Agency Exhibit F.

⁵ HV refers to home visits.

⁶ HF refers to Healthy Families.

standards. The employee does not organize or prioritize well. Documentation is not completed within 24 hours of participant encounters and in some instances has been 30 days delinquent. The HF program tracking system is not being kept current and the use of HF assessment tools is not timely. The documentation being done in HV notes is not accurate and reflective of program goals. Decisions the employee has made have not shown good judgment in critical situations, which has included the areas of reporting child abuse and boundaries with clients. She does not demonstrate the ability to work independently. Her home visits demonstrate poor planning and lack of continuity between visits. Supervisory guidance is needed for simple tasks an FSW with her years of experience should not need. Suggestions/guidance from her supervisor is frequently met with insubordination. She demonstrates the inability to self evaluate or use critical thinking skills.

An Improvement Plan was established:

HV rates need to improve to meet the FHA requirements. Creative outreach needs to be done per HF protocol. Activities need to become more creative and diverse. The program needs to be implemented per protocol. Reviewing program standards, policies, and FSW training manual is required. The employee needs to become more organized and learn to prioritize tasks. Documentation needs to occur within 24 hours of an encounter and more accurately reflect the program goals and use of tools. She should review her training manuals and gather knowledge from other FSW's who have shown creativity, organization, and good documentation practices. Trackers and tool use needs to be current and meet program standards. The employee needs to seek supervisory guidance more appropriately and follow instructions without insubordination. She needs to plan home visits to reflect the use of the program tools, creative activities, and develop continuity between visits. Boundaries training and review of all policies and procedures are required. See HF policy and procedure manual.⁷

Following the Notice of Improvement Needed/Substandard Performance, Grievant's work performance did not improve materially. For example, her home visit rates were consistently below the 75% Healthy Families standards. Grievant did not always document the reasons why she was not able to make a timely visit to families. Grievant failed to contact several new clients within three days of case assignment.⁸ Grievant failed to document her home visits within 24 hours of the visit. For example on May 20, 2009, a review of Grievant's records showed that she only made three home

⁷ Grievant Exhibit 5.

⁸ The Supervisor informed Grievant of her obligation to contact a new client within three days of case assignment.

visit notes in the month of May. Grievant did not always conduct developmental screens such as Ages and Stages Questionnaires on a timely basis. Several of Grievant's charts lacked documentation of immunizations and medical appointments.

On August 13, 2009, Grievant received an annual performance evaluation with an overall rating of Below Contributor. For the Core Responsibility of Workload Management, Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant] has failed to follow the criteria outlined in the "level" requirements for Healthy Families. Her home visit rates have been below the 75% required by HF standards for 7 of the last 10 months, despite not having a full caseload for any of those months. Her outreach to new clients has not been completed according to Program guidelines. Her home visits are poorly planned, lacked continuity, and demonstrate poor use of the available curricula. Many times no curricula were used, or was just left with the client without being reviewed. Activities used with the families have at times not been developmentally appropriate and have not been used to promote the parent-child interaction and foster normal growth and development, as they were intended to do. Developmental screening tools ASQ's have not been done according to program policy. Daily Activity Logs were implemented to help [Grievant] with time management and organization, but many times she failed to complete them, despite prompting. [Grievant] clearly demonstrates poor planning and organization. She arrives late and unprepared for it supervision, as well as home visits. Her supervisor has helped her to schedule her a time, but she still fails to make required visits. Reports and information necessary for her supervisor and the Program Manager to have to justify funding is either not provided in a timely manner, inaccurate, or both.

For the Core Responsibility of Documentation, Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant's] documentation of home visits is not done within 24 hours per Program policy, is not accurate, and does not reflect Program goals. At times her documentation has been more than 30 days delinquent. The HF timeline tracking system for immunizations, medical appointments, and referrals is not being kept current as required by policy. Due to [Grievant's] for preparation of records for our annual Quality Assurance audit, [Healthy Families] receive deficiencies. In May 2009 [Grievant] was asked to complete one self-audit per day on her records to aid with recognizing and correcting deficiencies. She should have completed over 55 audits; today, she has turned in one incomplete/inaccurate audit. Records closed in 2008 still have not been completed and filed. Policy requires this be done within 30 days of the closure. Data submitted each month to her supervisor and Program Manager does not accurately reflect

the contents of the participants' charts. [Grievant] is aware that this data is instrumental in providing feedback to funders.

