

Issues: Arbitrary/Capricious Performance Evaluation and Removal due to Below Contributor Rating on Re-Evaluation; Hearing Date: 05/22/14; Decision Issued: 06/11/14; Agency: VPI&SU; AHO: Carl Wilson Schmidt, Esq.; Case No. 10332, 10333; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 06/26/14; EDR Ruling No. 2014-3922 issued 07/22/14; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 06/26/14; DHRM Ruling issued 07/29/14; Outcome: AHO's decision affirmed; Judicial Appeal: Appealed to Circuit Court in Montgomery County; Outcome pending.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10332 / 10333

Hearing Date: May 22, 2014
Decision Issued: June 11, 2014

PROCEDURAL HISTORY

On November 12, 2013, Grievant received an Annual Evaluation with an overall rating of Unacceptable Performance. On December 11, 2013, Grievant filed a grievance to challenge the Agency's action. On February 5, 2014, Grievant received a three-month Reevaluation with an overall rating of Unacceptable Performance. Grievant was removed from employment effective February 6, 2014. Grievant filed a grievance challenging his removal. The matter proceeded to hearing.

On March 31, 2014, the Office of Employment Dispute Resolution issued Ruling No. 2014-3852, 2014-3853 consolidating the two grievances for a single hearing. On April 7, 2014, EDR assigned this appeal to the Hearing Officer. On May 22, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant's annual evaluation and reevaluation were consistent with State policy and neither arbitrary nor 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 and not based on an arbitrary or capricious reevaluation. The burden of proof is on Grievant 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:

Virginia Tech employed Grievant as a Laboratory Specialist Senior. He was to "plan, perform, and analyze results from experiments in plant physiology, molecular biology, and biochemistry."¹ Grievant began working for the Agency in 2007.

Grievant worked in two laboratories at the Agency. He had two supervisors – Dr. P and Dr. O. Grievant began working in Dr. O's laboratory on April 28, 2013. He began working in Dr. P's laboratory at approximately the same time.

Before April 28, 2013, Grievant worked in another Department of the Agency and reported to Ms. C. When Grievant left that department, Ms. C did not give Grievant an evaluation for the performance cycle beginning in October 2012.

On October 12, 2013, Grievant received a Group II Written Notice.

Grievant received a 2013 Annual Performance Evaluation with an overall rating of Below Contributor. Grievant signed the Annual Evaluation on November 12, 2013.

With respect to the Goal/Job Responsibility of Research, the Agency wrote:

[Grievant] has been unable to meet the responsibilities of the job. He has particular difficulty with time management issues. He does not arrive at work on time, even after multiple discussions from both supervisors about his late arrival times. He is not timely in beginning experiments, he does not schedule time appropriately to complete experiments on time, he has been unable to demonstrate the ability to complete multiple tasks

¹ Agency Exhibit 19.

(coordinate timing), on 10/8/13, [Grievant] was asked by [Dr. P] to do a GUS sustaining and providing instructions as per his expectations. [Dr. P] had a personal emergency which meant he had to leave for the day before lunch. [Grievant] emailed [Dr. P] and preferred waiting rather than trying to perform the experiment as best he could; instead, he downloaded one (1) MSDS sheet that day. [Grievant] needs to be reminded multiple times to take care of procuring supplies. He completed University safety training but only after multiple reminders. This position requires an individual capable of following up on request without reminders and in a timely manner.

With respect to the Goal/Job Responsibility of Writing, the Agency wrote:

Record keeping is another area where [Grievant] has shown unacceptable performance. Despite multiple requests, he did not use a new book for recording scientific laboratory results. On 9/12/13, [Dr. O] realized that [Grievant] had not put any entry into the lab book she gave him when he started five months ago. [Dr. O] instructed him to record his past data into a sound lab book. [Grievant's] response to this was simply to move all of his loose notes and data sheets unassembled into one binder but still out of order. [Dr. O] has now forbidden [Grievant] to put any writing on pieces of paper and has told him instead, to adhere to her instructions and write every calculation and every step down to the lab book. This is particularly critical for federally – sponsored research grants. He does not interpret results and often does not engage enough in the scientific process to understand what he is working on.

