

Issue: Separation from State due to Below Contributor Rating on Re-Evaluation;
Hearing Date: 06/01/16; Decision Issued: 06/21/16; Agency: DOC; AHO: Carl
Wilson Schmidt, Esq.; Case No. 10785; Outcome: Partial Relief; **Administrative
Review: DHRM Ruling Request received 07/05/16; DHRM Ruling issued 08/09/16;
Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10785

Hearing Date: June 1, 2016
Decision Issued: June 21, 2016

PROCEDURAL HISTORY

Grievant was removed from employment on February 2, 2016 after receiving a Below Contributor rating on three month re-evaluation.

On February 26, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 15, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 1, 2016, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether the Agency complied with State policy governing Grievant's removal based on a three-month re-evaluation?

2. Whether the Agency’s evaluation of Grievant’s work performance was arbitrary or capricious?

BURDEN OF PROOF

The burden of proof is on the Agency to show that it complied with State Policy governing Grievant’s removal. The burden is on Grievant to show that the Agency’s evaluation of his work performance was arbitrary or capricious. 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 Department of Corrections employed Grievant as a Probation Officer at one of its facilities. The purpose of his position was:

To provide professional investigative services for the Court and to provide a comprehensive system of supervision, services, and sanctions to assist adult offenders in leading law-abiding lives, resulting in enhanced public safety.¹

He began working for the Agency on March 30, 2015. Grievant formerly worked in as a Counselor in a Corrections Facility. As a Counselor, Grievant received an overall rating of Exceeds Contributor on his 2013 and 2014 annual performance evaluations. Grievant had been employed by the Agency for approximately 10 years.

Grievant’s Employee Work Profile as Probation Officer described his Core Responsibilities and Measures for Core Responsibilities including:

Core Responsibilities	Measure of Core Responsibilities
B. Supervises, counsels, and monitors offender behavior using Evidence Based Practices. COMPAS risk/needs tool will be utilized on an initial and ongoing basis to determine appropriate levels of supervision and to develop case plans.	Degree to which individual: <ul style="list-style-type: none"> • Monitors offender progress and makes appropriate referrals and develops a Case Plan based on COMPAS score and identified criminogenic needs. • Frequency of contacts should directly correlate to the level of risk and needs identified by COMPAS

¹ Agency Exhibit 7.

	<p>and in keeping with Departmental Operating Procedures.</p> <ul style="list-style-type: none"> • Uses a balanced approach consistent with Department and Unit philosophy. Routinely uses rehabilitative tools/techniques along with positive rewards and sanctions to work towards changing criminal thinking while moving towards behavioral goals. • Submits case reviews upon request and in good order.
<p>C. Investigates, reports, and follows up alleged offender violations to determine appropriate and available sanctions.</p>	<p>Degree to which individual:</p> <ul style="list-style-type: none"> • Investigates alleged violations, determines appropriate and available sanctions up to and including arrest. Reports findings to appropriate authorities as outlines in DOC Directives and Procedures (900 Series) and unit policy.

Compas is a computer program risk assessment tool. Grievant was to enter data into the program based on questioned he asked of offenders and take supervision action depending on the results from the program.

Grievant received a Notice of Improvement Needed on August 6, 2015. The Notice addressed, “he was learning at a slower pace than other new employees”, “missing deadlines with regard to writing Major Violation Reports”, and “we don’t expect reports to be written error free, we do expect them to be written when requested.” An Improvement Plan was developed providing, “Develop an organization system and record deadlines so they may be adhered to.”²

On October 23, 2015, Grievant received an annual performance evaluation with an overall rating of Below Contributor. The Agency failed to contact his prior supervisor and obtain information regarding his performance from October 2014 to March 2015 when he was employed as a Counselor at a Correctional Facility.

On October 30, 2015, Grievant received a Notice of Improvement Needed/Substandard Performance along with an Improvement Plan stating:

[Grievant] is to engage offenders with at least 3 open ended questions per appointment. He is to review court orders and case plans with each offender during each personal office conduct.

² Agency Exhibit 8.

