

Issues: Group II Written Notice (failure to follow instructions), Group II Written Notice with Suspension (failure to follow instructions), Arbitrary/Capricious Performance Evaluation, and Removal due to Below Contributor rating on Re-Evaluation; Hearing Date: 05/30/14; Decision Issued: 06/19/14; Agency: DSS; AHO: Carl Wilson Schmidt, Esq.; Case No.10342, 10343, 10344, 10345; Outcome: No Relief – Agency Upheld.



# ***COMMONWEALTH of VIRGINIA***

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

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

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

In re:

**Case Number: 10342 / 10343 / 10344 / 10345**

Hearing Date: May 30, 2014  
Decision Issued: June 19, 2014

#### **PROCEDURAL HISTORY**

On September 27, 2013, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions. On October 15, 2013, Grievant was issued a Group II Written Notice of disciplinary action with a 10 workday suspension for failure to follow instructions. On November 5, 2013, Grievant received an annual performance rating with an overall rating of Below Contributor. On February 18, 2014, Grievant received a three-month reevaluation with a rating of Below Contributor. She was removed from employment effective February 20, 2014.

On October 9, 2013, Grievant timely filed a grievance to challenge the Agency's Group II Written Notice issued on September 27, 2013. On November 4, 2014, Grievant timely filed a grievance to challenge the Agency's issuance of a Group II Written Notice issued on October 15, 2013. On November 6, 2013, Grievant filed a grievance to challenge the Agency's issuance to her of a Below Contributor Rating on her annual performance evaluation. On February 21, 2014, Grievant filed a grievance to challenge the Agency's issuance to her of a three-month reevaluation with an overall rating of Below Contributor.

On April 8, 2014, the Office of Employment Dispute Resolution issued Ruling No. 2014-3851 consolidating the four grievances for a single hearing. On April 28, 2014, EDR assigned this appeal to the Hearing Officer. On May 30, 2014, a hearing was held at the Agency's office.

## **APPEARANCES**

Grievant  
Agency Party Designee  
Agency Representative  
Witnesses

## **ISSUES**

1. Whether Grievant engaged in the behavior described in the Written Notices?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether Grievant's annual evaluation and three-month reevaluation were arbitrary or capricious?
6. Whether the Agency complied with State policy governing Grievant's removal?

## **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. Grievant has the burden of proof to show that the annual performance evaluation was arbitrary or capricious. The Agency has to burden of proof to show that the three-month reevaluation was not arbitrary or capricious and was consistent with State policy. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

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

The Department of Social Services employed Grievant as a Family Engagement Senior Consultant. The purpose of her position was:

Applying comprehensive knowledge of family engagement practices and the Virginia Practice Model to promote and assist in the development and implementation of a consistent method of partnering with families who are involved with the child welfare system in the Commonwealth of Virginia.

To provide leadership and coordination of development of guidance, practice, and support for involvement of fathers and paternal family in services and decisions affecting their families when children are involved with the child welfare system.

To manage, administer, and promote the Virginia Putative Father Registry in accordance with state law and regulation.<sup>1</sup>

She began working for the Agency in 2006. Grievant had prior active disciplinary action. On February 19, 2013, Grievant received a Group I Written Notice for unsatisfactory job performance because Grievant failed to produce a final version of the Newsletter by January 31, 2013.

In 2010, Grievant had conversations with a former human resource employee, Ms. C, regarding Grievant's claim of disability. The Agency contacted Grievant's Medical Doctor for additional information. The Medical Doctor sent a letter to Ms. C stating, "it is my understanding that [Grievant] has not requested any accommodations at this time. Until such a request of accommodation issue is received no further information is being provided."<sup>2</sup>

Grievant was responsible for drafting and issuing a Newsletter. The last publication of the Newsletter was October 2012. The next Newsletter should have been published in January 2013. The Supervisor had asked Grievant to submit the Newsletter to the Supervisor for her review. Grievant did not produce an acceptable draft. On April 18, 2013, the Supervisor instructed Grievant to complete the Newsletter by May 31, 2013. On May 14, 2013, the Supervisor reminded Grievant of the deadline. Grievant did not submit the Newsletter to the Supervisor on May 31, 2013.

On September 23, 2013, the Supervisor instructed Grievant as follows:

There is a stack of VPFR search requests that were never mailed. Please call each search requestor to determine if they still need the requested search. Log calls and actions for each request in a spreadsheet to be returned to me. (Court orders or attorney agreements are no longer required." Due date: October 15.)<sup>3</sup>

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<sup>1</sup> Agency Exhibit 3.

<sup>2</sup> Agency Exhibit 9.

<sup>3</sup> Agency Exhibit 2

Grievant did not make the telephone calls as instructed by the Supervisor. When the Supervisor asked Grievant why she did not make the telephone calls, Grievant responded that she did not think making the calls was necessary.

