

Issue: Arbitrary/capricious performance evaluation and termination due to Below Contributor rating on re-evaluation; Hearing Date: 05/16/14; Decision Issued: 06/03/14; Agency: VDOT; AHO: Lorin A. Costanzo, Esq.; Case No. 10341; Outcome: No relief – Agency upheld.

COMMONWEALTH OF VIRGINIA
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 10341

Hearing Date: May 16, 2014
Decision Issued: June 3, 2014

PROCEDURAL HISTORY

Grievant's employment was terminated on March 3, 2014 following a performance re-evaluation. Grievant timely filed a grievance to challenge Agency's action. The grievance proceeded through the resolution steps and when the outcome was not satisfactory to Grievant, he requested a hearing. The matter was qualified for hearing and the undersigned was appointed Hearing Officer, effective April 23, 2014, by the Department of Human Resource Management, Office of Employment Dispute Resolution.

A pre-hearing telephone conference was held May 2, 2014 and a grievance hearing was held on May 16, 2014 with Grievant in attendance at both.

APPEARANCES

Grievant (who was a also witness)
Agency Party Designee
Agency's Advocate
Witnesses: Supervisor
 Manager

ISSUES

Whether Agency's termination of Grievant's employment was warranted and appropriate under the circumstances and in accordance with Policy?

Whether Agency's performance evaluation and re-evaluation are arbitrary or capricious?

BURDEN OF PROOF

The burden of proof is on Agency to show by a preponderance of the evidence that the action was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.¹

¹ DHRM- OEDR, Grievance Procedure Manual §5.8 and §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:

Grievant was employed by Agency as a Transportation Operator II, Work Title: Maintenance Crew Member and has been employed by Agency since June 10, 2011. His duties include operating equipment, driving vehicles, and manual labor.²

Grievant's Probationary Progress Review identified a number of incidents of reporting late to work and his probationary period was extended for performance reasons until December 10, 2012.³ Grievant has one active Group I Written Notice (issued February 19, 2013) for Unsatisfactory Performance.⁴ On June 24, 2013 Grievant received a *Notice of Improvement Needed/Substandard Performance* which addressed ongoing issues with reporting to work on time and not calling in, among other matters.⁵

On October 23, 2013 Grievant's received an annual Performance Evaluation with an Overall Rating Earned of "Below Contributor".⁶

Grievant was placed on an Individual Development Plan ("IDP") and on a Leave Action Plan. Subsequent reviews were conducted with Grievant as follows:

- 1st month review on 12/2/13;
- 2nd month review on 2/3/14; and
- 3rd month review on 2/28/14.⁷

On February 28, 2014 Grievant received a Performance Re-Evaluation which provided Grievant with an Overall Rating Earned of "Below Contributor". By letter of 3/3/14 Grievant's employment with Agency was terminated.⁸

CONCLUSIONS OF POLICY:

The General Assembly enacted the Virginia Personnel Act, Va. Code §2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth of Virginia. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging, and training state employees. It also provides for a grievance procedure. Code of Virginia, §2.2-3000 (A) sets forth the Virginia grievance procedure and provides, in part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employee disputes which may arise between state agencies and those employees who have access to the procedure under §2.2-3001.

² A. Tabs 2 and 4.

³ A. Tab 4.

⁴ A. Tab 6.

⁵ A. Tab 9.

⁶ A. Tabs 14 and 1.

⁷ A. Tabs 13, 15, and 16.

⁸ A. Tab 20.

Policy 1.40:

DHRM Policy 1.40 governs Performance Planning and Evaluation and provides for the establishment and communication of employees' performance plans and procedures for evaluating employees' performance. DHRM Policy 1.40 defines "Below Contributor Rating" as:

Results or work that fails to meet performance measures. To receive this rating, an employee must have received at least one documented Notice of Improvement Needed/Substandard Performance form within the performance cycle.

Effective July 10, 2007

A Written Notice (Standards of Conduct Policy 1.60) that is issued to an employee for any reason in the current performance cycle may be used in place of the Notice of Improvement Needed/Substandard Performance to support an overall rating of "Below Contributor".

