

Issue: Separation from State due to Below Contributor Rating on Re-Evaluation;
Hearing Date: 05/23/16; Decision Issued: 06/26/16; Agency: DARS; AHO: Ternon
Galloway Lee, Esq.; Case No. 10777; Outcome: Full Relief; **Administrative
Review: EDR Ruling Request received 07/05/16; EDR Ruling No. 2017-4389
issued 08/23/16; Outcome: AHO's decision affirmed; Administrative Review:
DHRM Ruling Request received 07/05/16; DHRM Ruling issued 09/07/16;
Outcome: AHO's decision affirmed.**

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10777

Hearing Date: May 23, 2016

Evidence Closure Date: June 6, 2016

Decision Issued: June 26, 2016, 2016

SUMMARY OF DECISION

The Agency had found that Grievant's performance was unsatisfactory after a three (3) month re-evaluation period. It then terminated Grievant. The Hearing Officer found the Agency failed to meet its burden. Hence, Grievant was reinstated.

HISTORY

On or about January 20, 2016, the Agency separated Grievant from her employment. The separation was due to the Agency finding Grievant's performance was unsatisfactory after a 90 day re-evaluation period. Grievant timely grieved the Agency's Action.

The Hearing Officer held a telephonic prehearing conference (PHC) on March 8, 2016.¹ Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was May 23, 2016. Accordingly, by agreement of the parties, the hearing was set for that date. Following the PHC, on March 8, 2016, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC. Subsequent to the initial PHC, the Hearing Officer received a motion from the Grievant requesting that the Hearing Officer issue an order for the production of documents. After holding a second PHC on April 12, 2016, and providing the parties an opportunity to address the motion, the Hearing Officer issued an order that instructed the Agency to produce for the Grievant's Advocate certain documents.

On May 13, 2016, the Hearing Officer received another motion from the Grievant's Advocate asking that the Agency be compelled to produce certain documents. The Agency filed a response to the motion on May 16, 2016, asserting that it had complied with the Hearing Officer's order requiring the Agency to produce documents. A third PHC followed on May 19, 2016, where the Hearing Officer considered the arguments of the parties regarding the motion to compel. After careful deliberation, the Hearing Officer denied the Grievant's motion to compel.

Moreover, during the third PHC held on May 19, 2016, the Hearing Officer addressed the Agency's objections to Grievant's witness list. Nine (9) individuals were named on the list, and Grievant represented they were all Agency employees. Grievant's Advocate requested during the PHC that the Agency provide them for examination during the hearing. The Agency's Advocate argued that several of the nine (9) witnesses listed could not provide relevant testimony. Also, he stated that one of the listed witnesses was no longer an employee of the Agency. After obtaining proffers from the Grievant's Advocate regarding the witnesses' anticipated testimonies, the Hearing Officer found them to be relevant witnesses.

¹ This was the parties' first date available for the PHC.

However, the Hearing Officer found that the Grievant had not timely provided the witness list to the Agency. This is so, because under the scheduling order, the parties were instructed to exchange their witness list by May 16, 2016. Grievant provided her list to the Agency on May 18, 2016. Further, the Hearing Officer determined that Grievant had not requested any witness orders. The Agency's Advocate represented that he believed he could make sure that six of the witnesses who are employed by the Agency could attend the hearing. Of the remaining three witnesses, the Hearing Officer informed the Grievant's Advocate that the Agency was not responsible for assuring that any nonemployee be present for the hearing. The Hearing Officer instructed the Agency's Advocate to make reasonable efforts to determine if the remaining witnesses could testify by telephone.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. Then the Hearing Officer admitted Agency Exhibits 1 through 12. Grievant's Exhibit 1 was admitted, pages 1, 2, and 14 through 122. The Agency objected to pages 3 through 13 on relevancy grounds. Those pages were not admitted because they were untimely and irrelevant.

At the hearing held on May 23, 2016, both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant was also represented by her advocate.²

APPEARANCES

Advocate for Agency
Witnesses for the Agency (6 witnesses)
Grievant's Advocate
Grievant
Witnesses for Grievant (6, witnesses including the Grievant)

ISSUE

Whether the dismissal due to unsatisfactory performance during Grievant's 3 month re-evaluation period was warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

² At the conclusion of the hearing the record was left open until June 6, 2016, for the submission of a written statement by [witness] on behalf of Grievant. The statement was timely received and admitted as Grievant Exhibit 2. The Agency had no objections to the statement.

FINDINGS OF FACT

After reviewing all the evidence presented and observing the demeanor of each witness who testified in person makes the following findings of fact:

1. Grievant had been employed by the Agency since 2012. She received a “contributor rating” on her annual performance reviews in October 2013, and in October, 2014. The 2014 annual review noted that it was nice to have Grievant as part of the Portsmouth office and that Grievant was flexible. (G Exh., pp. 18, 21).

