

Issues: Removal due to poor performance, and Retaliation (grievance activity);
Hearing Date: 08/08/11; Decision Issued: 09/02/11; Agency: DSS; AHO: Carl
Wilson Schmidt, Esq.; Case No. 9652; Outcome: No Relief – Agency Upheld;
Judicial Review: Appealed to Richmond Circuit Court; Ruling issued 02/15/12;
Outcome: AHO's decision affirmed.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9652

Hearing Date: August 8, 2011
Decision Issued: September 2, 2011

PROCEDURAL HISTORY

Grievant was removed from employment based on a three-month performance re-evaluation. On March 15, 2011, 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 July 11, 2011, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On August 8, 2011, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant's removal was in accordance with State policy?
2. Whether Grievant's re-evaluation was arbitrary or capricious?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that Grievant's removal 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 Virginia Department of Social Services employed Grievant as an Administrative Office Specialist III at one of its Facilities. The purpose of her position was:

Provides clerical support to the DCSE district office. Duties may include processing incoming/outgoing mail; process case records in/out of district office; managing the District's record management system; documenting/updating the automated information system; serves as Customer Support Technician.¹

Grievant began working for the Agency in 2003. In November 2008, Grievant was transferred to the Administrative Office Specialist III position from another position in the Agency in lieu of layoff. Grievant reported to the Supervisor who reported to the District Manager. Grievant had been supervised by the Supervisor for approximately one year.

The Agency maintains a file for each child-support case administered by the Agency. A case file may contain confidential information about the custodial parent and noncustodial parent in each case. APECS is an automated case management system used by the Agency. ColorTrac is a system used to track case files. Each case file has a separate label and is given an identifying color.

Grievant worked in the case file room to ensure that the files were placed in the appropriate location. When a file came to the file room, Grievant was responsible for recording the file's location in the Agency's database and placing the file in the correct location in the file room. When a social worker requested a file, Grievant was responsible for locating the file and initiating delivery of the file to the social worker. The file room was open and sometimes social workers would bypass Grievant and retrieve files themselves.

¹ Agency Exhibit 1.

On November 9, 2010, Grievant received an annual performance evaluation with an overall rating of Below Contributor.² She received Contributor ratings for two of her four Core Responsibilities. She received Below Contributor ratings for the Core Responsibilities of Maintenance and Transfer of Case Records and Delivers Quality Customer Service.

On November 19, 2010, Grievant received a Re-evaluation Plan addressing two of her Core Responsibilities:

Maintenance and transfer of case records	<p>Prepares case records for transfer to and from other district offices.</p> <p>Ensures that case records have been referred and properly documented on APECS and physically mailed via courier.</p> <p>Assists in locating case records between district offices.</p> <p>Ensure the physical condition of records are in standard condition and make updates as needed (i.e. new labels, new folders) based on daily log and system reports.</p> <p>Maintains case file tracking system (Color Trac) making labels for case files; returning files to the file room; transferred in files documented and given [to the] appropriate worker.</p> <p>Case file actions received from other district offices are filed (petitions, hearing dispositions, etc.).</p> <p>Evaluation Standards; Contributor – tasks are completed one day after cases are received.</p>
Delivers Quality Customer Service	<p>Demonstrates initiative and creativity in assisting customers.</p> <p>Provides quality customer service to internal and external customers by responding to calls, visitors, work lists, and correspondence in a polite and professional manner.</p> <p>Completes the following actions as necessary: notifies customers of actions taken; provides requested information; work lists the appropriate worker regarding contact requiring further action.³</p>

The Agency removed Grievant’s duties with respect to the Core Responsibilities for which she was rated Contributor in her Annual Performance Evaluation. During the re-evaluation period, seventy percent of Grievant’s time was associated with the Core Responsibility of Maintenance and Transfer of Case Records. Thirty percent of her time was associated with the Core Responsibility of Delivers Quality Customer Service.

² Grievant was absent from work while on Short Term Disability from October 6, 2010 until November 8, 2010.

³ Agency Exhibit 1.

Part III of the Re-evaluation Plan was to address the Employee Development Plan. The Employee Development Plan contained space for the Supervisor to list Grievant's Personal Learning Goals and Learning Steps/Resources Needed. The Supervisor did not complete the Employee Development Plan.