DHRM Policy 1.40 sets forth procedure by which Agency may remove an employee from employment based upon a review of the employee's work performance. 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 the performance measure 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 reevaluation purposes. The form should clearly indicate that it is a reevaluation.
- The supervisor must discuss with the employees 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 their performance re-evaluation plan.
- If the employee transfers to another position during the reevaluation., The re-evaluation process will be terminated

The employee must be re-evaluated within approximately two weeks prior to the end of the three month period. 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. 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.

Evaluations:

An Agency may not conduct arbitrary or capricious employee performance evaluations. "Arbitrary or capricious" is defined in the Grievance Procedure Manual (§9) as "in disregard of the facts or without a

reasoned basis.”⁹ If a contested performance evaluation is qualified for hearing, and a Hearing Officer finds that it is arbitrary or capricious, the only remedy is for the agency to repeat the evaluation process and provide a rating with a reasoned basis related to established expectations. The remedy cannot include an award of any particular rating, unless it is the only possible result under a written policy mandate.

The evidence indicates management’s long standing concern with Grievant’s attendance/tardiness and management’s extensive efforts to correct such matters. Management addressed tardiness and attendance issues in Grievant’s Probationary Progress Review (April 12, 2012) and extended his probationary period, in large part, because of his attendance/tardiness.

This case addresses Agency desiring its employee to arrive at work on time as scheduled, follow established Agency expectations for reporting schedule changes and absences in advance, provide doctor’s excuses for missed work related to medical reasons, and maintaining current contact information with Supervision in order to be reached as needed for emergency response. The evidence further indicates these expectations were conveyed to Grievant and he knew or should have known these expectations. Evidence of Agency efforts to accomplish these expectations has been presented as has evidence of a valid business purpose for these expectations.

The evidence in this cause indicates a number of incidents involving Grievant being tardy, being absent, not providing notice/not providing notice as instructed, and not providing doctor’s notes as instructed. These incidents include:

a. incidents before IDP and Leave Action Plan:

- April 10, 2012 Grievant one hour late for work, no advance notice given
- April 11, 2012 Grievant advised not to be tardy in future
- April 13, 2012 Grievant was 20 min. late to work
- April 16, 2012 Grievant was 5 min. late to work
- April 20, 2012 Grievant was 2.8 hours late for work and Grievant counseled on this
- April 23, 2012 Grievant sleeping in a vehicle
- April 24, 2012 Grievant found sleeping again
- April 27, 2012 Grievant was 15 min. late to work
- July 24, 2012 Grievant called in the morning indicating he was tired – notified would be from work (8 hrs. leave taken)
- February 19, 2013 Grievant received a Group I Written Notice for being out of the work area
- February 25, 2013 Grievant was absent from work – called in that morning took 8 hours leave
- February 28, 2013 Grievant was 15 min. late to work, no advance notice given
- March 12, 2013 Grievant was 10 min. late to work, no advance notice given
- March 15, 2013 Grievant was 10 min. late to work, no advance notice given
- March 27, 2013 Grievant was 10 min. late to work, no advance notice given
- June 21, 2013 Grievant was 1 hour late to work, no advance notice given – just showed up late
- June 24, 2013 Management met with Grievant and discussed Grievant needing to be time and attendance
- June 24, 2013 Grievant was given Notice of Needs Improvement
- July 5, 2013 Grievant called in that morning for vacation day and took 8 hrs. leave time
- July 17, 2013 Grievant took leave re doctor’s appointment, no doctor’s note provided
- August 7, 2013 Grievant called in morning for vacation day – took 8 hrs. leave
- August 28, 2013 Doctor’s appointment, no doctor’s note provided and notified that morning -1 hour leave taken

⁹ See also *Norman v. Dept. of Game and Inland Fisheries*, (Fifth Judicial Circuit of Virginia, July 28, 1999). The court’s opinion in *Norman* indicates that an arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence, and that if an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to sustain an arbitrary or capricious performance evaluation claim as long as there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations.