With respect to the Goal/Job Responsibility of Department Assignments, the Agency wrote:

[Grievant] did not attend federally-mandated civil rights training. The notice for mandatory attendance was sent out by the Department head and he also received three follow-up reminders and still did not bother to attend. This is totally unacceptable and insubordinate. On 10/18, [Grievant] was issued a Group 2 Written Notice for Failing to Follow Instructions and/or Policy regarding three issues.²

Because Grievant received an overall rating of Unacceptable Performance on his annual performance evaluation, the Agency decided to place Grievant on a three-month reevaluation plan beginning November 21, 2013. The Agency presented Grievant with a Performance Plan setting forth his responsibilities for the following three month reevaluation period. With respect to the Goal/Job Responsibility of Research, the Agency wrote:

² Agency Exhibit 2.

During the re-evaluation period, the employee must:

Metrics:

- 1) Planning: design experiments accomplishable with available resources, using scientific literature and laboratory protocols.
- 2) Time Management: schedule and perform accurately the requested experiments in the time allotted in the PI's laboratory.
- 3) Execution: use protocols established in the laboratory to obtain experimental results.
- 4) Interpretation: analyze the results to determine the outcomes of the experiments, and suggest and perform troubleshooting if necessary.
- [5] Attend regular meetings with PIs to address metrics for this goal.

With respect to the Goal/Job Responsibility of Laboratory Administration, the Agency wrote:

During the re-evaluation period, the employee must:

Metrics:

- 1) Ordering: coordinate in a timely manner ordering of all research supplies, equipment and repairs. Communicate the needs to the PI if necessary, and follow procedures in use in the lab.
- 2) Records: key purchase order records and delivery slips for all purchases; receive and time the delivered items in Hokiemarket when appropriate.
- 3) Create and keep updated databases of supplies and chemicals.
- 4) Laboratory Safety: supervise undergraduate and graduate students and laboratory safety. Under the supervision of the PI if necessary, check and update safety protocols.
- 5) Hazardous Materials: following University training guidelines, assist in proper use, storage, and disposal of radioisotopes and hazardous chemicals.

With respect to the Goal/Job Responsibility of Reporting Completed Work, the Agency wrote:

During the re-evaluation period the employee must:

Metrics.

- 1) Data compilation: complete all results and experimental details into laboratory notebook, in a way understandable by every member of the laboratory, and as outlined by the PI.
- 2) Receive weekly project list from supervisor(s) every Monday.
- 3) Maintain a work record of daily activities and projects completed at work. Submit this work record every Friday to the supervisor(s) by 6 p.m.

With respect to the Goal/Job Responsibility of Other Assignments, the Agency wrote:

During the re-evaluation period, the employee must:

Metrics:

- 1) Departmental duties: complete duties assigned by department head.
- 2) Time Management: balance assigned management duties with primary scientific responsibilities in the time allotted in the PIs laboratory.
- 3) Display abilities to switch between task, to perform several tasks simultaneously and to adapt to new protocols and tasks.
- 4) Start working in the lab at the time agreed with the PI.
- 5) Participate to and communicate results with the lab members at regular lab meetings; attend and participate at regular scientific article discussions.³

When Dr. P drafted Grievant's Annual Evaluation, he consulted with Dr. O to obtain information. He did not speak with Ms. C regarding Grievant's work performance prior to April 28, 2013.

Grievant failed to attend training scheduled for November 8, 2013. On December 6, 2013, Grievant received a Counseling Memorandum/Clarification of Expectations addressing Work Overview, Work Hours, Attendance, Annual Leave, Unscheduled Absences, Time Management, Notification When Leaving the Normal Workplace, Lunch/Breaks, Compliance/Trainings, and Communication. The Memorandum sets forth the Agency's expectations with respect to Grievant's work performance.

On December 20, 2013, the Agency presented Grievant with a Counseling Memorandum. The Memorandum stated, in part:

After recent observations, it is necessary to counsel you in the following items. It is imperative that you make improvements in these areas immediately.

