

Issue: Separation from State Service for Below Contributor Rating on 90-day re-evaluation; Hearing Date: 05/14/12; Decision Issued: 05/21/12; Agency: TAX; AHO: Carl Wilson Schmidt, Esq.; Case No. 9803; Outcome: No Relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 06/04/12; Reconsideration Decision issued 06/04/12; Outcome: Original decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9803

Hearing Date: May 14, 2012
Decision Issued: May 21, 2012

PROCEDURAL HISTORY

Grievant was removed from employment following a performance re-evaluation. On February 15, 2012, 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 he requested a hearing. On April 9, 2012, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. The Hearing Officer found just cause to extend the time frame for issuing a decision in this grievance due to the unavailability of a party. On May 14, 2012, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

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

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its removal of the Grievant was warranted and appropriate under the circumstances. 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 Taxation employed Grievant as an IT Internal Auditor. He began working for the Agency in 2007. The purpose of his position was:

Assist the Internal Audit Director with evaluating the adequacy of TAX’s internal controls as designed and functioning and to determine whether these controls ensure the management’s goals and objectives are being met in the most effective, efficient, and economical manner; plan and conduct audits of automated application systems and information technology operations; test system integrity and reliability, system controls, and data security; provide system support for non-system audits and serve as a consultant to the information technology and user groups. An independent, objective assurance and consulting activity designed to add value and improve TAX’s operations through a systemic, disciplined evaluation approach to improve the effectiveness of risk management, control, and governance processes.¹

Grievant received an Annual Performance Evaluation on November 1, 2011. He received an overall rating of Below Contributor. Grievant did not file a grievance challenging the evaluation. On November 3, 2011, Grievant was provided with a Re-Evaluation Plan outlining Grievant’s work performance for the following 90 day re-evaluation period. The Supervisor met with Grievant to discuss Grievant’s work progress and provide feedback on November 17, 2011, November 29, 2011, December 1, 2011, December 15, 2011, December 20, 2011, December 27, 2011, December 29, 2011, January 5, 2012, December 10, 2012, and January 12, 2012.

Grievant was offered additional training. For example, Grievant received training from the Office of the State Internal Auditor to provide additional guidance regarding how to perform audits in compliance with VITA standards. Grievant completed the training on December 2, 2011.

¹ Agency Exhibit 1.

On January 30, 2012, Grievant received a re-evaluation completed by the Supervisor rating Grievant's overall work performance as Below Contributor.

The Supervisor evaluated whether action could be taken in lieu of removal. The Supervisor concluded that Grievant could not be demoted or reassigned because no other positions were available. He also concluded that Grievant's work duties could not be reduced because Grievant's position with its current duties was necessary for the Agency's operations.

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 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. He was given a re-evaluation work plan that identified the work he was expected to perform over the following three months and how his performance would be judged. Grievant was re-evaluated within two weeks of the end of the three month re-evaluation period. He received an overall rating of Below Contributor. The Supervisor considered whether to demote or reassign him to another position. The Supervisor concluded no suitable positions were available. The Supervisor concluded that Grievant's duties could not be reduced. The Agency chose to remove Grievant from employment.

Grievant's re-evaluation was not arbitrary or capricious. The Supervisor compared Grievant's work re-evaluation plan with his work product during the re-evaluation period and concluded that Grievant's work performance for several Core Responsibilities was Below Contributor. For example, for the Core Responsibility of "Perform audit planning and fieldwork to obtain an understanding of the area to be reviewed", Grievant was assigned responsibility to (1) Start and complete EESMC application audit and compliance with VITA standards, (2) Complete the

Correspondence processing on it, stated in the previous reporting period, and (3) Start and complete IRS safeguard follow-up on it. Grievant did not complete any of the assignments as expected.

For the Core Responsibility of “Perform test work to prepare working paper documentation”, Grievant provided workpapers that continued to be predominately a repetition of facts presented. Grievant demonstrated little assimilation of the facts into the information that could generate actionable recommendations for managers.

For the Core Responsibility of “Assist with the preparation and finalization of reports and oral presentations”, Grievant had difficulty drafting reports. His reports were not clear and concise. He recommended that the Agency adopt a process that already existed.

Upon consideration of Grievant’s work performance at the end of the re-evaluation period, the Supervisor concluded the Grievant should receive an overall rating of Below Contributor.

Grievant presented as evidence notes that he had written and some written discussion to contradict the Supervisor’s evaluation comments. Grievant did not testify to explain the nature of his objections to the Supervisor’s statements and presents facts supporting his position. Grievant did not present documents that would establish that the Supervisor ignored or misunderstood material facts forming the basis of the re-evaluation. Grievant has established that he has a different opinion regarding his work performance than the opinion formed by the Supervisor. What Grievant has failed to do is present sufficient evidence for the Hearing Officer to conclude that the Supervisor’s re-evaluation of Grievant was arbitrary or capricious. Grievant must show more than that his opinion is better than the Supervisor’s opinion regarding his work performance. Grievant must show that the Supervisor’s opinion was arbitrary or capricious. The evidence showed that the Supervisor reviewed Grievant’s work products and compared those work products with the re-evaluation plan in order to form an opinion that Grievant’s work performance was Below Contributor. Grievant has not established a basis for the Hearing Officer to reject the Agency’s re-evaluation which resulted in his removal.

DECISION

For the reasons stated herein, the Agency’s removal of Grievant following a performance re-evaluation is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9803-R

Reconsideration Decision Issued: June 5, 2012

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

(1) the evidence is newly discovered since the date of the Hearing Decision; (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant seeks reconsideration and states:

I believe that the decision rendered did not give fair consideration to any of my rebuttals to the comments and assertions made by the Director of internal Audit; as I said in an earlier e-mail to you, it was a matter of his word against mine, and mine apparently was given no weight.

The Agency presented testimony of the Internal Audit Director who explained how he concluded Grievant’s work performance was inadequate and how Grievant failed to obtain a contributor rating on the re-evaluation. Grievant asked questions of

the Internal Audit Director. The Hearing Officer was able to assess the credibility of the Internal Audit Director. At the conclusion of the Agency's case, Grievant was given the opportunity to present evidence in support of his position in the grievance. He did not present any testimony³ but rather chose to rely on notes he had written in response to the re-evaluation. Grievant asserts that the notes he had written should serve as facts sufficient to refute the Agency's evidence. The Hearing Officer gave greater weight to the testimony of the Agency's witness who was subject to cross examination and whose credibility could be assessed than to the hand written notes which could not be challenged by cross examination and were not verified with credible testimony. In short, this is not a case of "his word against mine" but rather a case of greater weight given to sworn testimony versus lesser weight given to written statements. Grievant's written statements were not sufficient to refute the credible sworn testimony of the Agency's Internal Audit Director.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions.⁴ For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

³ Grievant made statements he believed to be true, but did not offer that information under oath and subject to cross-examination. Those statements did not constitute evidence.

⁴ Grievant correctly pointed out that the date of December 10, 2012 should have been January 10, 2012.