2. Grievant’s designated job title was Office Services Specialist (OSS). Under this title, Grievant’s core responsibilities as set forth in her Employee Work Profile (EWP) are as follows:

20% Caseload Management Support: Supports the Rehabilitation Counselors, other staff and consumers to reach individual Roadmaps to success. Enters, and/or assists direct service delivery staff to enter customer services information into AWARE including referrals, applications, certifications of eligibility, IPE's and amendments, authorizations, and closures. Analyzes systems addicts, identifies problems by reviewing customer file, and makes corrections. Verifies printed products to ensure data in the system is correct. Drafts correspondence, memoranda, reports, and various customer services documents to assist direct service staff and manager. Assist staff with cases by a variety of contacts by telephone and/or letter. Maintains accurate and current customer filing system. Assist with records retention procedures.

60% Administrative/Fiscal Management: Prepares administrative and customer services vouchers to expect prompt and accurate payment in compliance with applicable policy and procedures. Ensures billed amounts are correct and obtains appropriate signatures on all vouchers. Identifies questions and problems with vendors related to payment, and refers to direct service staff as needed for resolution. Works with counselors in a teamwork approach to monitor and respond to aging authorizations. Monitors case service budget via AWARE, to ensure agency fund codes are properly used. Maintains cooperative and effective working relationships with vendors to ensure timely coordination and payment for customer services.

Handle Procurement Responsibilities in accordance with State and Agency guidelines.

15% Office Services Support: Performs a variety of clerical/administrative task to support office maintenance and operation. Opens and distributes mail and ensures outgoing mail is prepared appropriately. Communicates with customers and the general public to facilitate rehabilitation activities through telephone calls in fact (sic) to face contact. Take incoming telephone calls and directs calls as appropriate and gives general information. May schedule customer appointments

as appropriate. May assist customer to access the office of Employment Resource Center.

5% **Case Documentation:** In a quality manner, concisely documents the provision of services reflecting maximum customer input into the decision-making process. Documents in AWARE case notes reflecting schedules made from counselor's request for clients – doctor's appointments, interviews with employers, etc. Documents in case note client's letters. E-mail counselors when clients drop off materials and counselor's absence.

(A Exh. 2, pp. 2-3).

3. While the EWP does provide that an employee may be required to perform other duties in response to an emergency declaration, the evidence does not support any emergency declaration being made in the matter before this hearing officer. (A Exh. 2, p. 3).

4. Grievant initially worked as an OSS in the Agency's Norfolk office. This job began about June, 2012. There were three such specialists in the Norfolk office. Also, eleven (11) counselors worked out of the office. Each OSS was assigned either 3 or four (4) counselors to assist. While working in the Norfolk office, Grievant was assigned to 4 counselors. (Testimony of Grievant).

3. The duties Grievant performed for her 4 assigned counselors was "age off authorizations" and HRT billing. In addition, Grievant mailed letters for those 4 counselors. (Testimony of Grievant).

4. Also, in the Norfolk office, each of the 3 OSS workers were assigned a particular day to answer the telephone for 4 hours. While responding to telephone calls, Grievant also performed other tasks such as paying bills and greeting consumers as they entered the office. When Grievant was not answering the telephone, she performed other tasks such as scanning closed files and completing applications in the AWARE computer system. (Testimony of Grievant).

5. Although Grievant had received only two (2) hours of training on how to use AWARE, she and the other support staff in the Norfolk office worked as a team and assisted each other in using the system. Her co-workers did not report (for the purpose of suggesting Grievant was incompetent) to her superior if Grievant had a question about using AWARE. Employees in the office were receptive to Grievant asking questions about tasks. (Testimony of Grievant).

6. In the Norfolk office Grievant was responsible for scanning only the closed files as the open files were being maintained as hard files in folders and not on the computer. (Testimony of Grievant).

7. While working as an OSS in the Norfolk office, Grievant did not receive complaints about her work from the counselors. (Testimony of Grievant).

8. The Agency's office in Portsmouth is very busy, and management transferred Grievant to

that office in January, 2014. Grievant did not desire to be transferred. One reason was the immediate supervisor in the Portsmouth office had a reputation of being unprofessional. (Testimony of Grievant, Statement of Former Portsmouth).

9. When Grievant arrived to the Portsmouth office to work, she was the sole OSS to assist 11 counselors. In addition, two Employee Services Specialist (ESS) worked in the office. However, ESS1 transferred to the Hampton office about January 2015. (Testimonies of Grievant, ESS1, and District Manager).

12. The demands on Grievant as an OSS in the Portsmouth office mushroomed. For one, Grievant was required to assist all 12 counselors which was contrary to her being assigned only 4 counselors to work for in the Norfolk. (Testimony of Grievant). In addition, the office received about 50 telephone calls a day. While ESS1 answered the telephone sometime, the responsibility rested primarily with Grievant. (Testimonies of Grievant and ESS1). Grievant was also responsible for greeting customers and clients as they entered the office. In the Norfolk office the OSS workers rotated answering the telephone. (Testimony of Grievant).

