

Issues: Arbitrary/Capricious Performance Evaluation, Termination (due to below contributor rating on re-evaluation), Discrimination (race), Retaliation; Hearing Date: 04/14/14; Decision Issued: 04/25/14; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10308, 10309; Outcome: No Relief – Agency Upheld;  
**Administrative Review: EDR Ruling Request received 05/09/14; EDR Ruling No. 2014-3884 issued 06/02/14; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 05/09/14; DHRM Ruling issued 07/02/14; 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: 10308 / 10309**

Hearing Date: April 14, 2014

Decision Issued: April 25, 2014

#### **PROCEDURAL HISTORY**

The Agency issued Grievant an annual evaluation with an overall rating of Below Contributor. Grievant timely filed a grievance to challenge the annual evaluation. The Agency issued Grievant a three month re-evaluation with an overall rating of Below Contributor. Grievant was removed from employment based on the re-evaluation. On February 23, 2014, Grievant timely filed a grievance to challenge the Agency's re-evaluation.

On March 5, 2014, the Office of Employment Dispute Resolution issued Ruling No. 2014-3829 and 2014-3830 consolidating the two grievances for hearing. On March 18, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 14, 2014, 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 misapplied or unfairly applied State policy?
2. Whether Grievant's evaluations were arbitrary or capricious?
3. Whether Grievant was discriminated against based on his race and/or religion?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that it removed Grievant from employment after a re-evaluation in accordance with State policy. Grievant has the burden of proof to show that his annual performance evaluation 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 Virginia Department of Transportation employed Grievant as a Project Manager/ Small Contracts Supervisor. The Purpose of his position was:

Directs, oversees, and provides guidance on project management matters to all project team members in [location] District. Project management position responsible for overall project management to include planning, organizing, monitoring, and directing all work activities and resources necessary to complete assigned projects. Coordinates and communicates with VDOT and other engineering staff, local governments, other agencies, and FHWA. Manage projects to provide high-quality and accurate right of way and construction plans in accordance with applicable design standards and specifications. Ensure projects are on-time and on-budget. Responsible charge engineer for small contracts team; provides direction and oversight, technical guidance, and ensures standards compliance and QA/QC for the small contracts projects. Oversees and trains small contract team members on project management and technical matters.<sup>1</sup>

He began working for the Agency in January 2012.

---

<sup>1</sup> Agency Exhibit 4.

On March 18, 2013, Grievant received a Notice of Improvement Needed/Substandard Performance issued by the Former Supervisor. The Former Supervisor wrote:

[Grievant] has been in the position as a Project Manager for just over 12 months. He continues to struggle with basic understanding of Department processes, protocols, and systems which is diminishing his ability to perform his duties as Project Manager and the Small Contracts Supervisor.

Project documentation routinely requires editing and clarification: [Grievant] continually submits RW and CN packages with missing or incorrect information, grammatical and spelling errors, and overall lack of quality control. UPC [number 2] had over 50 errors identified in the bidability review.

Lack of full understanding of processes and procedures: [Grievant] has a lack of understanding as to the establishment of appropriate time durations and sequencing of key activities within the concurrent engineering process. UPC [number 2] had several activities in the incorrect order ... Scheduling, activities, and durations, has been covered multiple times at Project Management School.

[Grievant] has a lack of understanding of the submittal process for Tier I projects. UPC [number 2] submittal to Central Office was made incorrectly to Construction Division thus jeopardizing the advertisement date. Information on the proper submittal process has been shared with the project management staff on multiple occasions.

Time management: [Grievant] re-assigned numerous projects ... to a subordinate. A key project ... was re-assigned to a subordinate for submittal to S&C for Advertisement due to inadequate planning of his time. [Grievant] had not managed his time appropriately and needed to devote his time to the submittal of UPC [number 2]. With the hand-off of the project, [Grievant] did not adequately convey status of the project; the PAC meeting had been held, the new project manager was unaware and scheduled another PAC meeting.

Improvement plan: Gain a stronger understanding of data systems, the integration of those systems, and how those systems impact both the engineering and programming functions by reviewing and using the ... District Project Management Guide, information on the PMO portal, attending PM school, attending VDOT Web-based training as available, and utilize Central PMO as a resource.

Work one-on-one with experienced PM's and supervisor for a minimum of 1 hour each week for the next 30 days to better understand scheduling an activity durations. All schedules for projects assigned to [Grievant] should be updated to have proper durations and sequencing within three weeks. Attend weekly project management team meetings and bi-monthly Project Management School.

Prepare and lead the Project Management team meeting on May 6 on the subject of POOL and IPM interactions and how the PM should review and update information in the POOL tabs for "General", "Schedule/Estimate", "Misc.", "Jobs", "Classification", "Federal", "Comments" and "STP".