August 30, 2013 Grievant was 30 minutes late to work, no advance notice given
 September 11, 2013 Doctor's appointment, no note from doctor – 2 hrs. leave taken
 September 13, 2013 Grievant was 1.2 hrs. late to work with no advance notice
 October 2, 2013 Grievant called at 8:45 PM stating he had tried calling do not get an answer.
 Stated he was going to be off 10/3/13 for illness.
 October 4, 2013 Grievant was 30 min. late to work, no advance notice given

b. incidents after receipt of IDP and Leave Action Plan:¹⁰

October 22, 2013 Grievant given letter advising him of being placed on Leave Action Plan and IDP
 December 04, 2013 Grievant absent from work this day – No advance notice to Agency, Grievant had requested Friday off and called in this date in morning to change his request to today (Wednesday)
 December 10, 2013 Grievant left work early, Doctor Appt. no doctor's note furnished Agency- 3hrs VAC
 December 18, 2013 Grievant was tardy for work this day - 15 min late for work with no notice in advance provided Agency
 December 26, 2013 Grievant was absent from work this day 8 hrs. Agency called Grievant concerning where he was. Grievant returned call at 8:45 A.M. and said he overslept and planning to take Friday off as well. Grievant advised that leave was not approved for Friday, 8 hrs. leave taken
 January 07, 2014 Grievant left work early without permission – no notice was provided Agency - .5 hrs. leave taken
 January 09, 2014 Grievant left work early - doctor's appointment - no doctor's note provided to Agency 3 hrs. VAC
 January 24, 2014 Grievant was absent from work, called in sick that morning – no doctor's note provided Agency – eight hours leave
 January 27, 2014 Grievant was absent from work - called in that morning-no doctor's note provided Agency
 January 29, 2014 Grievant was tardy, 30 minutes late to work -no notice to Agency in advance provided
 January 30, 2014 Grievant was absent from work this day - called in that morning (had to install starter on truck)
 February 05, 2014 Grievant left work early.
 February 06, 2014 Grievant was absent from work this day - called in that morning- took eight hours of leave
 February 10, 2014 Grievant left work early, 3 hrs. leave taken, no doctor's note provided, no advance notice to Agency
 February 17, 2014 Agency called Grievant to report for Snow Removal – Grievant did not answer or call back, Grievant not show

Management issued Grievant a *Notice of Improvement Needed/Substandard Performance* on 6/24/13 which addressed their concerns with Grievant's reporting to work on time. Such *Notice* addressed Grievant's failure to report to work on time as a performance deficiency that needed to be corrected. Management instructed Grievant of the need to come to work on time. Management also instructed Grievant he needed to call management in advance if he was going to be late reporting to work.¹¹

On October 23, 2013 Grievant received an annual Performance Evaluation with an Overall Rating Earned of "Below Contributor". The Performance Evaluation also addressed comments as to three listed Core Responsibility Ratings of "Below Contributor" and indicates:

- On February 4th [Grievant] was caught out of work area during snow watch and was counseled. On February 19th a group notice was issued to him for failing to follow instructions. And for being out of work area, emergency operations or core responsibility and He needs to take these operations seriously as they are a important part of his job.
- [Grievant] Has a problem with his attendance he is often late, on march 12 he was late, march 27 late, June 21 he was an hour late and did not call in. On June 24 meeting was held with [Grievant] with [names redacted] along with [Grievant] on his attendance and a notice of needs improvement was issued. Late on august 22 again on September 13 on October 2 [Grievant] did not show up for work and did not call in

¹⁰ G. Ex. Tab 1.

¹¹ A. Tab 9.

- [Grievant] does not accept counseling well when he is talked with to help improve his problem areas he resistant says he does not Care¹²

Grievant’s Performance Re-evaluation addressed management concerns with Grievant’s actions/lack of actions. Management expressed concerns as to Grievant not being available when needed to be reached for business purposes /emergency activities, his not providing doctor’s notes as directed, and his not informing management, as he was directed, when he is to be absent/late.

After considering all available evidence, there is insufficient evidence to find an arbitrary or capricious performance evaluation has been conducted by Agency. There is adequate documentation in the record to support the conclusion that the performance evaluation and the performance re-evaluation had a reasoned basis related to established expectations.