13. In addition, in the Portsmouth office, Grievant was responsible for scanning documents and creating electronic files and file folders for open and closed cases. If the files were over five (5) years old, she would shred them after scanning materials and creating an electronic file. The only exception was if a counselor wanted to retain a hard copy of the file, it would not be shredded. (Testimony of Grievant). For the files that were less than five (5) years old, Grievant would scan the documents in the file and retain the file in hard copy form also. Before Grievant arrived in the Portsmouth office another employee had performed the scanning function. (Testimony of Grievant).

Specifically, the scanning required of Grievant in the Portsmouth office was vastly time consuming, complex, and confusing. Grievant was required to scan documents in folders and subfolders. Lack of clarity existed regarding what subfolder some documents were required to be scanned into. While Grievant received some training on a power point presentation, it failed to adequately prepare Grievant for the level of scanning required. At some point Grievant did receive additional training regarding scanning documents into folders from an employee in the Hampton Office. However, this subsequent training failed to cover all aspects of scanning Grievant was required to perform. (Testimony of Grievant; G Exh. p. 65).

Grievant asked for specific training from her immediate supervisor, but she never received it. (Testimony of Grievant; G Exh. p. 64). Counselors often gave her items to scan with no specific time noted for them to be placed in a client's electronic file. In addition, no office policy had been set on how soon documents were to be scanned. Grievant performed the scanning tasks along with other duties. (Testimony of Grievant).

14. Grievant's job duties in the Portsmouth office also included training AARP customers who sought the services of the Agency to receive job training. They volunteered to help answer the telephone, address envelopes, and mail correspondence. Because of her heavy work load, Grievant was not able to adequately monitor the AARP customers. (Testimony of Grievant).

15. The Agency purchases bus passes for clients to either come to appointments at the Agency Office or to go out and look for a job. Grievant was responsible for the billing associated with the purchases, also referenced as HRT billing, generated by all 11 counselors. (Testimony of Grievant; G Exh. p. 41).

16. Moreover, Grievant was responsible for obtaining Social Security Income Verification of the Agency's clients in the Portsmouth office. As such, she was identified as the Benefit Planning Query Point of contact (BPQP). As such Grievant conducted tasks related to the verification process on about 25 clients per week. Grievant did not perform this task in the Norfolk office as it was performed by another worker in the office who was not an OSS. (Testimony of Grievant; G Exh. p. 41).

17. In the Portsmouth office, Grievant also was responsible for opening the mail for the entire office staff. This involved Grievant opening the mail on a daily basis, sorting it, date stamping it, and placing it in the appropriate mailbox. (Testimony of Grievant).

18. Further Grievant was required to work in the AWARE System. Her tasks included, among others, opening new cases in AWARE, entering clients' information in the system and paying bills from AWARE. (Testimony of Grievant).

19. Additionally, Grievant was responsible for Age Off Authorizations. The Age Off Authorizations report was released monthly. It was used to determine if bills would be paid or not. Grievant's responsibility was to send an email to the counselors and inform them of the monthly report. She also inquired if the bills on the report would be paid or cancelled by the Agency. (Testimony of Grievant; G Exh. p. 38).

20. Even though Immediate Supervisor emphasized that the Age Off Authorizations was a crucial task, a reasonable person could determine that he held her in contempt if she asked questions about the process as well as other procedures such as scanning in the office. This is so because when Grievant asked questions, Immediate Supervisor used them to assist him in writing derogatory comments on her evaluation. (Testimony of Grievant).

Sometimes issues arose on a task she was completing which necessitated her asking questions of the counselors or the ESS. Grievant concluded that those questions were reported to her immediate supervisor. Grievant concluded such was the case because the questions she asked would be noted on the evaluations completed by her immediate supervisor. Specifically, her questioning would be used to her disadvantage on the evaluation to suggest Grievant was not confident and could not do her job. (Testimony of Grievant).

Immediate Supervisor encouraged other staff in the office to report questions Grievant had about her work and any errors she made. (A Exh. 10, 30; G Exh. 45, 60-62)

21. When Grievant worked in the Norfolk office, she could ask questions about tasks without being scorned by other staff or her questioning being construed as Grievant not knowing her job. Likewise, Grievant was receptive to others in the office asking her questions about their work. (Testimony of Grievant).

22. Although not described in Grievant's OSS job description, she also had duties regarding the group orientation of clients. Usually an orientation was held 4 times a month. They lasted 40 minutes each. ESS2 was in charge. Grievant's tasks included her sitting in on the group orientation, passing out business cards, and maintaining the orientation intake roster sheet. The latter involved, among other tasks, noting the counselor for each orientation client. (Testimony of Grievant).

23. Even though Grievant was working as the sole OSS in the Portsmouth in 2015, on March 10, 2015, Immediate Supervisor added four additional duties to Grievant's daily job tasks. Specifically, Immediate Supervisor directed Grievant to perform the following tasks:

distribute, track and reconcile the bus ticket accounts monthly;

be the Benefit Planning Query's point of contact;

get a small purchase credit card, pass all the remaining requirements to obtain the card, be prepared to assist counselors with consumer purchases, and be ready to assist with credit card purchases by April 1, 2015;

work with ESS2 to understand the resume writing process for the office, work with consumers regarding resume writing, and be ready to assist in this area by April 1, 2015.