Prepare a detailed schedule of intermediate steps required for RW and CN submissions for each project due within the next 9 months – is due within 2 weeks.

Prepare a weekly workplan to outline what will be accomplished for the following week. This plan must have sufficient detail to include projected hours per project. This is to be developed and submitted to supervisor COB on Friday for preceding week.<sup>2</sup>

On October 24, 2013, Grievant received an annual performance evaluation with an overall rating of "Below Contributor." The annual evaluation mentioned that Grievant received three written counseling memorandums and a Notice of Improvement Needed/Substandard Performance during the evaluation period.

The evaluation stated that Grievant failed to properly supervise a subordinate, Mr. S. Several of Mr. S's projects were behind schedule due to inadequate guidance from Grievant.

The evaluation stated that Grievant lacked a fundamental understanding of the processes, procedures, and systems involved. Several of Grievant's projects had to be reassigned to a subordinate.

The evaluation stated that while Grievant has attended sessions of the Project Management School, he did not grasp the concepts reviewed or how to use the various Department systems.

The evaluation stated that Grievant was ineffective in communicating with employees in other sections of the Agency.

In the Supervisor's Comments section of the evaluation, the Former Supervisor wrote:

---

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

[Grievant] should continue to enhance his knowledge of VDOT scheduling and estimating systems in order to more effectively manage the large number of projects currently allocated to him. He needs to improve his maintenance and updating of IPM/POOL data quality. [Grievant] should look for training opportunities to improve his skill set as a supervisor. With his increase in workload, he needs to focus on planning his workload and ensuring that senior administration has sufficient time to review and approve. He needs to make it a practice to document meetings and project discussion and communicating these milestones.<sup>3</sup>

On November 6, 2013, Grievant received a Performance Re-Evaluation Plan stating:

Because your performance for 2013 was rated as “Below Contributor” you will be re-evaluated under the guidelines of the DHRM Policy Number 1.40 – Performance Planning and Evaluation. The detail of the Re-Evaluation Process has been pulled from this policy [and] is copied to the end of this document.

Attached to this document is the Performance Re-Evaluation form that will be reviewed in 3 – months to record your re-evaluated performance for this period. Within the attached documents are the detailed core responsibilities which will be used to guide your Performance re-evaluation Plan.

Your supervisor, [Former Supervisor] will review this plan with you, highlighting the specific performance measures that you will need to meet. Your supervisor will schedule periodic meetings with you to discuss your progress. Per the policy, your planned re-evaluation will be scheduled approximately 2 weeks prior to the end of this 3 – month process. The estimated date for your re-evaluation will be January 23, 2014.

Grievant was provided with an Employee Work Profile, Performance Re-Evaluation setting forth his Core Responsibilities for the re-evaluation period as follows:

Monitoring and Providing Guidance to Direct Reports

Escalating Risks and Problems to Relevant Individuals Once They Occur. [Grievant] Shall Maintain A Daily Journal In Which He Notes Project Risks and His Actions.

---

<sup>3</sup> Agency Exhibit 5.

Completeness and Accuracy of Project Data/Documentation. [Grievant] and His Supervisor Shall Review Data On His Projects [On] A Weekly Basis.

Communication. In Addition To His Daily Journal, [Grievant] Shall Provide Copies Of Emails, Meeting Minutes, And Other Communications. Supervisor Will Also Check With Other Project Team Members For Communications They Received From [Grievant] During The Week.

Contract Submissions Inclusive of Forms, Special Provisions, And Copy Notes Shall Be Complete And Submitted On Time.

Project Schedules Including Intermediate Milestones Shall Be Met.

Project Budgets Shall Be Adequately Monitored.

The Former Supervisor held progress meetings with Grievant during the re-evaluation period. On December 4, 2013, the Former Supervisor resigned from the Agency. Grievant began reporting to the Supervisor who assumed responsibility for supervising Grievant throughout the remainder of the re-evaluation period.

The Supervisor typically met with Grievant on a weekly basis to discuss Grievant's work performance.

On January 28, 2014, the Supervisor presented Grievant with a memorandum describing his three month re-evaluation. She rated Grievant's overall work performance as "Below Contributor." She addressed each of Grievant's Core Responsibilities. With respect to Monitoring and Providing Guidance to Direct Reports, the Supervisor wrote:

While [Grievant] did set-up meetings with his direct report, [Mr. H], the content of those meetings was not documented and shared. [Grievant] failed to properly monitor the work product of his direct report as evidenced by the basic errors encountered at the year-end review of [Mr. H's] projects (8 of 14 need attention). During the evaluation period, other project submissions made by [Mr. H] with budgetary increases were not revised and corrected by [Grievant] even after the discrepancies were brought to [Grievant's] attention. This further demonstrates inability to adequately guide, direct and monitor work of subordinates.