Attendance –

On Wednesday, December 18, you left [Dr. O] a voice messages that you had to work over until 7:30 p.m. This, according to you was due to an issue locating one of the rotor lids, which you said was actually broken. That was the end of your message. The next morning, Thursday, December 19, you sent [Dr. O] a text message at 8:16 a.m. that said, "I was in the lab till 730 last nite, I will arrive at 930, today." Although your excuse for working until 7:30 the night before seems to be an extenuating circumstance, it is unclear why you did not communicate your request to arrive late the next morning at that time. You did not receive permission to

³ Agency Exhibit 12.

arrive late which is a crucial piece of the request for pre-approval that we have discussed previously. Working over the previous evening was not automatic justification for arriving late that morning. You did attempt to notify [Dr. O] by two different methods before the start of your scheduled shift, which is appreciated, and in one of those two messages to [Dr. O], it seemed as if you were asking permission. But the other of the two messages definitely states that you will simply be in later instead of asking permission to alter your schedule. The purpose of bringing this to your attention is to continuously counsel you. You have received approval in the future before deviating from agreed-upon schedule. This has been addressed with you previously in a separate counseling memorandum.

Performance –

On Monday, December 16, you poured a gel without putting in a comb, making the gel useless. You also failed to dilute a stock primer prior to running a reaction even though you were instructed to do so.

On Tuesday, December 17, you used the wrong volume of medium for transformation of plants. The volume you used was used in an old protocol, but there is a written record that we modified the protocol in your lab book and it was discussed with you why this modification was necessary. When [Dr. O] asked you why you made that mistake, your reply was “you asked me to do too many things at once and it is just a human nature to forget under such situation, and that your “memory was maxed out.” *** It is also noteworthy here that you did not work in your lab book and on protocol (the last item of the day).

Time Management –

One Thursday, December 5, [Dr. O] gave you instructions at the start of your shift to complete three tasks. *** [Dr. O] left with her student around 9:20 a.m. and when she returned to the lab at 11 a.m., she discovered that she had only managed to inoculate 10 flask of cultures that should have taken no more than 20 minutes. There were no other signs of progress for other tasks such as ordering and chemical inventory.

On Friday, December 6, you were tasked with loading to pre-casted protein gels. This took you nearly 3 hours to complete when it should have taken an hour and a half, maximum.

The above listed skills are essential job elements for a lab specialist senior. If we can help use be successful, we expect you to communicate your ideas and concerns with us. This action was mitigated from a Group Written Notice to a counseling memorandum [to] ensure fair warning and progressive discipline. Failure to follow these instructions or further

deficiencies will lead to further disciplinary action up to and including termination, according to the Standards of Conduct Policy, 1.60.⁴

On January 21, 2014, the Agency presented Grievant with a Counseling Memorandum stating, in part:

After recent observations, it is necessary to counsel you on the following items. It is imperative that you make improvements in these areas immediately.

Recordkeeping –

On Tuesday, December 10, you worked in [Dr. P's] lab for the first day since the week of November 18 – 22. [Dr. P] checked your notebook and noticed that your records for this week consisted in whole protocols for GUS staining, with modifications corresponding to plant lines that were treated and volumes of solution made, but there was a lot of missing information, such as the time when reactions were started and stopped. You told [Dr. P] that you had this information on loose papers or reaction plates, and [Dr. P] requested that you copy that information into your notebook.

On Wednesday, December 11, [Dr. P] met with you to talk about your notebook. [Dr. P] specifically detailed his expectations regarding the content of a notebook, namely easy access to the specific details of one experiment (reference to the protocol that was used, sample names, incubation times, volumes, amounts, etc.), rather than the file copies of the protocols that you provided [Dr. P] showed you in his own notebook and gave you a copy that you could access whenever you wanted to see what [Dr. P] expects. [Dr. P] sent you an email recapitulating this meeting, and you replied to it the same evening, thereby acknowledging you received it.

On Saturday, December 14, [Dr. P] reviewed your notebook. The notebook was not split as [Dr. P] had ask in the information missing from the work of the week of November 18 – 22 had not been entered. Additionally, the notebook was for the days of December 10 – 12 consisted of a few words with no information about treated samples, time of treatment, and volume of solutions needed. ***⁵

On February 5, 2014, the Agency reevaluated Grievant's work performance for the reevaluation period of November 21, 2013 through February 19, 2014.