(G Exh. pp. 43-44).

23. A review of Grievant's EWP does not reflect that it included drafting resumes as a responsibility of an OSS. Yet, Immediate Supervisor added the duty to her daily job tasks on March 10, 2015. Grievant had not been required to write resumes in her prior job as an OSS in the Norfolk office. She informed her supervisor that writing resumes was not her strength and it had been years since she wrote one. Yet, Immediate Supervisor expected Grievant to be trained and ready to start performing the task in 3 weeks.

ESS2 held only one training session on March 12, 2015, with Grievant for the purpose of showing Grievant how to draft resumes for clients. The session was interrupted several times when clients had questions for ESS2. During the training session, Grievant asked ESS2 how he was able to get different colors on the AWARE screen. ESS2 was nonresponsive stating to Grievant that on the "K" drive there is an AWARE folder with instructions on how to use AWARE. Grievant had reportedly previously asked another employee the same question. That employer responded by saying she would answer Grievant at a later time.

Unbeknownst to Grievant, on March 12, 2015, at the conclusion of the resume writing training with Grievant, ESS2 sent a confidential email to Grievant's immediate supervisor. The email portrayed Grievant as having deficiencies in writing resumes. Grievant was unaware that ESS2 would be sending such an email to her immediate supervisor. She learned about the email once she received the Agency's response to her Motion for Document production in preparation

for the grievance hearing. (Testimony of Grievant; G Exh. pp. 43-47).

It took Grievant about 2 hours to help a client write a resume. (Testimony of Grievant).

Subsequent to the resume training, Grievant felt that ESS2 was putting extreme pressure on her to write resumes. (Testimony of Grievant; G Exh. 48-51). Even though writing resumes was a responsibility of an ESS2. (Testimony of Grievant; Testimony of District Manager).

24. Grievant did not shop for clients while she worked in the Norfolk. (Testimony of Grievant). Shopping was not described as a duty in Grievant's EWP. Yet, as mentioned above, Immediate Supervisor added it to Grievant's job duties, effective April 1, 2015. After this duty was added to Grievant's responsibilities she found herself spending up to 3 hours shopping for clients during working hours. Items purchased included, among others, clothes or shoes to assist the client find successful work. Apparently, Wal-Mart was designated as the preferred or permissive store for the Agency to purchase items. At times to complete the shopping, she was required to go to different cities. This was so because the Wal-Mart in one locality may not have an item needed in stock, thereby necessitating that she travel to another Wal-Mart that had the item in the store. (Testimony of Grievant).

25. Grievant performed other tasks also while working in the Portsmouth office. For example, she picked up clients to take them to an Agency office for an interview. She picked up clients to transport them to school. As with shopping, while transporting clients to interviews or school, Grievant was out of the office. In her absence, there was no other OSS in the office to assist the counselors. (Testimony of Grievant).

26. In the Portsmouth office, Grievant's workload was tripled compared to work she performed in the Agency's Norfolk office. (Testimony of Grievant).

27. As noted previously, Grievant received a contributor rating on her annual job performance in 2014. (G Exh., pp. 19, 21).

28. Subsequent to the 2014 annual performance evaluation, ESS1 took a position in the Agency's Hampton office. Subsequent to these events, counselors in the Portsmouth office began to complain about Grievant's work. This precipitated the immediate supervisor issuing Grievant a five (5) month interim evaluation on or about February, 2015. This evaluation rated Grievant a "below contributor." (G Exh. p. 37).

90 DAY RE-EVALUATION PERIOD

29. Grievant received an unsatisfactory annual performance evaluation on October 22, 2015. (A Exh. 4). As such, Grievant was placed on a 90 – day Re-evaluation Plan (Plan). The period was from October 22, 2015 to January 22, 2016. (A Exh. 4).

30. Under the Plan, Grievant's responsibilities remained the same as those she had during the annual review period. (Testimony of District Manager). The Plan indicated Grievant would be re-evaluated in the 4 core areas appearing on her EWP. As mentioned here, those areas were

Caseload Management Support, Administrative/Fiscal Management, Office Service Support, and Case Documentation. The percentage of time Grievant was expected to perform tasks in each core area was identical to the percentages on her EWP; that is, 20%, 60 %, 15%, and 5%, respectively. (A Exh. 4, pp. 2-3).

31. The Plan highlighted measures for Grievant to take up in each core area.

Caseload Management Support

On the subject of caseload management support, the EWP reflects that Grievant's primary duties were to support the rehabilitative counselors, other staff, and consumers of the Agency. Assigned tasks under this area included Grievant using AWARE and entering customer service information in the system. Such information involved referrals, applications, authorization, and certifications of eligibility. Additionally, Grievant was expected to draft correspondence/memorandums, make contacts with relevant individuals by telephone or in writing, and retain records. Grievant's Plan instructed her to make sure case information was timely and accurately entered in AWARE. It noted that by doing so Grievant mending relationships with counselors would ensue. (A Exh. 4). Moreover, management recommended that Grievant meet with her counselors in person to foster building a good working relationship. (Testimony of Acting Manager).