For the Core Responsibility of Implementation of the HF Program, Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant] has failed to demonstrate the ability to implement the HF program according to best practices and standards. She does not use the curricula, assessment tools (ASQ's, Safety, HOME, EPDS, AAPI), trackers, IFSP's, etc.) as they were intended to be used to promote positive parent-child relationships, healthy childhood growth and development, and safe, nurturing environments. [Grievant] has shown an inability to employ diverse and creative activities tied to the curricula and the child's developmental level, and involve the parent in the activity. [Grievant] fails to use the IFSP as a guideline for service and referrals. Several clients have no IFSP after months in the program, or have outdated IFSP's. [Grievant] enables families rather than promoting self-sufficiency. She either fails to recognize problems her families face; or chooses not to address them. Families' description of services she provides has at times implied a babysitting role, rather than an FSW role.

For the Core Responsibility of Planning and Decision, Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant] does not demonstrate the ability to work independently and requires close supervision for areas an FSW with her years of experience should not need. Her alternate work schedule was rescinded during the past year for that reason. Judgment and critical thinking skills are substandard, particularly in the areas of recognizing child abuse and neglect and reporting it; professional boundaries are lacking. She was provided with remedial training in that area in May 2009, when this became a critical issue. [Grievant] lacks the ability to analyze problems independently and provide timely, appropriate interventions. She tends to seek supervisory guidance as afterthought, then disregard the guidance, which leads to poorly reasoned decisions on her part, which she then is unable to substantiate.

In September 2009, the Technical Assistance and Quality Assurance Specialists randomly selected five of Grievant's files for review.⁹ She found that one of the files had no visits by Grievant. Other files did not meet the 75% standard. She considered the quality of Grievant's documentation to be poor and that it took a long time for Grievant to see some clients.

⁹ The Technical Assistance and Quality Assurance Specialist was not in Grievant's chain of command.

On September 21, 2009, Grievant received a Performance Improvement Plan setting forth her work expectations following the August 13, 2009 annual performance evaluation. The Plan stated:

Issues that require immediate attention as noted in [Grievant's] annual evaluation:

1. HVs should be in accordance with the HF level requirements* and should not fall below 75% minimum required by HF standards.
2. All HF required assessment tools will be completed according to program policy.*
3. Outreach to new clients should be in accordance with HF guidelines.*
4. HVs should be planned in advance and planning should demonstrate continuity from one HV to the next while utilizing the appropriate curricula.
5. Curricula should be integrated into the HV and documentation should provide evidence of how the curriculum was used in working with the family.
6. Activity should be brought to the family and should coincide with the child's developmental needs as well as support the PCI; this should be reflected in the documentation.
7. Daily Activity Log should be completed each workday and submitted to supervisor to assist with workload management.
8. Employee is to report for weekly supervision at the set time; the employee is to arrive for the weekly supervision meeting with all materials necessary, including clients' charts with most recent HV records, ASQ's, Home Inventories, AAPIs, Safety assessments, progress notes, updated immunization flow sheets and updated referral forms. The employee will not wait until the scheduled time of supervision and leave her supervisor's office to locate and/or print copies of these items.
9. Employee is to submit monthly data in a timely as well as accurate manner.*
10. Documentation of home visits is to be typed or handwritten, signed & dated, and filed in client's chart within 24 hours of visit (if HV is on a Friday, the documentation is due the following Monday).
11. Documentation will reflect the goals of the HF program: working with caregiver(s) to strengthen their parenting skills, working with caregiver(s) to strengthen PCI, working with caregiver(s) to identify any possible developmental delays, working with caregiver(s) to support child's development, working with caregivers to support well-child follow-up, and referral of family to community resources as needed.