On November 24, 2010, Grievant sent the Supervisor an email stating:

According to the "Contributor" status of the incoming case files – tasks should be completed one day after cases are received, this is an unrealistic goal for this particular task. Also, according to the EWP request for physical files from the archives are to be within two days of receiving the request. This task has been in the past and continues, that archived requests are held and only faxed to the library on Fridays for a Monday delivery. This has been the procedure since taking over the duties of [Ms. C]. There are no issues from [Ms. T] in doing the way I was trained.

On November 30, 2010, the Supervisor sent Grievant a memorandum stating:

I am writing this memorandum to respond to your e-mail of November 24, 2010 titled EWP. You cited as unrealistic the one (1) day evaluation standard for the core responsibility of "maintenance and transfer of case files". This one-day standard has not changed from the EWP for the 2010 and evaluation year which you signed on December 29, 2009.

For the purposes of the 90 day re-evaluation period, only two (2) of the four (4) core responsibilities are being evaluated. In addition to "maintenance and transfer of case records", "delivers quality customer service" is being re-evaluated. "Manage archive cases" is not being evaluated; however the two (2) day standard is again taken from your EWP for the 2010 evaluation year.

I hope this clarifies any misunderstanding regarding subject EWP. I encourage you to again review this plan and look at the two (2) weighted core responsibilities which I have identified for re-evaluation. If you still have questions, I am available to assist you.⁴

Grievant had received training in the APECS and ColorTrac systems and she had experience with those systems.⁵ To assist Grievant during the re-evaluation period, the Supervisor encouraged Grievant to ask questions of Ms. F, an expert in the

⁴ Agency Exhibit 5.

⁵ In January 2009, Grievant received Initial In-Service training regarding APECS.

ColorTrac system. Although the Supervisor encouraged Grievant at the beginning of December 2010 to meet with Ms. F., Grievant did not do so until December 28, 2010.

On Friday, December 10, 2010, Grievant sent the Supervisor an email indicating that she was “not able to timely process this incoming case file without the worker’s code being changed.” The Supervisor replied on Monday, December 13, 2010:

This e-mail indicates to me that there are still some areas that need to be clarified re the program.

Please get with [Ms. F.] in her office on Thursday, Dec 16th at 9 a.m. for program clarification and training.

Grievant replied on December 14, 2010:

The CP and Dependent is active to TANF and [locality] and the case file will be pouched back to [locality]. This was sent to [District Office] in error by [locality] and [locality] has not returned my call in researching the issue with this case. I have followed your instructions to research these cases and that is what I have done with this one. I see no need to meet with [Ms. F] for clarification of the program. This e-mail was sent to you for the purpose of the number of days it took to properly process this incoming case file. This case was received in [District Office] on 12/8/10. I have handled this case file issue without the assistance of you and/or [Ms. F].

If you still insist that I meet with [Ms. F] I will. Thank you.

On December 16, 2010, the Supervisor sent Grievant an email stating:

Some of my concerns that I want [Ms. F] to cover in her training are:

- +APECS documentation.
- +Tracking files using APECS and ColorTrac.
- +Actions required when files are received from other offices.

[Ms. F] will cover other areas in great detail. I will also look at some formal training at the first of the year.⁶

Agency employees decided to have a Christmas party in December 2010. Fliers were sent to employees advising them that if they elected to participate in the party, they should pay \$10 to the party committee. Grievant did not pay in advance the \$10 required to attend the party. On the day of the party, Ms. S spoke with Grievant and indicated that she had paid to attend the party but did not intend to eat any food because of a medical condition. Ms. S suggested that Grievant go to the party in Ms.

⁶ Agency Exhibit 5.

S's place. Grievant attended the party and ate some food. One of the party's organizers observed Grievant at the party, realized that Grievant had not paid to attend the party, and asked Grievant to leave. Grievant refused. The Supervisor approached Grievant and confronted Grievant about attending a party for which she had not paid to attend. Grievant paid ten dollars on the following Monday.

On December 28, 2010, Ms. F sent the Supervisor an email stating:

I sat with [Grievant] this am for 1 hour and had an overview of her responsibilities to include APECS documentation, tracking files using APECS and ColorTrac, and actions required when [files] are received from other offices. We discussed using the Macro for APECS case event tracking verses the manual case events only stating the facts. We went over examples of her work and what should have [been] done.

[Grievant] admitted she forgot about the documenting the Closed Case Database when she requested files from the Library and said she would do better with that. She stated she had a log of what she has received and returned to the library. I told her the log was good for her but it should be [documented] on the database so the office can see it if needed.