[Grievant] is to respond to email requests for information within 3 days.
[Grievant] is to complete COMPAS assessments and refer clients to treatment as needed.
[Grievant] is to complete 27 typing lessons on [website] and be able to type at least 35 words per minute with 3% errors on each lesson.
[Grievant] is to follow up with case review instructions within 2 weeks.
[Grievant] is to adhere to the case opening checklist and timeframe given to complete each task on the checklist.³

Grievant's workload during the re-evaluation period was not excessive or unreasonable. Grievant received adequate review and feedback from his supervisor during the re-evaluation period.

On Monday February 1, 2016, the Manager issued Grievant a Notice of Improvement Needed/Substandard Performance. Grievant was given an opportunity to review the Notice and he wrote comments on that day.

On February 2, 2016, Grievant was given a final re-evaluation with an overall rating of Below Contributor. The Deputy Chief rated Grievant's performance for Core Responsibility B as Below Contributor and wrote:

[Grievant] is not utilizing Compas as trained, within policy allowed timeframes, and is not preparing case plans. Out of 17 cases filed that were reviewed, 14 required Compas to be done and [Grievant] completed 6 Compas assessments of the 14 required. Of those 6 cases, 4 scored Medium on the Lite but [Grievant] did not complete an EBP Compas [names of four offenders].

11 of the 14 cases reviewed needed Case Plans. [Grievant] hasn't done any of those Case Plans.

Of the 4 Compas evaluations [Grievant] completed, one scored HIGH on Compas Lite but the level wasn't changed and he hasn't been seen with the frequency required for HIGH cases. One of those cases scored LOW but Highly Probably for Subsequent Abuse. [Grievant] did not refer him for a substance abuse evaluation and did not prepare a case plan. One scored LOW and [Grievant] did not request to lower his supervision level or request a telephone supervision referral.

[Grievant] does provide files as requested for case reviews. Once reviewed, and the supervisor returns the files with instructions and comments, he's failed to follow those instructions. For example, files were returned to [Grievant] with notes to do the Case Supervision Review on

³ Agency Exhibit 10.

them but he didn't complete that within the two week timeframe [offender names].

[Grievant] was instructed to submit an early release order by [employee] but he's failed to do so.

The Deputy Chief rated Grievant's performance as Below Contributor for Core Responsibility C and wrote:

[Grievant's] follow-up with offenders regarding possible positive drug screens and treatment placement is still lacking. [offender names]

[Grievant is not following up on pending charges [offender names] in CAIS and documenting CORIS with the updates.⁴

On Tuesday February 2, 2016, the Agency presented Grievant with a letter removing him from employment.

CONCLUSIONS OF POLICY

An employee may be removed from employment following a three month re-evaluation period. An employee must first receive a Below Contributor rating on his or her annual performance evaluation.

Annual Evaluation

Grievant identified several errors made by the Agency regarding the August 2015 notice of improvement and the procedures required prior to the October 2015 annual evaluation. Those errors were material to the issuance of Grievant's annual evaluation. These errors are moot. Grievant did not appeal the annual evaluation and, thus, those errors are not before the Hearing Office. The relevant fact before the Hearing Officer is that Grievant's received an Annual Performance Evaluation with a Below Contributor rating thereby justifying the Agency's decision to initiate the re-evaluation process.

Re-Evaluation

DOC Operating Procedure 101.1 governs Employee Performance Management. Section IV(E)(7) provides that an employee who receives an overall rating of Below Contributor on his or her annual performance evaluation must be re-evaluated as follows:

Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a

⁴ Agency Exhibit 13.

performance re-evaluation plan that sets forth performance measures for the following three months, and have it approved by the reviewer.

The employee must be re-evaluated within approximately two weeks prior to the end of the three-month period. If an employee is absent for more than 14 consecutive days during the three-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-month re-evaluation period.

On October 23, 2015, Grievant received an annual performance evaluation with a Below Contributor rating. Seven days later he received a Performance Improvement Plan. Although the Agency failed to write that the improvement plan was a Re-Evaluation Improvement Plan, the mistake was harmless error.⁵ Employees are supposed to comply with improvement plans regardless of whether they are identified as for a re-evaluation period.