12. Employee will complete one accurate file review per day using the file review form previously provided and submit to supervisor for review.
13. Closed records will be reviewed and contain the final documentation within 30 days of closure to services. Charts that were closed more than 30 days ago must be processed IMMEDIATELY.
14. The IFSP will be used consistently as a guide for services to the family.
15. Employee will provide services to families that support independence rather than serve as an enabler.
16. Employee will report all suspected child abuse and/or neglect to her supervisor immediately. [Grievant] will call the supervisor if she is not able to have a face-to-face contact with the supervisor within two hours. Employee will call CPS immediately if the child is thought to be in imminent danger.*
17. Employee will recognize and respect appropriate boundaries while working with clients.
18. Employee will seek supervisory guidance before the fact rather than after the fact when dealing with situations that require timely interventions; employee will adhere to supervisor's guidance.
19. Employee will attend training and complete on-line training recommended by her supervisor.

* Employee should consult with supervisor or HF P&P manual (rev. 3/06) to clarify any standards that she is unsure of.¹⁰

On October 23, 2009, the Supervisor prepared a review of Grievant's work performance for the period from September 21, 2009 to October 20, 2009. Five home visits were documented during that time frame. The Supervisor addressed 19 items. Some of these items included, for example, the Supervisor noted that Grievant's home visit rate was at 50% which was below the 75% Healthy Family standard. Three ASQ's were due during the timeframe but were not found in the record. Grievant was assigned a new client but failed to contact the client. Grievant did not complete Daily Activity Logs. Grievant failed to document home visits within a 24 hour time period. Grievant failed to close records that were supposed to be closed immediately.

On December 4, 2009, Grievant received an interim assessment reviewing Grievant's work from October 21, 2009 to November 20, 2009. 27 home visits were documented during that time period. The Supervisor addressed 19 items. Some of these items included, for example, that Grievant's home visit rate for October 2009 improved to an average of 82%. Seven notes were absent in Grievant's records. Five ASQ's were due but only four were found in the record. In 11 out of 27 notes available, it appeared that Grievant had used curricula appropriately. Several notes showed no

¹⁰ Grievant Exhibit 9.

curricula at all. Daily Activity Logs were not completed and turned in to the Supervisor consistently. Much of Grievant's documentation of home visits was completed more than 24 hours after the visit. Seven home visit notes were missing entirely although the visits were reported as being made.

The Supervisor gave Grievant a three-month reevaluation dated December 16, 2009 stating:

This evaluation is based upon the Work Improvement Plan provided to the employee on 9/21/2009.

1. HF determines a full case weight to be no more than 25 cases with no more than 15 level one clients. This employee has followed 12 clients including no more than 5 level one clients at one time during this evaluation period. She met the minimum standard of completing 75% or more of the expected home visits for three of the 12 clients during the evaluation period. Nine clients received less than 75% of the expected home visits.
2. Of the 5 required assessment tools (known as ASQ, SE-ASQ, AAPI, HOME, Inventory and Safety) 48 assessments were due prior to or during this assessment period on her 12 clients. By the end of the evaluation period, she had completed 20 of the 48 required assessments. This is a 41% completion rate.
3. She failed to follow acceptable guidelines regarding outreach to the 4 new clients assigned in her during this evaluation period. Also see 30 day and 60 day interim assessments.
4. Of the 42 visit notes available for review, 13 demonstrated a degree of continuity between visits.
5. The employee consistently failed to demonstrate how the curricula were used effectively with the families.
6. The employee's documentation fails to reflect the appropriate use of activities in coinciding with the child's developmental needs as well as failing to support parent-child interaction. The FSW has been provided with resources to assist her with this, specifically the HELP (Hawaii Early Learning Profile) manual as well as other resources.
7. The employee never submitted the DAL's on a daily basis or in an otherwise timely manner; therefore, they were not useful in helping her with her daily workload management.