With respect to Escalating Risks and Problems to Relevant Individuals Once They Occur. [Grievant] Shall Maintain A Daily Journal In Which He Notes Project Risks And His Actions, the Supervisor wrote:

A daily journal was not maintained during the evaluation period. Examples of risks/issues discussed during the evaluation period include

the change in cut-off dates and property owner notification letters. In the instance of the change in cut-off dates, [Grievant] did not escalate the problem to the relevant individual. Moreover, he did not follow the standard operating procedure for obtaining guidance within the District that had been communicated to PMO staff at both PM School and at Program/Project Day on multiple occasions. For the issue of the property owner notification letters, instead of rendering a decision, [Grievant] requested the Survey Manager to render the decision. The other junior project managers when presented the same scenario, made the decision for their projects.

With respect to Completeness and Accuracy of Project Data/Documentation, [Grievant] and His Supervisor Shall Review Data On His Project [On] A Weekly Basis, the Supervisor wrote:

The majority of [Grievant's] projects had schedules already established prior to this evaluation period. The end of year cycle focus is on estimate in preparation for SYIP updates. There were a number of [Grievant's] projects that had estimate discrepancies, increases, and systematic inaccuracies.

With respect to Communication In Addition To His Daily Journal, [Grievant] Shall Provide Copies Of Emails, Meeting Minutes, And Other Communications. Supervisor Will Also Check With Other Project Team Members For Communications They Received From [Grievant] During The Week, the Supervisor wrote:

[Grievant] largely depends on others to supply information regarding his projects specifically when consultant services are used. He has used consultants to provide project briefing and documentation that are generally the responsibility of the PM.

With respect to Contract Submissions Inclusive of Forms, Special Provisions, And Copy Notes Shall Be Complete And Submitted On Time, the Supervisor wrote:

During the evaluation period the following were deliverables and/or submitted:

- [Grievant] submitted special provisions for UPC [number 1] on 12/20/2013.
- The scheduled CN submittal date for UPC [number 1] is 1/28/14, per [Grievant] the CN package would be turned in the ADA PE by 1/14/14; ADA PE received the CN package on 1/16/14.



- The scheduled CN submittal for UPC [number 2] is 1/28/14. The DA must receive the CN package for submittal no later than 1/23/14. As of 1/16/14, ADA PE had not received the CN package.

With respect to Project Schedules Including Intermediate Milestones Shall Be Met, the Supervisor wrote:

During the evaluation period, [Grievant] did not have any projects which required the development of a full schedule from inception to construction advertisement. However, [Grievant] did encounter issues with basic schedule maintenance/updates which required the assistance of his direct supervisor.

With respect to Project Budgets Shall Be Adequately Monitored, the Supervisor wrote:

[Grievant] had significant difficulties with establishing, monitoring, updating, and entering project budgets into the system. He has not followed established protocols for budgetary increases/decreases. [Grievant] has had numerous projects with estimate errors, systemic inaccuracies, prolonged periods without update that have caused significant increases, and general milestone tracking protocols not adhered to.

The Supervisor commented:

Overall, [Grievant's] performance is not improved during the 3 month evaluation period. He has failed to improve his understanding of Departmental process, procedure, and system usage. In his role as a senior project manager, [Grievant] should be proactive in the management of his subordinates and the development and review of their work. However, he often requires routine guidance when he should be giving guidance to others. [Grievant] lacks a fundamental understanding of many of the processes, procedures, and systems utilize by the Department for project management. He lacks the knowledge, skills, and abilities which are necessary for the position as a project manager.<sup>4</sup>

The Agency removed Grievant from employment effective January 30, 2014. Before removing Grievant, the Agency considered whether Grievant could be demoted or moved to another position. The Agency considered whether Grievant's work duties could be reduced in lieu of removal. The Agency concluded its only option was to remove Grievant from employment.

---

<sup>4</sup> Agency Exhibit 6.

## CONCLUSIONS OF POLICY

DHRM Policy 1.40 governs Performance Planning and Evaluation. Employees are evaluated based on their work during a performance evaluation cycle. A performance evaluation cycle is the “annual cycle during which an employee’s supervisor documents performance, usually beginning October 25th of each year.”

An employee’s work performance must be evaluated by the supervisor at the end of the performance cycle. The supervisor should consider an employee’s core responsibilities. Core responsibilities are, “[j]ob responsibilities that are primary and essential to the type of work performed by an employee and normally remain relatively consistent during the performance cycle.”

A Below Contributor Rating involves results or work that fails to meet performance measures. An employee cannot be rated “Below Contributor” on the annual evaluation unless he or she has received:

- At least one Notice of Improvement Needed/Substandard Performance form; OR
- A Written Notice for any reason as defined in Policy 1.60, Standards of Conduct.

Receipt of a Notice of Improvement Needed/Substandard Performance form or a Written Notice does not require that an employee be rated “Below Contributor.” Rather, it allows a “Below Contributor” rating if the employee’s overall performance reasonably supports a “Below Contributor” rating.