[Grievant] had a few concerns about the file request and how cases are received in Central Files. I clarified how the jackets should be clean/organized prior to sending them out of the file room and if they are not returned in the same order we need to know. I explained to [Grievant] that if she needed help or clarification my door was open.

I have [one] concern about the overview. [Grievant] had a phone "thing" in her ear the whole time we were in meeting. It beeped once and she adjusted it once. I felt uncomfortable with her wearing that thing because I didn't know if I was being recorded. If I have to meet with her again I ask that something is said to her so that she don't bring it with her. I don't know policy on cell phones so I chose not to say anything to her but it was inappropriate to have it on.⁷

On December 28, 2010, Grievant sent the Supervisor and email stating:

Thank you for the opportunity to train with [Ms. F]. I learned several options that will save time that I did not know before. I realized before and now that file keeping is definitely an essential part of the [District Office] work flow. Working as a team is also the greatest tool of all. I will continue to do the best job possible.⁸

⁷ Agency Exhibit 5

⁸ Agency Exhibit 5.

On January 31, 2011, the Supervisor sent Grievant a memorandum stating, in part:

I am writing this memorandum as a follow-up to our meeting on this date in which we discussed the status of your performance since being placed on a 90-Day Action Plan. I developed this plan to address the two core responsibilities from your EWP which I feel are a significant part of your job description. They are *maintenance and transfer of case records* and *delivers quality customer service*.

Your performance in these two areas continues to concern me. I have reviewed samples of your work and found that 35% of cases initiated by Intake and about 40% of cases transferred in were not processed in the accepted time frames. Case files checked into the file room are still being lost.

Your delivery of quality customer service is also below the contributor standard. I am still seeing a large volume of emails back-and-forth between you and workers in both this office and other offices. By this time, it is expected that you would have established effective working relationships with your counterparts and co-workers so as to get required task completed more efficiently. Along those same lines, you recently asked me for a phone list of the file rooms of other district offices, rather than take the initiative and compile a list of your counterparts. Though I said I would get you something, given the amount of time that you have been in this position, you could have taken the initiative to contact each office and develop your own contact lists.

Examples of poor internal customer service during this period include your inappropriate behaviors at the Xmas party; and your sharp retorts at your supervisor which border on insubordination.

At this point in time, your overall performance has not been that of a contributor and your job is in jeopardy. Unless drastic improvement is shown within the next week or two, you will not pass your re-evaluation and could be terminated.⁹

On February 4, 2011, Grievant and the Supervisor met and discussed:

- +ColorTrac is the primary tool to be used to track the location of case files
- +Follow a logical progression of events to track/locate case files
- + [Ms. S] will take on the responsibility of receiving and distributing facsimile

⁹ Agency Exhibit 5.

- +Wisely use time management skills to perform duties
- +For immediate feedback, ask questions rather than sending emails and waiting for response.¹⁰

The Supervisor audited Grievant's case files. The Supervisor looked at the number of cases being processed by intake employees or cases arriving from other district offices. The Supervisor looked to see when Grievant processed the cases in APECS and when Grievant documented the cases in the ColorTrac system. The Supervisor determined that approximately one third of the cases initiated by intake employees were out of compliance and about 40% of the other cases transferred to Grievant were not in compliance.

On February 16, 2011, Grievant received a three month re-evaluation. For the Core Responsibility of Maintenance and Transfer of Case Records, Grievant received a Below Contributor rating. The Supervisor wrote:

[Grievant] still has not fully met the measures for this core responsibility. Case files continued to be misplaced or misfiled and [Grievant] still has problems tracking their location. In spite of training, she doesn't understand the child support process, which impacts her ability to follow case management and case processing in APECS, and its correlation to the Color Trac system. Case files continued to be processed outside the established time frames.

For the Core Responsibility of Delivers Quality Customer Service, Grievant received a rating of Below Contributor. The Supervisor wrote:

[Grievant] has no contact with clients or visitors; however her personal interaction with co-workers is marginal at best as she hides behind a barrage of emails. She is disrespectful to her supervisor and is generally unreceptive to guidance and direction offered. Her responses and sharp retorts to her supervisor border on insubordination.

The Supervisor also commented:

[Grievant] has been unsuccessful in establishing a positive working relationship with staff or management. She has expressed her unhappiness in being assigned to this office, which has no doubt negatively impacted her ability to successfully perform assigned duties. [Grievant] has been extremely reluctant to accept guidance/supervision and has shown a general disrespect for her supervisor.