8. Of the 10 scheduled supervisory meetings, the employee wasn't able to attend 2, was on time for 1, and was unprepared for all of the meetings.
9. The employee continues to submit inaccurate monthly data.
10. For the last 3 weeks of this evaluation period, 8 out of 14 (57%) home visits were not documented within the 24 hour time frame. Also see 30 day and 60 day interim assessments.
11. Documentation consistently fails to reflect the goals of the HF program.
12. Employee opted not to use the file review tool to assist her in performance improvement.
13. Of the 11 records requiring closure documentation, this employee has failed to submit any. In some of these cases services were discontinued in 2008 and early 2009. Employees are expected to submit closure documentation within 30 days of services ending. All 11 cases have gone far beyond the 30 days.
14. Of the 12 families served, 3 currently have out of date IFSPs (Individualized Family Service Plan), 3 have no IFSP, and 6 have current IFSPs. 6 families had the exact same goals in their IFSP. The employee continues to fail to use the IFSP as a guide to service for families.
15. The employee fails to demonstrate that families are encouraged to be independent.
16. On 2 occasions the employee failed to recognize a potential APS/CPS risk and when directed to address this by her supervisor failed to do so.
17. The employee recently attempted to insert herself into a custody battle involving a client who has not receive services from HF for over 6 months. She also has demonstrated a lack of insight with regards to her intrusiveness of her after hours Friday home visit.
18. The employee continues to disregard supervisor's guidance.
19. While the employee did attend a recent training on an assessment tool (MCHAT), she has failed to implement the tool.

In summary, the employee continues to perform at the below contributor level, in spite of every effort being made to support her improvement.¹¹

Agency managers evaluated whether Grievant could be transferred to another position, demoted, or kept in the same position with fewer duties. They concluded that these options were not available given the Agency's business needs. The Agency chose to remove Grievant from employment based on the three-month reevaluation.

CONCLUSIONS OF POLICY

Grievant challenges the disciplinary action she received and her removal based upon a three-month performance reevaluation.

Group II Written Notice

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."¹² Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

When an employee fails to comply with his or her routine work duties as expressed in an employee work profile, the employee's behavior constitutes a Group I offense for inadequate or unsatisfactory job performance. If an employee is given a specific instruction by a supervisor and fails to comply with that instruction, the employee may be subject to a Group II Written Notice for failure to follow a supervisor's instructions. If an employee fails to comply with the terms of a written policy, the employee may be subject to a Group II Written Notice for failure to follow written policy.

The Agency contends that Grievant should receive a Group II for failure to follow a supervisor's instructions and failure to comply with policy. Grievant had an employee work profile identifying her job duties. Her job duties included complying with the policies governing the Healthy Families program policy. When the facts of this case are considered as a whole, it is clear that the instruction given to Grievant was, in essence, a general instruction to perform her job duties that were already stated in her employee work profile. Grievant attempted to comply with the instruction. She did not intend to disregard the general instruction. The best description of Grievant's behavior is that of an employee who failed to meet her routine job expectations and not of an employee

¹¹ Agency Exhibit A.

¹² The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

who intentionally disregarded a supervisor's instruction or written policy. Grievant's behavior rises no higher than a Group I Written Notice.

Grievant contends that the Agency had a pattern of singling out certain FSW's for disciplinary action and subsequently contacting the clients of a singled out employee and encouraging the clients to report negative information or complain about the FSW's service.¹³ The evidence showed that the Supervisor focused on Grievant because the Supervisor perceived Grievant as a poor performer. Although the Hearing Officer has some concern regarding the quality of the supervision provided by the Supervisor and the Supervisor's interaction with Grievant, the Supervisor's decision to focus on Grievant was not contrary to State policy. Although Grievant argued that the Supervisor focused on employees based on race, it is clear that the Supervisor focused on employees because of their work performance and not because of their races.¹⁴

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution...."¹⁵ Under the *Rules for Conducting Grievance Hearings*, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Mitigating circumstances can include the situation where an employee is subject to supervision that is so inappropriate as to interfere with an employee's work performance and render him or her unable to perform work in accordance with the Agency's expectations. Grievant presented evidence that the Supervisor's management style was not appropriate.¹⁶ For example, the Supervisor was demeaning, caustic, and disrespectful to Grievant and to other employees with who she considered

¹³ It was appropriate for the Supervisor to contact Grievant's clients to determine the level of service Grievant was providing to the clients. A logical way to determine whether Grievant was effective in the delivery of services to clients, would be to contact its clients directly.