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.

NOTE: Regardless of the employee's movement to another position during this re-evaluation period, the employee will not be eligible for a performance increase.

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.

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.

In this case, the Agency has substantially complied with the requirements for issuing an annual performance evaluation with an overall rating of Below Contributor. Grievant's core responsibilities were evaluated and when considered together resulted in an overall rating of Below Contributor. Grievant received a Notice of Improvement Needed/Substandard Performance during the performance cycle.

The Agency has substantially complied with the requirements for issuing a re-evaluation with an overall rating of Below Contributor. Following the annual evaluation, Grievant was given a re-evaluation performance plan. He met periodically with the Former Supervisor and the Supervisor to review his work performance during the re-evaluation period. Grievant's work performance supported his rating of Below Contributor on the re-evaluation. The Agency considered whether it could demote, transfer, or reduce Grievant's duties in lieu of termination. The Agency concluded that such options were not available and, thus, was authorized to remove Grievant from employment.

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.

The Former Supervisor and the Supervisor testified during the hearing. Their testimony was credible. The Former Supervisor established that he had reviewed Grievant’s performance during the annual performance cycle and drafted an annual performance evaluation reflecting his assessment of Grievant’s work performance.<sup>5</sup> The Former Supervisor testified that Grievant’s work performance during the first few weeks of the re-evaluation period showed that he was a Contributor. The Former Supervisor ended his supervision of Grievant on December 4, 2013 when the Former Supervisor resigned from the Agency. The Supervisor testified that she reviewed Grievant’s work performance for the remaining portion of the re-evaluation period and concluded the Grievant’s overall work performance was that of a Below Contributor.<sup>6</sup> Neither the Former Supervisor nor the Supervisor disregarded any material facts regarding Grievant’s work performance. Their assessment of Grievant’s work performance was reasoned and supported by the evidence.

Grievant argued that the Supervisor’s re-evaluation of Grievant was arbitrary or capricious because it differed from the Former Supervisor’s evaluation of Grievant’s work performance prior to December 4, 2013. An evaluation reflects the opinion of a supervisor. Two supervisors may look at the same employee’s work performance and reach different opinions regarding the nature of that performance. Simply because the Former Supervisor had a different opinion from the Supervisor’s opinion is not a basis to establish that the Supervisor’s opinion was arbitrary or capricious. In addition, the Supervisor’s opinion better reflected the entire three month re-evaluation period than did the Former Supervisor’s opinion.

Grievant testified that it was not unusual or unexpected for an employee in his position to make some errors. He believed that the number of errors he made were not

---

<sup>5</sup> The Former Supervisor testified that he believed some of the written counseling documents given to Grievant should have been verbal counselings because they were not significant enough to require written counseling. Regardless of whether a verbal or written counseling should have been given, behavior that would give rise to either type of counseling would be behavior appropriate to consider as part of a performance evaluation that could result in a Below Contributor rating.

<sup>6</sup> The Supervisor was also familiar with Grievant’s skills because she was involved in the Project Management School and was able to observe that Grievant had difficulty grasping the VDOT processes he was obligated to follow. The Project Management School involved “hands-on” projects to enable students to understand the VDOT project planning process.

so significant as to justify Below Contributor ratings. He pointed out that none of his projects were over budget or untimely when the project planning process was completed. Grievant's testimony reflects his opinion. Even if the Hearing Officer were to agree with Grievant's opinion of his work performance and concluded that Grievant's opinion was more accurate than the opinion of the Supervisor, the Agency has presented sufficient evidence to show that the Supervisor's opinion was not arbitrary or capricious. It is clear that the Agency devoted substantial effort to identifying problems with Grievant's work performance, notifying him of those problems, and giving him the opportunity to improve his work performance.

Grievant argued that the Agency discriminated against him based on his race and religion. Grievant described himself as an "Arab-American and a Muslim." Grievant alleged that the Supervisor was a Christian Caucasian female who made her religious affiliation well known and that she favored a project manager who went to church with her. No credible evidence was presented showing that the Supervisor knew Grievant's race and religion. No credible evidence was presented showing that the Supervisor took any action against Grievant because of his actual or perceived race or religion. Grievant's assertion is without merit.

Grievant claimed that the Agency's action against him may have been based on an intent to retaliate. No credible evidence was presented showing that Grievant engaged in protected behavior for which the Agency chose to retaliate against him.

## DECISION

For the reasons stated herein, Grievant's request for relief with respect to his annual performance evaluation is **denied**. Grievant's request for relief with respect to the re-evaluation is **denied**. Grievant's request for relief from discrimination and retaliation 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>7</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*

---

Carl Wilson Schmidt, Esq.  
Hearing Officer

---

<sup>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.