The Agency considered alternatives to discharging Grievant from employment. Grievant was not a candidate for reassignment. The Agency could not reduce

¹⁰ Agency Exhibit 5.

Grievant's duties because she was the only person classified as an Administrative Program Specialist III within the Operations Unit and was the only individual assigned with the duties outlined in her Employee Work Profile. The Agency reviewed the four vacant positions in the Agency and concluded that Grievant's knowledge, skills, and abilities were not suited for any of the vacant positions.

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 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. Grievant was reevaluated within two weeks of the end of the three month re-evaluation period. She received an overall rating of Below Contributor. Agency managers considered whether to demote or reassign her to another position. They concluded no suitable positions were available. They concluded that Grievant's duties could not be reduced. Agency managers chose to remove Grievant from employment.

Grievant argued that the Agency failed to comply DHRM Policy 1.40 because the Supervisor failed to complete the Employee Development Plan which consisted of Personal Learning Goals and Learning Step/Resource Needs. DHRM Policy 1.40 states, "[t]he supervisor should develop an entire performance plan including, 'Employee Development.'" The Hearing Officer construes the word "should" in the sentence to mean that the supervisor is encouraged to complete the Employee Development section of the re-evaluation work plan. The word "should" is directive, not mandatory. The Hearing Officer does not construe the word "should" in the sentence to mean that the supervisor's failure to complete an Employee Development section renders the reevaluation work plan defective.

Grievant's re-evaluation was not arbitrary or capricious. The Supervisor conducted an audit of Grievant's cases and concluded that approximately a third of them were out of compliance. The evidence showed the Grievant had difficulty meeting the one-day standard in her Employee Work Profile.

Grievant argued that the Agency's standard set for her was unreasonable. The Supervisor testified that she did not expect Grievant to meet the Agency's standard with respect to every one of Grievant's case files. The number and percentage of case files out of compliance, however, was significant and raised the Supervisor's concern. The Agency has presented sufficient evidence to show that its conclusion was not in disregard of the facts or without a reasoned basis.

Grievant argued that the Supervisor's audit was unreliable because the documents supporting her audit were not presented at hearing. Although the Agency's presentation would have been materially improved had the Agency presented such documents, the absence of such documents is not fatal to the Agency's case. The Supervisor's testimony was credible. The Supervisor's concerns were supported by other documents in the case file indicating that she had informed Grievant that Grievant's case files were not properly filed.

The Agency presented sufficient evidence to support its conclusion that Grievant did not deliver quality customer service to internal customers. Grievant attended a Christmas party without having paid the required fee to attend.¹¹ Grievant met with Ms. F with a device in her ear that Ms. F believed Grievant was using to monitor their conversation. The Supervisor testified that Grievant was often abrupt during her interactions with the Supervisor.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;¹² (2) suffered a

¹¹ Although it is clear to the Hearing Officer that the Agency failed to properly manage Grievant's attendance at the Christmas party, that failure does not established that the Agency's opinion of Grievant was without a reasoned basis. The Supervisor confronted Grievant in front of other employees regarding a minor issue that could have waited for another place and time. Grievant believed that it was appropriate for her to attend the party in the place of another employee. The Supervisor believed that Grievant should not have attended under any circumstances unless she had paid in advance. Although it was within the Supervisor's discretion to determine whether Grievant's substitution for another employee was appropriate, the Supervisor should have confronted Grievant privately.

¹² See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

materially adverse action¹³; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant's evidence shows by a preponderance of the evidence that the Agency's stated reason was a mere pretext or excuse for retaliation. Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.¹⁴

Grievant engaged in protective activity because she filed grievances in November 2009 and September 2010 with the Agency. Grievant suffered a materially adverse action because she was removed from employment. Grievant has not established a connection between the protective activity and the materially adverse action. Grievant was removed from employment because the Agency believed her work performance was not adequate. She was not removed from employment because she filed grievances against the Agency. The Agency did not remove Grievant from employment as a pretext for retaliation.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**. The Agency's removal of Grievant 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:

¹³ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the "materially adverse" standard for qualification decisions based on retaliation. A materially adverse action is an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

¹⁴ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

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.¹⁵

[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

¹⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

Circuit Court
OF THE
City Of Richmond

MELVIN R. HUGHES, JR.
JUDGE

JOHN MARSHALL COURTS BUILDING
400 NORTH 9TH STREET
RICHMOND, VIRGINIA 23219-1540

February 15, 2012

[Grievant]

