

Issue: Separation from State due to performance; Hearing Date: 03/26/14; Decision Issued: 04/09/14; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10289; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10289**

Hearing Date: March 26, 2014

Decision Issued: April 9, 2014

#### **PROCEDURAL HISTORY**

Grievant was removed from employment effective January 15, 2014 because she failed to improve her performance during a 90 day re-evaluation period.

On January 31, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On February 24, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 26, 2014, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Advocate  
Witnesses

#### **ISSUES**

1. Whether the Agency complied with State policy regarding Grievant's re-evaluation and removal?
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 its removal of Grievant was consistent with State policy. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Virginia Commonwealth University employed Grievant as a General Administration Supervisor I / Coordinator I. The role description for this position was:

The General Administration Supervisor I / Coordinator I role provides career tracks for administrative specialists/coordinators and administrative supervisors who perform or supervise a variety of administrative and business functions in a unit, non-retail business, facility, or field office. The first career track is for supervisors who manage a variety of office and administrative employees performing a variety of well-defined administrative, business, and financial operations. The second career track is for administrative specialists who provide administrative support for program areas or an administrator.<sup>1</sup>

Grievant had been employed by the Agency since August 2007. She was removed from employment effective January 15, 2014.

In October 2013, Grievant received an annual performance evaluation with an overall rating of “Unsatisfactory Performer”.<sup>2</sup>

On October 29, 2013, the Supervisor sent Grievant a memorandum regarding “Performance Re-evaluation Process.” The memorandum stated, in part:

This memorandum confirms that you will begin a performance reevaluation period from October 16, 2013 to January 15, 2014 due to the recent rating of “Unsatisfactory Performer” that you received on your annual performance evaluation.

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<sup>1</sup> Agency Exhibit 9.

<sup>2</sup> The adequacy of the annual performance evaluation is not an issue before the Hearing Officer.

During the three-month re-evaluation, I will monitor your progress toward meeting the performance expectations given to you on (date). We have discussed specific actions that you must take to show improvement including verifying accuracy of correspondence and other information you disseminate, have a quicker response time to initial requests from customers as well as regular follow-up until requests are completed; communicate, as much as possible in writing, in a clear and concise manner and maintain documentation of communications; develop a tracking system to ensure tasks are completed in a timely manner, organize work area to ensure information is readily available and easily retrievable; document procedures and processes as a point of reference for issues that may arise; become knowledgeable of HR policies and procedures and stay abreast of updates/changes. I will offer assistance, but it is your responsibility to improve your performance.<sup>3</sup>

The Agency revised Grievant's Employee Work Profile and included a Development Plan providing:

Review and double check all correspondence/documents to ensure it contains correct information. If possible compare the information to relevant sources. Carefully follow directions for specified functions. For example, if new functions are required to produce a report and/or document and you are not sure as to how to perform that function, seek assistance. Review the procedures for processing PAFs, particularly processing employment and terminations. Check the NBAJOBS Transaction reports, make necessary adjustments and reply to HR via email immediately with any comments and notify supervisor of any problem.

Acknowledge receipt of customer requests within 24 hours and provides periodic follow-up, if completion date is not provided, until requests are completed; communicate, as much as possible in writing, in a clear and concise manner and maintain documentation of communications; develop a tracking system to ensure tasks are completed in a timely manner, organize work area to ensure information is readily available and easily retrievable; document procedures and processes as a point of reference for issues that may arise.

Become more knowledgeable of HR policies as they relate to faculty search and promotion and tenure policies and work visa issues for international employees in order to better understand your role in the process, offer ideas to facilitate the process, implement changes to improve the process and ensure adherence to policies.<sup>4</sup>

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<sup>3</sup> Grievant Exhibit 2.

<sup>4</sup> Grievant Exhibit 2.

Grievant and the Supervisor signed the new EWP on October 29, 2013.

On November 25, 2013, the Supervisor sent Grievant a memorandum stating, in part:

This memorandum is a re-evaluation of your job performance for the period from October 16, 2013 to November 22, 2013 due to the recent rating of "Unsatisfactory Performer" that you received on your annual performance evaluations.

Since October 16<sup>th</sup> there continue to be deficiencies in your job performance. Some examples include:

- You provided a revised offer letter to one of our faculty, [Ms. H] with the wrong job end date (see email dated 10/18/13).
- You submitted an in-band adjustment request to the Office of the Vice President for Health Sciences with incorrect information and when asked to correct it, you submitted incorrectly again. You did make the proper adjustments on the third attempt. I have copied on the request from the VP's Office dated 10/30/13 for you to resubmit.
- Your email dated 10/31/13 regarding [Dr. B's] inquiry about the lay off [of] two classified employees had contradicting statements. In one section you stated "it appears both are eligible for layoff rights and severance benefits" and at the bottom of the email you stated that "[name] is not eligible for severance".
- You are given a project to provide job descriptions for Deans, Assistant and Associate Deans and Chairs for the APCE self-study. You had the purpose of the position in the section for the purpose of the unit and most of the job descriptions. Even though I made several attempts to explain the difference and asked you to change the job descriptions to reflect the relevant information, you have difficulty distinguishing between the two. You told me you had looked at departmental websites and couldn't find any information that was useful. I asked if you had job descriptions on new faculty requirements (which are now required). You said you did. But, it didn't occur to you that those job descriptions had the unit purpose on them. I had to point that out to you. I also had to give you examples of the differences between the unit's purpose and the position's purpose. This project has taken over three weeks and is still not complete. As of Friday, November 22, you advised me that you had made more changes and that I could review them again. As HR Administrator, you should have a better understanding of

differences between the unit's purpose and the position's purpose. See emails dated 11/01/13 and 11/08/13.