Administrative/fiscal Management

Regarding the administrative/fiscal management area, the Agency provided transportation for its clients. Often HRT transported them. A major administrative task of Grievant was for her to prepare vouchers that would facilitate authorization for payments and prompt remittance of bills for the HRT service. The Plan noted that Grievant was to "work to pay all assigned bills (HRT) and complete age off authorizations without constantly asking for reassurance." (A Exh. 4, p. 2).

Office Services Support

Concerning her responsibility under the area "Office Services Support," Grievant's major duty in this area was to perform a variety of clerical/administrative tasks. Among those tasks, Grievant was to open and distribute mail, ensure that outgoing mail was appropriately prepared. In addition, she was expected to communicate with customers and the general public in person and by telephone. The Plan stressed the need for Grievant to be professional when dealing with various non-staff individuals when at the front window or over the telephone. In addition it noted the need to promptly report to her desk in the morning and to avoid becoming defensive when approached about errors. (A Exh. 4-3).

Case Documentation

Under the fourth area of core responsibility - case documentation - Grievant was expected to document services provided to customers and provide case notes in AWARE pertaining to the cases handled by the rehabilitation counselors. Also, when a client delivered

materials for a counselor to the office and the counselor was absent, Grievant was expected to promptly inform the counselor by email. The Plan stressed that Grievant was expected to timely and accurately enter the information in AWARE. (A Exh. 4-3).

Employee Development Plan

32. Under Policy 1.40, the supervisor must develop an entire Re-Evaluation Plan. This includes an Employee Development Plan. (Policy 1.40; A Exh. 1, p. 10; G Exh. pp. 23-34).

33. Part III of the Plan addressed the “Employee Development Plan.” This section indicated that during each month of the plan the manager would meet with the employee to discuss Grievant’s performance and progress toward meeting her goals. The development plan section also referenced meeting with Grievant one to two weeks before the end of the Plan and re-evaluating Grievant. It noted that a “below contributor” rating would subject Grievant to termination. (A Exh. 4, p. 4).

34. No personal learning goals/roadmap to success was written in the Employee Development Plan. (A Exh. 4, p. 4).

November Review Day under the Plan

35. The first monthly meeting under the Employee Development Plan was held on November 23, 2015. Those present were Grievant, Acting Manager, and District Manager. Grievant’s immediate supervisor was not in attendance. Management made a decision to have Acting Manager attend in lieu of the immediate supervisor because the relationship between Grievant and her immediate supervisor had become extremely difficult. (Testimony of Acting Manager; A Exh. 10, p. 4). Grievant was unaware until she entered the meeting that Immediate Supervisor would absent. She became uncertain as to who was designated as her supervisor for purposes of the re-evaluation period. (Testimony of Grievant).

Acting Manager read the first month review. Concerning caseload management, Acting Supervisor mentioned the recommendation that Grievant meet with each counselor to determine their needs and how past errors could be corrected. Grievant declined to meet with the counselors.

Grievant’s decision was based on her view that she had justified reasons to distrust the counselors individually/collectively. For example, Grievant reports that in the past, she has met with counselors one on one and they have made certain statements to her. However, they would make a different statement to the immediate supervisor. (Testimonies of Acting Manager and Grievant; A Exh. 10-4). In addition, prior to Grievant receiving her “below contributor” rating on her 2015 annual performance review, she notes that some of the counselors had complained to the immediate supervisor about Grievant’s work without first approaching Grievant and/or giving her an opportunity to resolve any concerns. (Testimony of Grievant; G Exh. pp. 58-63). Grievant was also of the view that the described behavior of the counselors was encouraged by Immediate Supervisor. (Testimony of Grievant; G Exh. pp. 58-63, 109; A Exh. 3, p. 6 and A Exh. 8, p. 3).

Further, based on certain comments the immediate supervisor would make to Grievant, she opined that when she would ask other staff a question on how to perform a certain task, the inquiry would be communicated to Immediate Supervisor. Subsequently, her questioning would then be held against her for evaluation purposes. (Testimony of Grievant; A Exh. 3, p. 6).

36. In addition to mentioning the recommendation concerning meeting with counselors, Acting Manager referred to the comment about Grievant not submitting a leave slip upon request. (A Exh. 10, p. 4).

37. In the area of administrative management, the evaluation reported that Grievant had to be reminded by the ESS of steps to reconcile the accounts payable. Further it noted that Grievant continues to have questions about the Age off process and had to obtain clarification about the process from the ESS.

38. The Hearing Officer finds that Grievant's continued questions about the Age Off process indicated a need for additional training.

39. On the subject of Office Services Support, the evaluation noted only one report of Grievant being described as being rude to a parent. (A Exh. 6, p. 1).