Plans:

Grievant was placed on an Individual Development Plan (“IDP”) and a Leave Action Plan. The IDP addressed applicable Core Responsibilities and Measures for Core Responsibilities, Job-Related Development, and an Action Plan describing specific knowledge and skills. The IDP was endorsed by Grievant, Supervisor, and Reviewer 10/22/13 and provided an action plan which addressed specific knowledge or skills, activity description , management monitoring, and provided for outcome results to be reported. The IDP was reviewed by Grievant and Supervisor who both initialed and dated the below reviews: 1st month review on 12/2/13, the 2nd month review on 2/3/14, and the 3rd month review on 2/28/14.¹³

The IDP addressed “Time Management”, “Attendance”, “Emergency Operations”, and “Team Work” which would be monitored by management and which required the following of Grievant:

- Time Management Grievant was required to report to work and be ready to begin team meetings and shift work on time.
- Attendance Grievant was required to follow established expectations for reporting scheduled changes and absences in advance.
- Emergency Operations
 - a. Grievant was required stay within the work area and follow instructions.
 - b. Grievant was required to maintain current contact information with Supervision in order to be reached as needed for emergency response.
- Team Work Grievant was required to perform work as member of a team focused upon safety, reliability, responsiveness, competency and quality of the response, service and work product.

“**Outcome/ Result**” completed as to each Specific Knowledge or Skill listed in the IDP provided in the 2nd and 3rd month reviews as follows:

Re: Time Management ... (Grievant was required to report to work and be ready to begin team meetings and shift work on time.)

2nd mo. ... On 12/26/13 Grievant did not show for work and did not call, per [redacted] Superintendent had to call three times before Grievant called back.

¹² A. Tab 14.

¹³ A. Tabs 13, 15, and 16.

3rd mo. ... Grievant left work early on 2/5/14.
Grievant did not report to work on 2/6/14. He called Superintendent 1 hr. before work and [name redacted] was off sdp, he did not call supervisor on duty and did not report to work.

Re: Attendance ... (Grievant was required to follow established expectations for reporting scheduled changes and absences in advance.)

2nd mo. ... On 1/7/14 Grievant left work early and didn't get supervisor approval

3rd mo. ... Grievant off (left work early) on the 10th of February but did not produce doctor's note as per leave action plan.

Grievant did not work on the 6th of February he did not contact supervisor on duty he contacted Superintendent who was off work that day.

Re: Emergency Operations ... (a. Grievant was required to stay within work area and follow instructions.)

Grievant achieved adequate results both months as to the above requirements.

Re: Emergency Operations ... (b. Grievant was required to maintain current contact information with Supervision in order to be reached as needed for emergency response.)

2nd mo. ... On 1/20/14 Superintendent could not get hold of Grievant to come to work on alternate work schedule. Grievant returned call at 8:45 PM.

3rd mo. ... On 2/7/14 management could not contact Grievant for alternate work schedule and left message. Grievant showed up but did not return call and agency did not know if he was working or not until he showed up at midnight

On 2/17/14 Superintendent could not get hold of Grievant to come to work on alternate work schedule. Grievant returned call on February 18th.

Re: Team Work ... (Grievant was required to perform work as member of a team focused upon safety, reliability, responsiveness, competency and quality of the response, service and work product.)

Grievant achieved adequate results a both months.

The Leave Action Plan Agency developed for Grievant affirmed in writing of Grievant's exact work hours, lunch break, and the requirement to inform his supervisor no less than 15 minutes before his scheduled start time if he was unable to report to work on time. The Plan provided him 3 telephone numbers for his supervisor and a phone number for his supervisor's supervisor in the event Grievant's could not reach his own supervisor. The Plan affirmed a specific instruction that all sick absences will require a doctor's note until further notice, and informed him noncompliance with the leave action plan may result in disciplinary action up to and including termination. Grievant was given a copy of the Leave Action Plan.¹⁴ Testimony indicated the Leave Action Plan was an "established expectation" of management and was so referred to in the IDP's Action Plan Section.

