

Issue: Removal due to poor performance; Hearing Date: 07/13/10; Decision Issued: 07/14/10; Agency: NSU; AHO: Carl Wilson Schmidt, Esq.; Case No. 9359; Outcome: Full Relief.



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 9359**

Hearing Date: July 13, 2010  
Decision Issued: July 14, 2010

**PROCEDURAL HISTORY**

On October 9, 2009, Grievant was removed from employment based on a review following a 30 day performance improvement development plan.

On October 12, 2009, 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 June 7, 2010, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the timeframe for issuing this decision based on the request of a party. On July 13, 2010, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Witnesses

**ISSUES**

1. Whether the Agency removed Grievant from employment 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 in accordance with 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:

Norfolk State University employed Grievant as a Procurement Officer. She began working for the Agency in 2005. Grievant's work performance was below the Agency's work expectations. On September 2, 2009, the Supervisor gave Grievant a Notice of Improvement Needed/Substandard Performance regarding her poor performance. A Plan of Action Performance Improvement Plan was attached to the Notice. Six areas were identified for which Grievant's performance was to improve within the following 30 days. The 30 Day period began on September 9, 2009. At the end of the 30 day period, Grievant's work performance had not improved in all six areas. On October 9, 2009, the Supervisor met with Grievant to review Grievant's work performance. Grievant was notified that her performance was not meeting standards established for a Procurement Officer. On October 16, 2009, the Interim Human Resource Director sent Grievant a letter removing Grievant from employment effective October 9, 2009. The letter stated, in part, "[t]his termination is the result of your failure to [satisfactorily] complete the Performance Development Plan established for you on September 8, 2009."<sup>1</sup>

## **CONCLUSIONS OF POLICY**

DHRM Policy 1.40, Performance Planning and Evaluation, sets forth the procedure by which the Agency may remove Grievant from employment based on a review of Grievant's work performance. The Agency failed to comply with the material provisions of DHRM Policy 1.40 thereby rendering Grievant's removal unsupported by State policy.

Under DHRM Policy 1.40, an employee who receives a rating of "Below Contributor" on an annual performance evaluation 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

---

<sup>1</sup> Agency Exhibit F.

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.

In Grievant's case, the Agency issued Grievant a Notice of Improvement Needed/Substandard Performance which would have justified it giving Grievant an annual evaluation with an overall rating of Below Contributor. Instead of issuing an annual evaluation with an overall rating of Below Contributor, developing a performance re-evaluation plan, and conducting a three-month re-evaluation, the Agency simply removed Grievant following a 30 day review. Nothing in State policy supports this action.

The Agency relies on the following language of DHRM Policy 1.40 to support its action:

Supervisors should immediately identify poor, substandard, or unacceptable performance. Supervisors normally should address first-time minor or marginal performance issues through performance counseling and coaching.

An employee may receive a Notice of Improvement Needed/ Substandard Performance form at any time during the performance cycle if the employee exhibits substandard performance on any core responsibility, special assignment, agency or unit objective, or core value or core competency.

If an employee's performance level falls below Contributor level, a Notice of Improvement Needed/Substandard Performance form (or agency-developed form) may be issued at any time. Reviewers must approve and sign such Notices.

Receipt of a Notice of Improvement Needed/Substandard Performance form also may result in issuance of a Written Notice under [Policy 1.60, Standards of Conduct](#).

#### **Improvement Plan**

The Notice of Improvement Needed/Substandard Performance form must include an improvement plan, which should have an improvement period of no less than 30 days or more than 180 days. The improvement plan shall be developed by the supervisor and the employee. If agreement cannot be reached, the supervisor may establish the improvement plan. The plan should be included on the form or attached to it. Employees should be given a copy of the Notice and plan. When the annual evaluation is completed, the Notice and plan must be attached to the Evaluation Form if the overall evaluation reflects a rating of Below Contributor. Otherwise, the form is retained in the supervisor's file as described in the Retention of Performance Forms section of this policy. Substandard performance on the improvement plan also may result in

disciplinary action under the Standards of Conduct. (See [Policy 1.60, Standards of Conduct.](#))

This section of DHRM Policy 1.40 relates to the Notice of Improvement Needed/Substandard Performance. It does not justify or authorize removal of an employee based on a Notice of Improvement Needed/Substandard Performance and failure to comply with that Notice. In order to remove an employee, the Agency must comply with the Re-Evaluation provisions of DHRM Policy 1.40 which require a three-month re-evaluation following an annual evaluation with an overall rating of Below Contributor.

The Agency's material failure to comply with DHRM Policy 1.40 means that the Agency's removal of Grievant must be reversed even though Grievant admitted and the Agency has established that Grievant's work performance was "below par" during the relevant time periods.

## DECISION

For the reasons stated herein, the Agency's removal of Grievant must be reversed. 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.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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.<sup>2</sup>

[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

---

<sup>2</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.