¹⁴ Grievant argued that the Supervisor created a hostile work environment for her based on race. Ms. K, an employee of a race different from Grievant's race, complained of the Supervisor's daily harassment. The perception that the Supervisor was "harassing" employees resulted from the Supervisor's "micromanagement" of employees and not because the Supervisor treated employees differently based on race.

¹⁵ Va. Code § 2.2-3005.

¹⁶ One witness testified that the Supervisor talked to Grievant "like a child".

to be poor performers. The Supervisor sometimes criticized Grievant using personalized and insulting terminology rather than critiquing Grievant's work product. When Grievant attempted to respond to the Supervisor's criticism, the Supervisor would "roll her eyes". The Hearing Officer finds that the Supervisor's method of communication and degree of personalized criticism was inappropriate at times. It is not clear, however, that the Supervisor's inappropriate management style is what caused Grievant or significantly influenced Grievant to fail to fully perform her work duties. If Grievant had had a less abrasive and more respectful supervisor, it is not clear that Grievant's work performance would have been materially better. In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce further the disciplinary action.

Three Month Performance Reevaluation

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" on an annual evaluation must be re-evaluated and have a performance reevaluation 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 reevaluation 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 reevaluation purposes. The form should clearly indicate that it is a reevaluation.
- The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the reevaluation plan during the reevaluation period.
- The employee's reviewer, and then the employee, should review and sign the performance reevaluation plan.

- If the employee transfers to another position during the reevaluation period, the reevaluation process will be terminated.

On August 13, 2009, Grievant received an annual performance evaluation with an overall rating of Below Contributor. She was given a Performance Improvement Plan on September 21, 2009 for the reevaluation period. Although the Agency did not create the Performance Improvement Plan within the 10 day expectation of DHRM Policy 1.40, the Agency's failure to do so is harmless error. The Agency's error had the effect of extending Grievant's employment. Nothing in state policy would authorize the Hearing Officer to reverse the Agency's removal because it failed to timely issue a Performance Improvement Plan. Grievant also argued that she was not involved in the development of the Performance Improvement Plan.¹⁷ This is harmless error. Although Grievant should have been involved in the development of the Performance Improvement Planned, the Agency's failure to do so does not change the outcome of this case. The purpose of the Performance Improvement Plan was to inform Grievant of the expectations for her work performance over the following three month period. Including Grievant in the development of the plan would not have given Grievant additional knowledge regarding the Agency's expectations of her.

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 reevaluation period, the period will be extended by the total number of days of absence, including the first 14 days.

Grievant received a three-month reevaluation on December 16, 2009. She had received interim reviews approximately 30 days and 60 days following the issuance of the Performance Improvement Plan.

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

Grievant received a three-month reevaluation with an overall rating of Below Contributor. The Agency's reevaluation was not arbitrary or capricious. The Supervisor's assessment of Grievant's performance was based on her observation of Grievant's work activities and work product. The Agency did not establish every allegation of fact upon which it based the reevaluation. With respect to several facts that the Agency established, the Agency did not reach the same conclusion that the Hearing Officer would have reached based on those facts. For example, the Agency asserted that Grievant had inadequately reported cases of possible child abuse.¹⁸ The

¹⁷ The Supervisor testified that she drafted the Performance Improvement Plan based in part on Grievant's response to criticism of her work performance. The Supervisor also considered Grievant's Employee Work Profile and her annual evaluation.

¹⁸ Several of the incidents of alleged inadequate reporting occurred before the three months reevaluation period.

evidence showed that Grievant complied with the Healthy Families policy¹⁹ and exercised appropriate judgment and timeliness. When the evidence of Grievant's work performance during the reevaluation period is considered as a whole, however, there remain sufficient facts to enable the Agency to conclude correctly that Grievant's work performance during the reevaluation period was at the level of Below Contributor.