⁴ Agency Exhibit 7.

⁵ Agency Exhibit 10.

For the Goal/Job Responsibility of Research, the Agency gave Grievant a rating of Unacceptable Performance and wrote:

On several occasions [Grievant] failed to perform a very simple mathematical operation to figure out the amount of sample (plasmid DNA) required, and the supervisor needed to do the calculation for him. Senior lab specialist should not require that level of supervision from the supervisor.

Most tests take [Grievant] much more time than expected for a Lab Specialist Senior, even after performing them several times. Examples are outlined in the Counseling Memorandum from Dec. 6th. Efficiency has been a subject of a meeting and a recapitulation email on Dec. 11, 2013 but has not led to noticeable improvement.

[Grievant] forgets most of the instructions given to him orally or as notes. He needs extremely detailed and written instructions to accurately perform an experiment. Some of the cases are documented in the counseling memorandum issued on Dec. 20th. [Grievant] also makes frequent calls to the P.I. during experiments with questions about details, the answers to which should be obvious to a Lab Specialist Senior.

[Grievant] was also unable to accurately perform again tasks a few weeks or months later. He was found poorly able to identify important steps and controls in a procedure, leading sometimes to results that could not be used and experiments to be repeated.

[Grievant] is not always thoughtful in execution of even simple tasks, leading to wasted time. This raises concerns of his problem-solving ability. [Grievant] had to be reminded a total of three times (two during the re-evaluation period) of following up in the communication with a vendor for laboratory supplies.

While giving ample time during the weeks of January 6 – 10 and 20 – 24, [Grievant] did not manage to advance the compilation of SOPs about toxic chemical as much as expected. It appears that, in general, working on the computer takes more time for [Grievant] than for anyone else. This was previously discussed for the compilation of the lab notebook (see below, in Goal 3).

Disposal of waste was properly taken care of, and ordering was done as expected by the PIs.

For the Goal/Job Responsibility of Reporting Completed Work the Agency gave Grievant a rating of Unacceptable Performance and wrote:

Record-keeping has somewhat improved from the previous evaluation period, but has nevertheless been well below expectation. It has been the subject of another Counseling Memorandum (January 21) by [Dr. P] [Grievant] does not seem able to discern what is important or not to be recorded, and ends up recording everything, to the point where important information is very difficult to find. One example is when he scribbled 2 pages worth of calculations just to find out the amount of stock solution required to get the correct dilutions, whereas it should be as simple as one sentence for a seasoned technician. In the end, it was impossible for anyone else to find out what was actually performed. A Lab Specialist Senior should be able to perform accurate and appropriate record-keeping. This is been an ongoing performance problem for [Grievant].

For the Goal/Job Responsibility of Other Assignments, the Agency gave Grievant a rating of Unacceptable Performance and wrote:

Despite being clearly outlined in the Counseling memorandum (Dec. 6, 2013), [Grievant] continues to be tardy, almost never arriving before 9 a.m. He routinely arrives between 9:01 and 9:05 a.m. [Grievant] frequently took more than one hour for his lunch (as on January 28, 2014) and left work on two occasions before 6 p.m. without authorization (January 9 and January 10, 2014).

While expected in the job description, (Grievant) showed a poor ability to switch between tasks in the labs of the two supervisors. He sometimes mixed up instructions (as on January 22nd). As outlined in the Counseling Memorandum of Dec. 6, (Grievant) acknowledged that he was unable to perform more than one task at the same time.

Based on the reevaluation, the Agency considered whether it could demote Grievant or move him to another position within the Agency. Agency Managers concluded that they could not demote Grievant or move him into another position within the Agency.

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.

DHRM Policy 1.40 governs Performance Planning and Evaluation. The Agency's use of the phrase Unacceptable Performance is the equivalent of Below Contributor under Policy 1.40.