In addition, it was noted that Grievant failed to secure confidential records after being reminded to do so. (A Exh. 6, p. 1).

40. In the area of Case Documentation, the evaluation reported that Grievant was entering new referrals into the AWARE system. It also reported that Grievant lacked initiative to look up case information in the AWARE system when a counselor is absent and a consumer may ask a question about a case. (A Exh. 6, p. 1).

41. Regarding Customer Service, the evaluation noted that Grievant was much better in this area. (A Exh. 6, p. 1).

42. The evaluation also mentioned that Grievant was disrespectful to her supervisor when he was reviewing her annual evaluation on October 22, 2015, and that Grievant fails to problem solve. (A Exh. 6, p. 1).

43. Finally, the first month evaluation noted that it was hard for Grievant to learn a new way of doing things. The evaluation stated that Grievant needed a lot of training and re-training to adapt to change. (A Exh. 6, p. 1).

44. Other than the discussion about Grievant meeting with the counselors, management provided Grievant with no counseling during the November 23, 2015, review meeting. (Testimony of Grievant).

45. Also, at the conclusion of the first month evaluation period, the Agency did not provide or offer Grievant additional training in areas that it is reasonable to conclude she could have

benefited from had such training been provided. Those areas include additional training in using the AWARE system, HRT billing, and Age Off Authorizations. It is reasonable to conclude that the identified training would have assisted Grievant in being able to successfully perform her duties.

46. Although Acting Manager reviewed the first month re-evaluation with Grievant, he did not complete the review. Additionally, although Grievant had been instructed to perform some of the duties of an ESS, Acting Manager did not know the difference in the duties required of an OSS and ESS. Thus, he failed to realize that the duties of an OSS do not include shopping for clients and preparing resumes. (Testimony of Acting Manager). Moreover, Acting Manager was unable to answer some questions asked by Grievant during the 1st month review of the Plan. (Testimony of Grievant).

December Review Date under the Plan

47. The second monthly review was held on December 21, 2015. Those present were Grievant, Acting Manager, and District Manager. Grievant's immediate supervisor was not in attendance. This was so due to the difficult working relationship between Grievant and Immediate Supervisor which was previously mentioned here. (Testimony of Acting Manager).

48. Grievant was read the second month re-evaluation form. In the area of case management, Grievant was again reminded of the recommendation to meet with the counselors. For the reason previously noted, she declined to meet with most if not all of the counselors in person. However, Grievant sent an email to the counselors soliciting concerns each counselor had regarding the work she was providing for them. The counselors responded. (A Exhs. 7 and 11).

49. On the subject of administrative management, the re-evaluation noted that Grievant had to ask the ESS for reassurance regarding reprinting payment stamps. No mention is made of whether Grievant was performing her duties in this area within the permissible 5% error rate. (A Exh. 4, p. 2; A Exh. 6, p. 3).

50. On the subject of Office Services Support, the re-evaluation mentioned that Grievant was given instructions on being more assertive regarding what the consumer needs are when dealing with a consumer request for a vacant caseload. In this same area, the re-evaluation noted that Grievant had made errors with telephone numbers and consumer names. Grievant denied this assertion and stated she had provided the information to her supervisor as she had received it. . The evidence was insufficient to substantiate the Agency's claim of erroneous information being provided.

51. The second monthly review also mentioned that Grievant had sent a complaint to Human Resources about him. Further, it mentioned that Grievant disrespected her immediate supervisor's authority. The evidence establishes that Grievant and her immediate supervisor experienced a relationship where neither party trusted the other.

52. A note in the second month report indicated there was at least one occasion where Grievant failed to secure confidential information. (A Exh. 6, p. 3; A Exh. 10).

53. During this review, Grievant sensed that the immediate supervisor did not intend to help her develop. Contrarily his motive was to terminate Grievant. (Testimony of Grievant).

TRAINING PROVIDED

54. Trainer sent an email to Grievant on October 16, 2014, with instructions on scanning. A power point presentation was also included with those instructions. (G Exh., pp. 39, 40).

On May 21, 2015, Grievant met with Trainer to receive training on placing documents in the electronic folder. Trainer described the scanning process as being overwhelming and confusing at times. (G Exh. pp. 65).

On March 5, 2015, ESS1 sent Grievant an email with the attached instructions for completing the Age Off Authorization monthly reports. ESS1 invited Grievant to ask questions of her if necessary. (G Exh. p. 112).

55. Grievant had not prepared resumes for years. On March 11, 2015, Grievant received training on writing resumes from Master Applications from ESS2. At the completion of the training, ESS2 asked Grievant to prepare resumes for two of his clients by using each client's Master Application. Subsequently, ESS2 begin asking Grievant to prepare resumes for clients from their Master Applications. (G Exh. pp. 45-51).

