

Issue: Removal due to Below Contributor rating on re-evaluation; Hearing Date: 05/12/14; Decision Issued: 05/16/14; Agency: VDOT; AHO: William S. Davidson, Esq.; Case No.10336; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 10336

Hearing Date: May 12, 2014
Decision Issued: May 16, 2014

PROCEDURAL HISTORY

The Grievant was terminated from employment on February 20, 2014, based upon her mandatory re-evaluation after a finding of “Below Contributor” on her most recent Employee Work Profile.¹ On February 3, 2014, the Grievant timely filed a grievance to challenge the Agency’s actions. On February 26, 2014, the Department of Human Resource Management (“DHRM”) assigned this Appeal to a Hearing Officer. On May 12, 2014, a hearing was held at the Agency’s location.

APPEARANCES

Advocate for Agency
Agency Representative
Grievant
Witnesses

ISSUE

Was the Grievant’s work performance unsatisfactory on her re-evaluation?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency’s disciplinary action. By statute and under the grievance procedure, management is reserved the exclusive right to manage the affairs and operations of state government.² Implicit in the Hearing Officer’s statutory authority is the ability to independently determine whether the

employee’s alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs.*, 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

¹ Agency Exhibit 1, Tab 9, Pages 1-2

² See Va. Code § 2.2-3004(B)

While the Hearing Officer is not a “super personnel officer” and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency’s decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) §5.8. The employee has the burden of proof for establishing any affirmative defenses to discipline such as retaliation, discrimination, hostile work environment and others, and any evidence of mitigating circumstances related to discipline. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. ³ However, proof must go beyond conjecture. ⁴ In other words, there must be more than a possibility or a mere speculation. ⁵

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

The Agency provided me with a notebook containing ten tabs, and that notebook was accepted in its entirety as Agency Exhibit 1, without objection.

The Grievant provided me with no documentary evidence.

On May 24, 2013, the Grievant received a Notice of Improvement Needed/Substandard Performance form. ⁶

On June 12, 2013, the Grievant was issued a Group II Written Notice. ⁷ That Written Notice has now become final and is active.

On October 30, 2013, the Grievant was issued a Group I Written Notice. ⁸ That Notice has now become final and is active.

³ *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991

⁴ *Southall, Adm’r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)

⁵ *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

⁶ Agency Exhibit 1, Tab 3, Pages 1-2

⁷ Agency Exhibit 1, Tab 3, Page 4

On October 23, 2013, the Grievant received an Employee Work Profile Performance Evaluation (“EWP”). Pursuant to this Evaluation, the Grievant was rated as “Below Contributor.”⁹ The EWP, in part stated as follows:

End users have provided feedback regarding the delay in business work being accomplished by [Grievant] affecting their workload and their continually having to re-send documents and/or follow up on status of items.¹⁰

The EWP also states in part as follows:

[Grievant] is responsible for entering time and leave, vouchers, purchasing card charges, requisitions, purchase orders, and IMS transactions for different departments within VDOT but she does not always meet established deadlines.

Time and Attendance: [Grievant] has had issues with not entering time and leave in a timely manner and with some errors being made for her assigned employees. She has been instructed to enter time/leave daily [so] as not to get behind on data entry, which she fails to do every day. She has been instructed to run and submit the timesheet report for the crew(s) she enters to [her] supervisor on a daily basis, and this is not always accomplished.

Accounts Payable: [Grievant] is knowledgeable about Accounts Payable policies and procedures and the Virginia Prompt Pay Act. She receives, verifies, reconciles vendor invoices and performs data entry but still needs to make improvement meeting the five day deadline. She has processed several past the processing deadline. She interacts with originating location and/or vendors to research information and resolve discrepancies but does not always respond timely as needed. She also reviews charge distributions for appropriateness and accuracy and researches discrepancies as needed...

...Inventory Management (IMS): Since [Grievant’s] job duties changed last year she has gained more knowledge with inventory management. She generally performs data entry within required timeframes, with few being late but she does not check Activity Register Reports for errors in a timely manner.