Substantial Compliance:

When Grievant received an Overall Rating Earned of "Below Contributor" in his Performance Evaluation he had received one documented Notice of Improvement Needed/Substandard Performance

¹⁴ A. Tab 12.

form within the performance cycle (received 6/24/13) and additionally had received a Written Notice issued in the current performance cycle (issued 2/19/13).¹⁵

A performance re-evaluation plan was timely developed and was discussed with Grievant. As discussed more fully above, the plan set forth performance measures to be addressed in Grievant's performance re-evaluation and set work expectations. The IDP set out the plan for performance re-evaluation and was signed by Reviewer, Grievant, and Supervisor. Grievant was aware of the minimum performance measures set forth in the plan he was expected to meet and was aware these performance measures were being monitored by management. Grievant was essentially required to:

- report to work and be ready to begin team meetings and shift work on time;
- follow established expectations for reporting schedule changes and absences in advance and providing doctor's notes; and
- maintain current contact information with Supervision in order to be reached as needed for emergency response.

Grievant was received a "Below Contributor" overall rating on his Re-Evaluation which specifically address the performance measures he failed to accomplish.

Grievant was re-evaluated and terminated after the 3 month period provided for in Policy 1.40. Policy 1.40 provides for an extension if an employee is absent for more than fourteen consecutive days during the three month evaluation period. There is no evidence that there was a more than fourteen consecutive day absence in this cause.

Extension of the 3 month period has been addressed in a Policy Ruling of the Department of Human Resources Management (December 12, 2011) in which it was noted, in pertinent part:

.... The agency also stated that it should not be penalized for extending the re-evaluation period for an additional thirty (30) in order to give a new supervisor a chance to evaluate the grievant's performance. The DHRM agrees with the agency for two reasons: (1) that the original supervisor was absent and the new supervisor needed appropriate time to evaluate the grievant's performance represents a legitimate, fair and equitable reason; (2) the extra thirty (30) days prolonged the grievant's time period to improve his performance. Please note that policy cannot list all instances where exception may be appropriate. In the present case, an exception to policy was appropriate.

Regarding the hearing decision, DHRM agrees that the agency did not adhere strictly to the letter of the policy, However, this non-adherence to policy was advantageous to the grievant because it extended his employment. Thus, we are returning this decision to the hearing officer in order that he can revise it to be consistent with the Department's interpretation and application of policy.

Agency failed to strictly comply with Policy 1.40 in extending the time period for the 3 month Re-Evaluation. While Agency conducted its Re-Evaluation and Grievant's termination after the 3 month period provided for, the extension was advantageous to Grievant. The time period extension afforded additional time as an employee and provided additional time and opportunity to exhibit improved performance. As such, the extended time period was harmless error and Agency is found to be in substantial compliance with Policy 1.40 in its actions.

¹⁵ A. Tabs 9 and 6.

DECISION

For the reasons stated above:

1. Agency's performance evaluation and Agency's performance re-evaluation are not found to be arbitrary or capricious.
2. Agency has proven by a preponderance of the evidence that the Agency's termination of Grievant's employment was warranted and appropriate under the circumstances.
3. Grievant's termination is found to have been in substantial compliance with Policy 1.40.
4. Agency's termination of Grievant's employment is hereby **UPHELD**.

APPEAL RIGHTS

As the *Grievance Procedure Manual* (effective date: July 1, 2012) sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

A. Administrative Review:

A hearing officer's decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

A party may make more than one type of request for review. All requests for administrative review must be made in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. "**Received by**" means delivered to, not merely postmarked or placed in the hands of a delivery service.

1. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy with which the hearing decision is inconsistent. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, VA 23219 or faxed to (804) 371-7401 or e-mailed.

2. Challenges to the hearing decision for noncompliance with the grievance procedure and/or the Rules for Conducting Grievance Hearings, as well as any request to present newly discovered evidence, are made to EDR. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Office of Employment Dispute Resolution's ("EDR's") authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed to EDR (EDR's fax number is 804-786-1606), or e-mailed to EDR (EDR's e-mail address is edr@dhrm.virginia.gov).

B. Final Hearing Decisions:

A hearing officer's decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if Ordered by EDR or DHRM, the hearing officer has issued a revised decision.

C. Judicial Review of Final Hearing Decision:

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law. A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision.

Lorin A. Costanzo, Hearing Officer