The Agency set forth performance objectives for the reevaluation period that were reasonable and attainable. Grievant argued that it was often not possible to make home visits because of the schedules of clients. Although Grievant's assertion is true, the Agency's performance standard accounted for this by reducing the expectation from having 100% of visits made timely to having only 75% of visits made timely. The 75% standard was reasonable and attainable.²⁰

An employee whose performance during the reevaluation 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 reevaluation period. When an employee is moved to another position with lower duties due to unsatisfactory performance during or at the end of the reevaluation 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 reevaluation period to remain in his or her position, and reduce the employee's duties. Such a reduction should occur following and based on the reevaluation 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 duties, termination based on the unsatisfactory reevaluation is the proper action. The employee who receives an unsatisfactory reevaluation will be terminated at the end of the three (3)-month reevaluation period.

The Agency evaluated whether Grievant could be transferred to another position, demoted to a lesser position, or remain in the same position with fewer duties. The Agency concluded that these were not viable options and chose to remove Grievant from employment. Grievant's removal must be upheld.

¹⁹ Under the Healthy Families Procedure and Practice, Child Protected Services had to be contacted within 72 hours of the observation of suspected child abuse or neglect. Grievant met this standard.

²⁰ Although Grievant was not the only employee who failed to meet the 75% standard, she was the only employee who consistently failed to meet that standard.

Grievant argued that she had to maintain the caseload of three full-time Healthy Family Workers. Although Grievant assumed portions of the caseloads of two other employees when those employees were absent from work, Grievant's caseload did not exceed the caseload appropriate for one full-time employee.²¹

Grievant argued that her work performance improved steadily over the 90 day reevaluation period. Although Grievant's performance improved over the 90 day time period, it did not improve enough to support an overall rating of Contributor.

Grievant argued that she was experiencing medical impairments and personal family health matters that affected her performance. Grievant has not established that these considerations were so excessive as to justify mitigating the disciplinary action. To the extent these matters could be construed as mitigating, the concept of mitigation does not apply to performance reevaluations. The concept of mitigation only applies to disciplinary actions.

Grievant presented credible evidence showing that the Supervisor's management style was sometimes inappropriate. The Supervisor was not satisfied with Grievant's work performance. It appears that the Supervisor may have expressed her frustration with Grievant through emotional and caustic comments and behavior. The question becomes whether the Supervisor's management style was so significant as to render Grievant unable to meet the Agency's expectations during the reevaluation period. The Hearing Officer concludes that the Supervisor's behavior was not so significant as to make the application of DHRM Policy 1.40 unfair. Many of Grievant's work deficiencies during the reevaluation period resulted from her failure to timely document her work or to have any documentation at all. The Supervisor required Grievant to use Daily Activity Logs to help with Grievant's time management and productivity yet she did not always utilize them.²² The Supervisor's management style may have interfered with Grievant's judgment regarding her cases. For example, the Supervisor's ineffective method of communication may have prevented Grievant from properly weighing the information she collected during home visits and forming logical conclusions. The Supervisor's ineffective method of communication, however, did not likely have any effect on Grievant's ability to timely document her activities. Grievant received numerous documents indicating her obligation to document her activities.²³ She routinely failed to do so thereby affecting her work performance. It is not likely that Grievant would have

²¹ The maximum caseload for grievant was 30. She did not exceed that number even when she took responsibility for some of the cases of other employees.

²² Daily Activity Logs could be completed in approximately 10 minutes. Grievant pointed out that several other employees had not been asked to complete Daily Activity Logs. The Supervisor explained that the logs were intended to help Grievant become more organized and processed for work efficiently. The Supervisor had discretion to impose this expectation on Grievant.

²³ For example, Grievant's Employee Work Profile requires that she document home visits within 24 hours of the visit.

been able to meet the Agency's work expectations during the reevaluation period even if she had had a different supervisor.

Grievant argued that the Supervisor retaliated against Grievant because Grievant complained to the Human Resource staff about the Supervisor. It appears that Grievant complained about the Supervisor before the favorable evaluation Grievant received in 2008. Although Grievant suffered from materially adverse Agency actions because she received disciplinary action and removal, Grievant did not establish any connection between her complaints to the Human Resource staff and the Supervisor's action. The Supervisor took action against Grievant based on the Supervisor's belief that Grievant was performing poorly.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice. The Agency's removal of Grievant from employment 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.²⁴

[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

²⁴ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.