- On November 6 I asked you about the status of the updated EWP for [Mr. W] because his FLSA status was in question. You told me you weren't aware that [Mr. W's] EWP was supposed to be revised. I forwarded to you the attached email dated 11/07/13 (which you were copied on) from [Mr. C] [Mr. W's] supervisor, stating he would work with you to adjust [Mr. W's] EWP.

There have been some noticeable efforts to communicate more, although there was a recent incident where you discussed concerns about an employee's green card application with one of the Business Office staff, but never spoke with me about it. This resulted in me spending a great deal of time researching the details to respond to the supervisor's request for financial support to process the employee's application. There was another incident where you sent out an email that was difficult to follow and did not provide clear and concise instructions for the recipients of the correspondence. You provided me with a draft of a memo you were preparing that was also very confusing because you did not explain your expectations. I had to point out the problems and advise you on how the document needed to be written.

I was able to get some additional storage for your work area and you have begun to put some effort into better organizing your workspace. In addition, we have increased our regularly scheduled meetings to semi-monthly instead of monthly.

Overall, the specific actions needing improvement identified in your evaluation and my follow-up memo are still required.

As I previously stated, I will continue to offer assistance, but it is your responsibility to improve your performance. Because of the holiday break, I will conduct another review sometime during the week ending Friday, December 13, 2013. I will contact you with a date and time.

Please let me know if you have any questions regarding the re-evaluation process or how I may assist you during this time period.<sup>5</sup>

On December 17, 2013, the Supervisor sent Grievant a memorandum stating, in part:

Per our discussion, this memorandum confirms that you will receive an "Unsatisfactory Performer" rating at the completion of your three-month performance reevaluation on January 15, 2014.

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<sup>5</sup> Grievant Exhibit 2.

Because you have received a second “Unsatisfactory Performer” rating, I am writing to let you know that, effective January 15, 2014, you are being terminated from your position as Human Resource Administrator ... based on continued unsatisfactory performance.<sup>6</sup>

On January 14, 2014, Grievant received a 90 day re-evaluation with an overall rating of “Unsatisfactory Performer.” The Supervisor wrote:

Unfortunately, [Grievant] still does not demonstrate the ability to perform her HR administrative duties at the level of proficiency required to satisfactorily meet job expectations. Despite written notices of improvement, disciplinary actions, counseling sessions, improvements have not been made to change the overall rating of unsatisfactory. [Grievant] still does not operate in an independent fashion, nor has she demonstrated the ability to handle multiple tasks simultaneously or the ability to handle more complex issues. There is also evidence that even simple routine tasks have not been handled satisfactorily during this 90-day re-evaluation period (e.g., in accurate or incorrect form submitted for approval (e.g., status changes; CE payment; in-band adjustments); submitting status changes in a Timely fashion; incorrect date on contract letter).<sup>7</sup>

The Supervisor evaluated whether Grievant could be transferred or demoted in lieu of removal. She concluded there was no other position to which she could transfer Grievant and that removal was appropriate.

### **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 an annual performance evaluation with a rating of “Below Contributor” must be re-evaluated and have a performance re-evaluation plan developed.

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<sup>6</sup> Grievant Exhibit 2.

<sup>7</sup> Agency Exhibit 6.

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.

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.

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.

Grievant received an annual performance evaluation with a rating of "Unsatisfactory Performer" which is the same as "Below Contributor." The Agency revised Grievant's EWP and included a development plan applicable for the 90 day period.<sup>8</sup> The Supervisor met regularly with Grievant and informed Grievant of the status

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<sup>8</sup> Although the Agency could have done a better job drafting the documents, the EWP and development plan adequately inform Grievant of her obligations during the 90 day period.



of her work performance. In December 2013, the Supervisor re-evaluated Grievant's work performance and concluded that Grievant's work performance had not improved and that she remained an "Unsatisfactory Performer". The Supervisor determined whether Grievant could be demoted or transferred in lieu of termination. Because the Agency did not have an available position, the Supervisor concluded that Grievant should be removed from employment. The Agency has substantially complied with the policy requirements needed to show that Grievant should be removed from employment following the re-evaluation process.

The Agency's re-evaluation of Grievant's work performance was not arbitrary or capricious. The Supervisor testified regarding the examples of Grievant's unsatisfactory work performance. Those examples formed the basis of the re-evaluation.

Grievant argued that her work performance was adequate. Grievant presented testimony from several witnesses who testified regarding Grievant's competencies and good work practices. Most of the testimony from Grievant's witnesses, however, related to time periods before October 2013. The issue before the Hearing Officer, however, involved Grievant's work performance during the 90 day re-evaluation period. Grievant did not present sufficient evidence to contradict the Agency's evidence. Grievant argued office practices were not adequately documented and she had not received sufficient training to perform her job. The evidence showed, however, that many of Grievant's mistakes were not based on the absence of written policy or inadequacy of training. If the Agency had adequate policies and training in place, the outcome of this case would remain the same. Grievant made a sufficient number of mistakes to justify the Agency's opinion that her work performance was unsatisfactory.

## DECISION

For the reasons stated herein, the Agency's decision to remove Grievant is **upheld**. Grievant's request for relief is **denied**.

## 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 14<sup>th</sup> St., 12<sup>th</sup> 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 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto: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.<sup>9</sup>

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>9</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.