On November 5, 2013, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

With respect to the Essential Responsibility of Support the Statewide Implementation of Family Engagement, the Supervisor wrote:

While [Grievant] has facilitated meetings and participated in several special committees this period, reminders about scheduling meetings and timely submission of minutes was required. Also of concern, little progress has been made towards the goal of the special committees. [Grievant] has attended several FPM Brown Bag and Roundtable events, but she has not utilize these opportunities to gather information to inform program activities nor take a leadership role in promoting best practice. Financial reports throughout the period contain errors that had to be very carefully reviewed. Additionally, the quarterly Engaging Families Newsletter has not been published since October 2012.

With respect to the Essential Responsibility of Managing the Virginia Putative Father Registry the Supervisor wrote:

Although [Grievant] appeared to be managing the responsibilities of the VPFR appropriately, in the spring it became apparent that she was not responding in a timely and professional manner to all of those who requested assistance. Further, her organizational strategies were insufficient to allow other staff to adequately cover for her when she was absent.

With respect to the Essential Responsibility of Provide Support to the Strengthening Families Initiative, the Supervisor wrote:

Despite being trained as a Master Trainer with the NCPL and being afforded opportunities to attend additional training and fatherhood events, [Grievant] has not utilized her training to assist LDSS to develop fatherhood programs, to impact FE Guidance, or to promote best practice at the LDSS or VDSS level. [Grievant] conducted one training on how to involve fathers and paternal relative at the Spring 2013 VASWP, BPRC and POSSES Conference.

With respect to the Essential Responsibility of Other Duties As Assigned, the Supervisor wrote:

During this period, [Grievant] was asked to assist the Adoption Unit with some work overflow in light of a reduction in her responsibilities relative to the FPM incentives. While she initially complied with this request, she

gradually performed fewer and fewer duties for the adoption unit. [Grievant] eventually stated that she was too busy to continue to assist the adoption unit, despite adoption being a major Division initiative and no meaningful increase in her overall assigned workload.<sup>4</sup>

On November 7, 2013, the Employee Relations Coordinator sent Grievant's Medical Doctor a letter seeking information about Grievant's claim of disability. The Medical Doctor replied on November 12, 2013:

This correspondence is in response to your letter dated November 7, 2013. [Grievant] does have a qualifying condition as provided by the legal definition of the ADA. [Grievant's] condition will have lifelong effects with periodic episodes. During past episodes, [Grievant] has experienced increased anxiety, loss of concentration and forgetfulness, among other physical reactions. In reviewing [Grievant's] job description she is able to perform her essential functions, however during these episodes she will need reasonable accommodations. At those times the following recommendations for reasonable accommodation are being requested for [Grievant] during these episodes.

1. Telecommute 1 to 2 days a week.
2. Provide prompts and reminders for deadlines.
3. Supervisor to provide written communication of deadlines and expectations by having scheduled conferences prior to deadline dates.
4. Summarize goals and expectations in a written and verbal format and review frequently.<sup>5</sup>

On December 10, 2013, the Employee Relations Coordinator sent Grievant and the Supervisor an email stating:

As you are aware, [Grievant] has requested reasonable accommodation to assist with the performance of the essential functions of her job. In June 2010, while working with [Ms. C], it was established that [Grievant] has a qualifying disability however; at that time accommodations were not requested or needed. [Grievant] now has submitted a letter from her medical provider with recommendations for reasonable accommodation. After reviewing consideration of the recommendations, the following will be put into place immediately.

- 1) The current weekly supervision meetings will be utilized to review and re-enforce deadlines, goals and expectations. At the conclusion of each supervisory meeting upcoming deadlines should

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<sup>4</sup> Agency Exhibit 3.

<sup>5</sup> Agency Exhibit 9.

be reviewed. [Grievant] will be responsible for ensuring the notes are detailed and include all deadlines.

- 2) [Grievant] will type up the notes and forward to her supervisor by the end of the day.
- 3) Supervision notes are to be reviewed by supervisor and returned within 48 hours of receipt.<sup>6</sup>

The Agency also permitted Grievant to take breaks and use a room to work with fewer people and distractions.

Grievant received a reevaluation plan on November 25, 2013. The reevaluation plan was in the form of a revised Employee Work Profile. Grievant had input into the plan. The reevaluation plan set forth detailed tasks and specific deadlines for Grievant's work over the following three months.

The Supervisor met regularly with Grievant to discuss Grievant's work performance, assignments, and performance. These supervisory meetings occurred on December 10, 2013, December 17, 2013, December 30, 2013, January 6, 2014, January 15, 2014, January 22, 2014, January 28, 2014, February 5, 2014, and February 11, 2014.