56. On or about March 23, 2015, ESS1 provided some training for Grievant regarding HRT billing and Age Off Authorization reports. The training session lasted for 45 minutes and took place at the end of the work day. It covered an enormous amount of information that Grievant was to utilize in performing her duties as an OSS. Grievant took notes during the session; however, she determined that she needed additional training to assure her note taking was accurate. Thus, the day after the training, Grievant requested that ESS1 provide her a refresher course. (G Exh., p. 114; Testimony of ESS1).

57. Subsequent to the March 23, 2015 training, Grievant asked ESS1 questions about tasks she was performing, ESS1 considered her answering those questions as additional training being provided to Grievant. ESS1 then reported to immediate supervisor that Grievant was asking questions about how to perform her job. (Testimony of ESS1). Immediate Supervisor held Grievant's inquiries against Grievant.

58. Grievant also asked her immediate supervisor for additional training. (Testimony of Grievant).

59. Grievant has repeatedly stated she was not adequately trained. (A Exh. 10, pp. 21, 26).

60. Staff in the Agency/office had not received uniform training on how to scan documents. (A Exh. 10, p. 8).

61. It was brought to Immediate Supervisor's attention again on or before December 14,

2015, that Grievant felt she had not been adequately trained. This was more than 30 days before the end of the 90 day Re-Evaluation Period. (A Exh. 10, p.21). Evidence does not establish that any additional training was provided to Grievant in spite of the immediate supervisor knowing of Grievant's need for training in using AWARE, scanning, HRT billing and Age off authorizations. Adequate training in these areas was critical to Grievant being successful in performing her job.

OTHER

62. Some counselors complained about Grievant's work during the 90 Day Re-Evaluation Period and noted they were dissatisfied with her work. (Testimonies of VRC1, 2, and 3).

DETERMINATION AND OPINION

I. Analysis of Issue(s) before the Hearing Officer

Issue: Was the termination warranted and appropriate under the circumstances:

The evaluations under the Plan fail to support termination.

First the Hearing Officer focuses on the November review under the Plan. For one, this 30 day review recommends that Grievant meet with the 12 counselors. The evidence shows that while Grievant may not have met with each of the counselors, she did send them correspondence to determine any concerns they had with her work. Her correspondence was professional as well the responses from the counselors. Further, Grievant's correspondence was capable of fostering and mending any broken relationships between the Grievant and the counselors. Grievant's election of an alternative method to mend fences that could be as effective as the one "recommended" by the Agency fails to substantiate a "below contributor" rating.

In addition, the November review illustrates that Grievant needs additional training to improve her job performance. For instance, the immediate supervisor notes that Grievant showed a need for further clarification regarding age-off authorizations and the procedure to reconcile accounts payable. At the conclusion of his review he notes that "it's hard for [Grievant] to learn the new way to do things without **much training and re training.**" (emphasis added). Yet, management did not provide additional training for Grievant. This is so in spite of Grievant having virtually 60 more days (and presumably adequate time to be trained) prior to the expiration of the re-evaluation plan. Of note as well, during the 2015 annual performance year, Grievant informed her immediate supervisor of the need for more adequate training on scanning and billing. Management's response was only to insist that training had been provided.

What is more, with the exception of the incident on October 22, 2015, which occurred even before Grievant was issued the re-evaluation plan, there was only one report of rudeness during the first 30 days of the Plan. Of note also, the acting manager who attended the review in lieu of the supervisor did not complete the 30 day evaluation. He did not know what, if any training, Grievant had received to perform her job duties. In addition, even though Grievant held

the job title of OSS, he thought an OSS and ESS performed the same tasks. Grievant who testified credibly stated that she asked questions during the meeting; however, acting manager was unable to answer them. In addition Grievant testified that she received no counseling during the meeting.

Besides the November review, on December 21, 2015, Acting Manager and District Manager held a 60 day review with Grievant under the Plan. Again under this review, management mentioned the recommendation that Grievant communicate with the counselors in person. For the reasons noted above, the Hearing Officer finds Grievant employed an acceptable and alternative means of speaking with the counselors to repair relationships.

On the subject of administrative management, the re-evaluation noted that Grievant had to ask the ESS for reassurance regarding reprinting payment stamps. As with the November 2015 review, the 60 day review demonstrates that Grievant required additional training so she could acquire the tools to perform her job. Adequate training was not provided. Of note also, in the area of administrative management, Grievant's EWP required her to "prepare bills and vouchers for payment ... in compliance with the Prompt Payment Act, agency guideline ... with 95% accuracy. The Agency evidence fails to show whether Grievant was performing her duties in this area within the permissible 5% error rate.

Moreover, concerning Office Services Support, the Agency's evidence was insufficient to show that Grievant provided names/telephone numbers that were not actually given to her by clients/consumers.

The second monthly review also mentioned that Grievant had sent a complaint to Human Resources about Immediate Supervisor. Further, it mentioned that Grievant disrespected her immediate supervisor's authority. The evidence establishes that Grievant and her immediate supervisor experienced a difficult relationship where neither party trusted the other. Each contended the other was disrespectful.