The Deputy Chief did not sign the re-evaluation performance plan as a reviewer. This mistake is harmless error because Grievant received adequate notice of his performance expectations and there is no reason to believe the Deputy Chief's review and signature would have changed any of the Agency's expectations for Grievant's work performance.

The three month evaluation period was to end on Sunday, January 31, 2016. The Deputy Chief reviewed Grievant's work performance prior to the end of the three month period but issued the re-evaluation two days after the three month period ended. This delay is harmless error. The delay did not alter or affect the nature of the Agency's evaluation of Grievant's performance during the three month period.

An evaluation is an opinion by a supervisor of an employee's work performance. An employee must show that the evaluation was arbitrary or capricious. In this case, the Agency's re-evaluation of Grievant was not arbitrary or capricious. The Agency considered all relevant facts relating to Grievant's work performance. The Deputy Chief reviewed 17 cases assigned to Grievant. The Agency presented numerous examples of Grievant's poor work performance during the re-evaluation period. For example, Grievant was supposed to have initial contact with offenders within ten business days of a file being assigned to him. He was to complete a Compas Lite within 45 days and a Compas EBP within 60 days for certain offenders. He was to complete a Livescan finger printing of certain offenders. Some offenders needed to have their DNA samples taken. Grievant should have prepared Case Plans for several offenders.

⁵ The Agency made the same mistake when completing the re-evaluation.

Grievant should have completed Compas EBPs for four offenders. He did not complete any Compas EBPs. Grievant should have completed Livescans on seven offenders but did not finger print any of them.⁶ Grievant did not take DNA samples from any offenders. Of the 14 offenders needing Case Plans, Grievant completed none of them. Grievant's three month performance re-evaluation was not arbitrary or capricious. The Agency's re-evaluation must be upheld.

DHRM Policy 1.40 governs Performance Planning and Evaluations. This policy provides:

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 adequately considered whether it could reduce Grievant's duties, demote or reassign him to another position within Probation and Parole. The Agency was unable to find a suitable position for Grievant because all of its related positions required Grievant to demonstrate timely performance of tasks and processing of paperwork. The Regional Administrator's conclusion that Grievant lacks sufficient ability to meet the Agency's standards is supported by the evidence.⁷

⁶ Grievant received his password to access Livescan in September 2015.

⁷ For example, a Surveillance Officer position requires similar skills to the Probation Officer position.

The Regional Administrator had authority over probation and parole districts. He did not have authority over correctional facilities like the one where Grievant worked as a Counselor prior to becoming a Probation and Parole Officer. Large agencies with many divisions and locations throughout the State are not expected to perform an exhaustive search for any possible position in which to put an employee. In this case, however, Grievant demonstrated satisfactory work performance in a prior position with DOC. The Agency should have considered whether Grievant was a suitable employee for any open DOC Counselor positions. The Hearing Officer will order the Agency to make a good faith assessment of whether Grievant can adequately perform the duties of any open counselor positions within the Department of Corrections.

Grievant argued that he did not receive adequate training to perform his job duties. He points out that he was not trained by Ms. R when he arrived at the Agency's office in April 2015. The evidence showed that in August 2015 he received approximately two weeks of "Basic Training" at the Agency's Academy covering all his job responsibilities. He received one-on-one training from a Senior Probation and Parole Officer. He received on the job training from his Supervisor beginning September 10, 2015. Grievant was given a checklist. If he had followed the checklist, he would have been able to complete his duties for each case. Grievant received more than sufficient training to enable him to understand and perform his job duties.

Grievant argued that an employee made a racially offensive statement to him. The evidence showed that that employee was not involved in the re-evaluation. She retired before the annual evaluation was completed.

DECISION

For the reasons stated herein, the Agency's three month re-evaluation of Grievant's work performance is **upheld**. The Agency is **ordered** to make a good faith effort to determine whether Grievant would be a suitable candidate for any open Counselor position with the Agency. If the Agency's concludes that Grievant is a suitable candidate, the Agency should offer the Counselor position to Grievant.

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

Department of Human Resource Management
101 North 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 North 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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.