Assistant Attorney General
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Re: [Grievant] v. Department of Social Services
CL11-4520

Dear [Parties]

In this grievance appeal noted by a terminated employee of the Virginia Department of Social Services, (DSS), the issue is whether the grievant has established that the grievance process ending in a hearing upholding the agency decision was contradictory to law. Va. Dep't. of State Police v. Barton, 38 Va. App. 439, 573 S.E.2d 319

(2002). See Va. Code § 2.2-3006(B). The "law" as explained in Tatum v. Va. Dep't. of Agric. & Consumer Servs., 41 Va. App 100, 124, 582 S.E.2d 452, 459 (2003), is "the aggregate of legislating judicial precedents and accepted legal principles." It should also be noted that the law places on the person challenging the outcome the burden of showing how it is contradictory and what law is contradicted. Id.

[Grierant] appeals on the ground that the decision by the hearing officer was arbitrary and capricious and the agency's decision to terminate was retaliatory. On November 22, 2011, the parties argued their positions in the appeal, after which the court took the matter under advisement to review the extensive agency record.

FACTUAL FINDINGS:

The Department of Employment Dispute Resolution, in a hearing held August 8, 2011, made the following factual findings: Since November 2008, [G] had been employed as an Administrative Office Specialist III. The position calls for providing clerical support to the child support enforcement division, such as processing mail and case records, managing the record management system, documenting and updating the automated information system, and serving as a Customer Support Technician.

[G] worked in the case file room to ensure that the files were placed in the appropriate location. She was responsible for recording the location of files in the agency database and placing files in the correct location in the file room. For example, when a social worker requested a file, [G] was responsible for locating and delivering it to the social worker. However, [G] noted during her court hearing that the file room was open and sometimes social workers would bypass her and retrieve the file themselves.

On November 9, 2010, [G] received an annual performance evaluation with an overall rating of "Below Contributor," including "Below Contributor" ratings for the core responsibilities of "Maintenance and Transfer of Case Records" and "Delivers Quality Customer Service." On November 19, 2010, [G] received a Re-evaluation Plan (REP) addressing those two responsibilities. During the Re-evaluation period, 70 percent of [G's] time was associated with "Maintenance and Transfer of Case Records" and 30 percent with "Delivers Quality Customer Service."

[G]: complained in an e-mail to her supervisor about a one-day standard for maintaining and transferring case files; her supervisor responded that the standard "has not changed from the [Employee Work Profile] for the 2010 and evaluation year which you signed on December 29, 2009."

[G] had previously received training in APECS and ColorTrac.¹ During [G's] Re-evaluation period, her supervisor encouraged [G] to ask questions of "Ms. F, an expert in ColorTrac." On December 10, 2010, [G] sent her supervisor an e-mail indicating that she could not timely process a case file without the "worker's code being changed." The supervisor replied on December 13, 2010, that she needed to "get with [Ms. F] . . . for program clarification and training."

[G] replied on December 14, 2010, that she saw "no need to meet with [Ms. F] for clarification of the program," but that she would do so if the supervisor insisted. On December 16, 2010, the supervisor e-mailed [G] stating there were some concerns that she wanted Ms.

¹ The Decision of the Hearing Officer issued on September 2, 2011, noted on page 2 that APECS is an "automated case management system used by the agency," while ColorTrac is a "system used to track case files." Each case file has a separate label and is given an identifying color.

F to cover in her training with [G] and that she would "look at some formal training at the first of the year."

On December 28, 2010, Ms. F sent the supervisor an e-mail describing her training time spent with [G] and complained about a "phone thing" in [G]'s ear during the entirety of the meeting and that she thought it was "inappropriate to have it on" even though she did not know the policy on cell phones. That same day, [G] sent her supervisor an e-mail thanking her for the training and that she learned "several options" and that "[w]orking as a team is also the greatest tool of all. I will continue to do the best job possible."

On January 31, 2011, [G's] supervisor sent [G] a memorandum stating that her performance in "Maintenance and Transfer of Case Records" and "Delivers Quality Customer Service" were areas that "continues to concern me." The supervisor communicated to [G] that 35 percent to 40 percent of cases were not "processed in the accepted time frames" and that case files checked into the file room were still being lost. As for quality customer service, the supervisor communicated to [G] that there were still problems, such as a large volume of e-mails back-and-forth

when "it is expected that you would have established effective working relationships" with co-workers to get required tasks completed more efficiently and "sharp retorts at your supervisor which border on insubordination." The supervisor warned [G] that her job was in jeopardy unless "drastic improvement" was shown within the "next week or two."