On February 18, 2014, the Supervisor evaluated Grievant's work performance during the three month reevaluation period. The Supervisor made comments regarding all material aspects of the reevaluation performance plan. She discussed that Grievant had satisfactorily completed the Newsletter published on December 13, 2013 but pointed out that additional corrections were necessary for the next Newsletter. Grievant had drafted a workplan for a roundtable program. Several of the items that had been designated as completed in January had not been completed. Grievant submitted a draft FAQ in a timely manner but the final draft was incomplete. Grievant did not make satisfactory progress to ensure participation of LDSS stakeholders. Grievant provided documentation of themes from the December 18, 2013 stakeholder meeting but did not adequately capture the major issues discussed and suggestions made by the stakeholder group. As of January 31, 2014, Grievant was still working on developing draft Guidelines for borrowing and transferring homes. For a January 27, 2014 meeting with Resource Family Consultants, Grievant did not establish a clear agenda for the meeting or direct meeting participants to bring copies of previously emailed draft guidance. Participants had to wait until copies were made. Grievant did not provide a draft to the Supervisor of the guidance document prior to the meeting. After the Supervisor moved earlier the deadline for submitting weekly reports, Grievant did not submit some reports.

Agency Managers considered whether Grievant could be demoted or transferred to another position within the Agency but concluded these were not realistic options. On February 20, 2014, Grievant was informed that she was being removed from employment because she received a Below Contributor rating for her three month reevaluation.

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<sup>6</sup> Agency Exhibit 9.

## CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”<sup>7</sup> Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

### Group II Written Notice – Newsletter

Failure to follow a supervisor’s instructions is a Group II offense.<sup>8</sup> The Supervisor instructed Grievant to complete the Newsletter by May 31, 2013. Grievant failed to do so thereby failing to comply with the Supervisor’s instruction. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action.

### Group II Written Notice – Telephone Calls

On September 23, 2013, the Supervisor instructed Grievant to “call each search requestor to determine if they still need the requested search”. Grievant was to complete the task by October 15, 2013. Grievant did not make any telephone calls as instructed. The Agency has presented sufficient evidence to support the issuance of a Group II Written Notice of disciplinary action. Upon the issuance of a Group II Written Notice, an agency may suspend an employee. Accordingly, Grievant’s suspension for 10 workdays is upheld.

### 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 Human Resource Management ....”<sup>9</sup> 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, and (3) the

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<sup>7</sup> The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>8</sup> See, Attachment A, DHRM Policy 1.60.

<sup>9</sup> Va. Code § 2.2-3005.



disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

### Retaliation

Grievant alleged that she was being harassed and retaliated against. No credible evidence was presented to support this allegation.

### Arbitrary or Capricious Evaluations

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 reevaluate 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 Agency has presented sufficient evidence to show that Grievant’s annual performance evaluation was not arbitrary or capricious. Grievant failed to perform her duties as required by the Agency. Grievant engaged in behavior that gave rise to two disciplinary actions. Because the Agency issued disciplinary action, the Agency was authorized by DHRM Policy 1.40 to give Grievant an overall rating of Below Contributor. Grievant’s request for relief with respect to the annual evaluation must be denied.

DHRM Policy 1.40 provides that an employee who receives a rating of "Below Contributor" on an annual evaluation 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.

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, Grievant received an annual evaluation with an overall rating of Below Contributor thereby justifying the Agency's decision to reevaluate Grievant's work performance over a three month period. The Supervisor drafted a reevaluation performance plan with input from Grievant. The Supervisor met regularly with Grievant to discuss the Supervisor's expectations for Grievant's work performance and Grievant's progress in meeting those expectations. Grievant's three-month reevaluation was not arbitrary or capricious. Grievant received a Below Contributor rating thereby justifying the Agency's decision to remove Grievant. The Agency considered alternatives to removal and concluded that no alternatives were available. The Agency's decision to remove Grievant must be upheld.

### Reasonable Accommodation

Grievant contends the disciplinary action should be mitigated because of her disability. She asserted that the Agency's failure to provide her with an accommodation renders its performance evaluations unreliable.

Grievant did not testify in this case. It is unclear how her disability affected her ability to perform her job duties within the context of the Supervisor's evaluation of Grievant's job performance. Agencies may take disciplinary action regardless of whether an employee seeks reasonable accommodation. Based on the evidence,

presented it appears that the Agency acted timely to evaluate the nature of the accommodation needed by Grievant and implemented remedies providing a reasonable accommodation to Grievant. Once the Agency afforded reasonable accommodation for her disability, Grievant's work performance should not have been adversely affected by her disability.

Grievant argued that the Agency should have accommodated her disability in 2010. The evidence showed that the Agency was aware of Grievant's disability in 2010 and offered to consider Grievant's need for accommodation but Grievant failed to seek accommodation.

### **DECISION**

For the reasons stated herein, the Agency's issuance to the Grievant of the first Group II Written Notice of disciplinary action is **upheld**. The Agency's issuance to the Grievant of the second Group II Written Notice of disciplinary action with suspension is **upheld**. Grievant's request for relief with respect to her annual performance evaluation is **denied**. The Agency's decision to remove Grievant following a three month reevaluation is **upheld**.

### **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>10</sup>

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

*/s/ Carl Wilson Schmidt*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>10</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.