Grievant was terminated on January 20, 2016, for receiving a "below contributor" rating at the conclusion of her 90 day Re-evaluation Plan. Her final review continued to show Grievant needed additional training in scanning and in handling HRT billing. The review also reported that Grievant continued to not secure confidential information when she was away from her desk for an extended period of time. The evidence provided one incident of this claim during the third period of the 90 day re-evaluation period.

The Hearing Officer has considered all the evidence. This includes the testimonies of the Agency's witnesses, Grievant's witnesses, and exhibits provided. The Hearing Officer has accorded the weight she deems necessary to various evidence. Having thoroughly reviewed the evidence, the Hearing Officer finds the Agency has failed to show the termination based on the evaluation at the conclusion of the 90 day Re-Evaluation period is appropriate and warranted under the circumstances.

In addition, the Hearing Office finds the Agency cannot meet its burden because, Grievant has been asked to perform an impossible job for the reasons noted below.

First, Grievant was required to serve as the OSS for a staff of 12 counselors. This workload for an OSS is contrary to other similarly situated offices and to the current Portsmouth office. Specifically, the evidence shows that when Grievant worked in the Norfolk office, there were 11 counselors and three office support staff workers. Each OSS was assigned between 3 and 4 counselors to provide support services such as scanning and other clerical/administrative work. When Grievant worked in the Norfolk office, she was rated a “contributor.” In addition, after Grievant was terminated from the Portsmouth office, 2 support staffers were hired. The evidence shows that currently, the Portsmouth office employs 3 Employment Services Specialists as the support staff. Each is assigned counselors. No one support staffer is assigned to all counselors. This change in assignment is contrary to what Grievant was expected to do.

Duties Grievant was required to perform were enormous. They included scanning both old and new files for 12 counselors. Each counselor carried a caseload between 90 and 170 cases. Thus, the scanning was voluminous even if only some of the counselors asked Grievant to scan documents in their files. As substantiated by Trainer, the scanning was also overwhelming. In addition, Grievant was required to attend orientations 4 times a month. Each lasted 40 minutes. In addition to attending the orientations, she performed tasks related to them. Grievant also was responsible for greeting customers and clients who entered the office. She answered the telephones. Usually about 50 telephone calls a day when not assisted by a volunteer. Grievant also trained AARP volunteers to do clerical jobs in the office such as addressing letters and mailing them. Grievant’s duties also entailed receiving the mail. Each day, she was required to sort, open, and then distribute mail for an office of 12 plus employees. In addition Grievant performed HRT billing. She verified Social Security Income. Moreover, in April 2015, her immediate supervisor added duties not in her job description. They included writing resumes for clients and shopping on behalf of clients. A resume could take up to 2 hours to draft. Shopping could take her away from the office for 3 hours at a time. The evidence shows that in her absence, she had no back up.

What is more, the Hearing Officer finds that Grievant was in need of additional and adequate training in HRT billing, Age Off Authorization, use of AWARE, and scanning documents. Mastering this training was critical to Grievant achieving acceptable job performance. The evidence shows that immediate supervisor was aware of Grievant’s need for this training as early as spring 2015. Yet he failed to provide it. In addition, when Grievant pursued help from others by asking questions for guidance, they reported this to the immediate supervisor. In turn, the supervisor used this information to assist him in rating Grievant as a substandard employee or “below contributor.”

Furthermore, the Hearing Officer finds the 90 day Re-evaluation Plan is defective. In pertinent part Policy 1.40 provides that the re-evaluation plan should include “Employee Development.” In the Employee Development Plan section of the Plan, the Agency failed to identify personal learning goals and or the Grievant’s Individual Roadmap to Success. Either or both could have entailed the provision of adequate training to assist Grievant in developing. Said training would consist of more than Grievant just asking questions to an ESS.

For all the reasons noted, the Hearing Officer finds the Agency has failed to meet its

burden.

DECISION AND ORDER

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. For the reasons stated her, the Hearing Officer finds the Agency failed to meet its burden and show that the termination was appropriate and warranted. Thus, the Hearing Officer vacates the termination for these reasons:

1. The Plan failed to support termination;
2. The Agency failed to adequately train Grievant for her job;
3. It was impossible for Grievant to perform her job considering the number of counselors she was assigned, her job duties, the supervisor adding responsibilities that were not a part of her job description; and inadequate training; and
4. The Plan was defective.

Thus, the Agency is ordered to take the following action:

1. rescind the termination;
2. pay full back pay for the period Grievant has been separated from his job; however, back pay is to be offset by any interim earnings;
3. appropriately restore other benefits and seniority;
4. reinstate Grievant to her former position or, if occupied, to an equivalent position;
5. Prepare an appropriate 90 Day Re-Evaluation Plan for Grievant to be re-evaluated by.

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 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
Departmental of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219
or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov. or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative 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.³

Entered this 26th day of June, 2016.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate
Agency Representative
Grievant's Advocate
Grievant
EDR's Director

³ Agencies must request and receive prior approval from EDR before filing a notice of appeal.