The Agency has presented sufficient evidence to support its decision to issue Grievant an overall rating of Below Contributor with respect to the time period of April 28, 2013 through October 24, 2013. Grievant was told by Dr. O to keep a notebook showing all of his work. Instead of using the notebook he received, Grievant assembled a collection of notes in a disorganized manner. The effect of Grievant's action was to undermine the credibility of the research projects he performed during that time period. Grievant often reported to work late. The quality and consistency of his work varied. His work product was often unacceptable to the Agency.

Although the Agency has established that Grievant's work performance after April 28, 2013 was unacceptable, the Agency's Annual Performance Evaluation of Grievant was arbitrary or capricious. DHRM Policy 1.40 provides:

If a supervisor changes an employee's performance plan during the performance cycle, the employee should be evaluated based on the performance plan in effect during each portion of the cycle. Evaluations of performance during each portion of the cycle should be consolidated to an "overall" rating and documented on the form that is in effect at the end of the cycle. If a supervisor changes an employee's performance plan during the performance cycle, the employee should be evaluated based on the performance plan in effect during each portion of the cycle. Evaluations of performance during each portion of the cycle should be consolidated to an "overall" rating and documented on the form that is in effect at the end of the cycle.

Grievant's performance cycle began in October 2012. He worked in another Department and reported to Ms. C. Ms. C was not consulted regarding the quality of Grievant's work performance prior to April 28, 2013. The Agency has disregarded material facts regarding Grievant's work performance prior to April 28, 2013 and, thus, the Annual Performance Evaluation is not reliable. The Agency must repeat Grievant's Annual Performance Evaluation and consider his work performance for the entire performance cycle.

If the Hearing Officer assumes for the sake of argument that Grievant's Annual Performance Evaluation showed Grievant's work performance as Unacceptable, the Agency has presented sufficient evidence to support its issuance to Grievant of a three-month reevaluation with an overall rating of Unacceptable Performance. The Agency's evidence showed the Grievant's work performance did not improved during the reevaluation period. He failed to perform simple calculations, forgot instructions, and poorly performed tasks. His record-keeping improvement that was not sufficient to raise his work performance above unacceptable performance. He continued to report to work late.

The Agency made a good-faith effort to consider whether Grievant could be demoted or moved to another position within the Agency. Agency Managers concluded that was not a reasonable option. The Agency has complied with the material requirements of DHRM Policy 1.40 and Grievant's removal must be upheld based upon the reevaluation period.

The Agency must repeat the Annual Performance Evaluation to include assessment of Grievant's work performance prior to April 28, 2013. If the Agency concludes the Grievant's work performance during the annual performance period was acceptable, then there would be no basis for a reevaluation. The reevaluation would be rescinded and Grievant should be reinstated. If the Agency concludes that Grievant's work performance during the annual performance period remains unacceptable, then the Agency's decision to remove Grievant must be upheld.

Grievant argued that his work performance during the annual performance cycle (since April 28, 2013) should have been acceptable to the Agency. He presented evidence regarding the quality of his work and that the Agency's evaluation of his work performance was inaccurate. The Hearing Officer finds the Agency's evidence is more compelling. It is clear that the Agency carefully evaluated Grievant's work performance in the two laboratories and concluded that it was unacceptable.

Grievant argued that his work performance during the reevaluation period should have been acceptable to the Agency. He presented evidence regarding the quality of his work. He argued that the Agency incorrectly evaluated his work performance. The Hearing Officer finds that the Agency's evidence is more compelling. The Agency carefully evaluated Grievant's work performance during the reevaluation period and concluded that it was unacceptable. The Agency has presented sufficient evidence to support the reevaluation rating of Unacceptable Performance.

Grievant argued that the Agency failed to comply with State procedure. He has not presented sufficient evidence to support this allegation except with respect to the Agency's failure to speak with Ms. C prior to the issuance of the Annual Evaluation.

DECISION

For the reasons stated herein, this grievance is **remanded** to the Agency for the Agency to repeat Grievant's Annual Performance Evaluation with consideration of Grievant's work prior to April 28, 2013. If the Agency concludes the Grievant's work performance remains unacceptable, then Grievant's removal is upheld. If the Agency concludes the Grievant's work performance is acceptable, Grievant should be reinstated and receive an award of attorneys fees.

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.⁶

⁶ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

[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