Because tasks have not been completed timely, other employees in the office have to complete them. This lowers the morale in our office. This behavior does not display [Grievant] as being a team player. She does not prioritize her work well and should continue to focus on work priorities

⁸ Agency Exhibit 1, Tab 3, Pages 7-8

⁹ Agency Exhibit 1, Tab 5, Pages 3-5

¹⁰ Agency Exhibit 1, Tab 5, Page 4

and organization skills due to workload and business need. She spends excessive time on many tasks and needs to improve her time management skills. She needs to improve on communication skills with [her] Supervisor as well as performance of work assignments. Her supervisor has to continually check with her on status of these assignments. She also needs to continue to work on filing, including e-mail files as she has often asked for duplicates of e-mails related to work activities.¹¹

The Grievant acknowledged receipt of the EWP on October 23, 2013, by her signature. The Grievant testified that she did not grieve this “Below Contributor” assessment.

Policy 1.40 mandates that an employee who receives a rating of “Below Contributor,” must be re-evaluated and have a Performance Re-Evaluation Plan developed.¹²

The Department of Human Resource Management Policy 1.40 (Performance Planning and Evaluation) states in part as follows:

...If Performance Does Not Improve: 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....

...Terminate: 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...¹³

The Grievant and the Agency entered into an Individual Development Plan (“IDP”), on or about November 19, 2013.¹⁴ While this IDP is not signed, the Grievant testified that this was the Plan that she prepared with some minimal assistance from her manager.

On December 10, 2013, the Grievant received her first month re-evaluation under the IDP.¹⁵ This first month re-evaluation indicated that the Grievant had made some progress.

On January 7, 2014, the Grievant received her second month re-evaluation under the IDP.¹⁶ This second month re-evaluation indicated that the Grievant not only did not continue to make progress but rather she regressed and continued to under-perform.

On February 19, 2014, the Grievant received her third month re-evaluation under the

¹¹ Agency Exhibit 1, Tab 5, Pages 3-4

¹² Agency Exhibit 1, Tab 8, Page 30

¹³ Agency Exhibit 1, Tab 8, Page 31

¹⁴ Agency Exhibit 1, Tab 6, Pages 1-3

¹⁵ Agency Exhibit 1, Tab 7, Pages 1-8

¹⁶ Agency Exhibit 1, Tab 7, Pages 9-20

IDP.¹⁷ In this final re-evaluation, the Agency found that the Grievant continued to have the same problems in performance that led to her original “Below Contributor” rating on her EWP. All three of these re-evaluations were acknowledged by the Grievant with her signature on the documents. The Grievant testified that she had an opportunity to review each of these documents and to disagree or agree with them as she saw fit.

The Grievant presented no documentary evidence before me. She presented no witnesses other than herself. She indicated that she thought she was making improvements, even in the face of the re-evaluations, which clearly indicated that she was not.

I find that the Grievant received a “Below Contributor” rating on her EWP. I find that, pursuant to Policy 1.40, the Agency initiated a mandatory 90-day re-evaluation. I find that the Grievant was re-evaluated at approximately day 30, day 60 and day 90. While the 30-day evaluation indicated that some progress had been made, clearly the 60 and 90 day re-evaluations indicated that progress was negated and that the Grievant had not met the re-evaluation goals. Accordingly, I find that the Agency properly terminated the Grievant.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the Agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Employment Dispute Resolution...”¹⁸ Under the Rules for Conducting Grievance Hearings, “a Hearing Officer must give deference to the Agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency’s discipline only if, under the record evidence, the Agency’s discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency’s discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, I find that the Agency has borne its burden of proof regarding the issuance of the Notice of Improvement Needed/Substandard Performance form, and subsequent termination of the Grievant was appropriate.

APPEAL RIGHTS

You may file an administrative review request if any of the following apply:

¹⁷ Agency Exhibit 1, Tab 7, Pages 9-20

¹⁸ Va. Code § 2.2-3005

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. You may fax your request to 804-371-7401, or address your request to:

Director of the Department of Human Resource Management
101 North 14th Street, 12th Floor
Richmond, VA 23219

2. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. You may fax your request to 804-786-1606, or address your request to:

Office of Employment Dispute Resolution
101 North 14th Street, 12th Floor
Richmond, VA 23219

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 of the original hearing decision. A copy of all requests for administrative review must be provided 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 administrative requests for a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.¹⁹ 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.²⁰

[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]

William S. Davidson
Hearing Officer

¹⁹An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²⁰Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.