On February 4, 2011, [G] and her supervisor met and discussed ColorTrac and other issues. The supervisor audited [G's] case files. She looked at the number of cases processed by intake employees or cases arriving from other district offices and looked to see when [G] processed the cases in the ColorTrac system. The Supervisor determined that about a third of the cases initiated by intake employees were out of compliance and about 40 percent of the other cases transferred to [G] were not in compliance, compared with 35 percent and 40 percent, respectively, in the previous review.

On February 16, 2011, [G] received a three-month Re-evaluation and was rated "Below Contributor" rating in the same two areas: "Maintenance and Transfer of Case Records" and "Delivers Quality Customer Service." In that

re-evaluation, her supervisor wrote that [G's] "personal interaction with co-workers" was "marginal at best as she hides behind a barrage of e-mails. She is disrespectful to her supervisor and is generally unreceptive to guidance and direction offered." In summary, [G] was found to be "unsuccessful in establishing a positive working relationship with staff or management" and that she "expressed her unhappiness in being assigned" to her current job. The agency considered whether there were alternatives to firing [G] but found that she was "not a candidate for reassignment," nor could the agency reduce her duties because "she was the only person classified as an Administrative Office Specialist III within the Operations Unit and was the only individual assigned with the duties outlined in her Employee Work Profile." The agency reviewed four vacant positions but concluded that [G's] knowledge, skills and abilities were not suitable for those positions.

HEARING OFFICER'S FINDINGS:

At the conclusion of the hearing, the Officer found that the audit of [G's] work showed a third of the cases she managed were out of compliance and that she had "difficulty meeting the one-day standard in her Employee

Work Profile." [G] argued that her supervisor's audit was unreliable because her audit documents were not presented at the hearing. The hearing officer found that while the documents would have "materially improved" the Agency's case, their absence was "not fatal to the Agency's case." Further, the supervisor's testimony was "credible," and "were supported by other documents in the case file indicating that she informed [G] that [her] case files were not properly filed."

The Officer also found that the Agency presented "sufficient evidence" to support its conclusion that [G] did not deliver quality customer service to internal customers. [G's] supervisor testified that [G] was "often abrupt" during her interactions with her.

On the matter of retaliation, the hearing officer found that [G] did not show that she was removed because of her filing the grievances.

CONCLUSION:

During the grievance hearing and here, [G] argues that the Agency's standard set for her (the one-day standard for maintaining and transferring case files) was

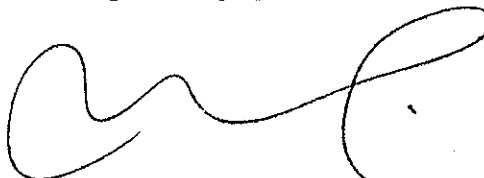
unreasonable. However, the Hearing Officer noted that the supervisor testified that she did not expect [G] to meet the Agency's standard for every case file; nonetheless, the number and percentage of case files out of compliance was "significant and raised the [s]upervisor's concern." As mentioned, [G] received "Below Contributor" ratings, which triggered agency regulations that required the supervisor to "demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period" if there is no improvement. The Hearing Officer noted that the Agency "presented sufficient evidence to show that its conclusion was not in disregard of the facts or without a reasoned basis."

In summary, the court finds that there appears to be no grounds for showing that the Performance Evaluations were arbitrary or capricious. Nor are there grounds to show that the performance evaluations were retaliatory. While [G] alleged in the hearing before this court that the grounds for her firing are suspect because she was told continually that she was "not a fit," the grounds provided by the DSS for its actions and the procedures it followed are sufficient to uphold [G's] termination.

Under the foregoing principles applicable to appeals before the court, it cannot be said that the decision to uphold [G's] dismissal was either arbitrary or without evidence to support it. The agency's findings that [G's] termination for the reasons of below-contributor ratings and lack of improvement has a basis in the record. Under the circumstances, the court has no option other than to deny relief to [G]

Counsel for DSS is directed to furnish for entry a final order upholding the agency's decision with exceptions noted.

Very truly yours,

A handwritten signature in black ink, appearing to be 'Melvin R. Hughes, Jr.', written in a cursive style.

Melvin R. Hughes, Jr.