

Issue: Termination due to poor performance; Hearing Date: 06/11/14; Decision Issued: 06/13/14; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No.10363; Outcome: Partial Relief; **Administrative Review**: **DHRM Ruling Request received 07/09/14; Outcome: Request denied – untimely; Judicial Appeal: Appealed to Circuit Court in Halifax County; Outcome pending.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10363

Hearing Date: June 11, 2014

Decision Issued: June 13, 2014

PROCEDURAL HISTORY

On November 26, 2013, Grievant received a reevaluation with an overall rating of Marginal Contributor. She was removed from employment effective March 14, 2014.

On April 11, 2014, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On May 12, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 11, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency complied with policy with respect to Grievant's removal from employment?

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 policy and that Grievant's reevaluation was not arbitrary or capricious.

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 State Police employed Grievant as a Trooper in one of its Divisions. Grievant was removed from employment effective March 14, 2014.

In 2009, Grievant was transferred to the Division to gain a "fresh start" after she had demonstrated poor performance while working in another division.

On September 9, 2013, Grievant received an annual performance evaluation with an overall rating of Marginal Contributor. On September 9, 2013, Grievant received an Employee Work Profile with a Notice of Improvement Needed/Substandard Performance. The Notice of Improvement Needed/Substandard Performance identified the specific performance deficiencies improvements needed, and stated, in part:

Throughout the last performance cycle, [Grievant] remained well below the Area and Duty Post average in the category of the promotion of Highway safety (30% core responsibility). [Grievant] issued 224 summons/arrests for the performance cycle which equates to a 1.06 per day average. ***

[Grievant's] criminal and self initiated activities are substandard. ***

The Improvement Plan provided, in part:

[Grievant] will utilize moving and stationary RADAR as well as the Pace method to detect and enforce speed violations. [Grievant] will be vigilant in the detection and enforcement of occupant restraint violations and in the apprehension of persons driving under the influence of alcohol. [Grievant] will ensure she is thoroughly familiar with all applicable motor vehicle laws as established in the Code of Virginia and take necessary steps to increase her overall performance in the promotion of Highway safety. ***

On September 17, 2013, the Captain met with Grievant and told her that if her performance was not at a satisfactory level at the end of the 90 day performance plan, he would place her in an alternate position or remove her from State service as set forth in General Order ADM 10.03.

On December 5, 2013, Grievant received a three-month reevaluation. With respect to the Core Responsibility of Promote Highway Safety, Grievant received a Below Contributor rating. The Supervisor wrote:

[Grievant] issued 58 summons/arrests from July 28, 2013 to November 23, 2013 which equates to a .84 per day average. She finished the last performance cycle on July 27, 2013 with 224 summons/arrests which equates to a 1.06 per day average. [Grievant] has placed 0 DUI charges, 6 speeding charges and 0 child restraint violations during this time period. [Grievant] has very little speed enforcement and self initiated activities in almost 4 months of work. [Grievant] needs to improve and be self-motivated in traffic enforcement.

With respect to the Core Responsibility of Investigate Criminal Activity, the Supervisor gave Grievant a rating of Below Contributor. The Supervisor wrote:

From July 28, 2013 to November 23, 2013, [Grievant] has 3 misdemeanor charges 0 drug and 1 felony charges for a total of 4 criminal charges. Two of the four criminal charges were not self initiated by [Grievant]. [Grievant] presents her cases in court in a very professional manner in accordance with policy and guidelines. She has 2 alert stops a 5 new SP-102's during the performance cycle.

The Supervisor gave Grievant an overall rating for the three month reevaluation of Marginal Contributor.

Agency managers considered whether Grievant could be demoted or moved to another position within the Division, but concluded Grievant should be removed from employment. Grievant was removed from employment effective March 14, 2014.

CONCLUSIONS OF POLICY

General Order ADM 10.00 defines Marginal Contributor as, “[a] performance rating recognizing marginal job performance not quite at the ‘Contributor’ level, but demonstrating the capacity to improve with additional training.” The Order defines Below Contributor as, “[a] performance rating recognizing job performance that fails to meet the criteria of the job function.”¹

General Order ADM 10.03 addresses Conducting the Evaluation Meeting. Section 2 addresses the Corrective Action Plan and states:

¹ DHRM Policy 1.60 defines Below Contributor as, “[r]esults or work that fails to meet performance measures.”

An employee who receives an overall performance rating of “Marginal Contributor or “Below Contributor” must have an action plan developed by the supervisor. This plan should outline the minimum performance expectations.

The action plan must be approved and signed by the reviewer.

The approved plan must be discussed with the employee within 10 workdays of the evaluation meeting.

The action plan must set forth the performance measures for the following 30 to 90 days. The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures outlined in the improvement plan.

Two weeks prior to the end of the re-evaluation period, the employee must be re-evaluated.

If the employee receives a re-evaluation of “Marginal Contributor” or “Below Contributor” the supervisor may address the issue through the Standards of Conduct.

If the Department identifies another position within the re-evaluation period that is more suitable for the employee’s level of performance, then the employee may be reassigned or demoted, which will conclude the re-evaluation period. If this occurs, then the employee will not be eligible for a performance increase. If the Department does not reassign or demote the employee after the second re-evaluation, the employee may be removed from state service.

Grievant received a rating of Marginal Contributor on her annual evaluation. She was given a performance development plan in September 2013 and told that her performance would be reevaluated near the end of the reevaluation period. Her performance was reevaluated and she was given an overall rating of Marginal Contributor. The Agency made a good faith effort to determine if she could be demoted or moved to another position within the Agency. Since no other positions were available in the Agency’s judgment, the Agency removed Grievant from employment.

When an employee receives a substandard annual evaluation, a purpose of the reevaluation is to measure the employee’s performance during the subsequent three month period. In this case, the Agency considered Grievant’s work performance for the timeframe beginning July 28, 2013 and ending November 23, 2013. Grievant’s reevaluation time period did not begin until September 9, 2013. The Agency incorrectly considered Grievant’s work performance prior to the beginning of the reevaluation period.

The Agency has substantially complied with the requirements necessary to remove Grievant from employment except to the extent it considered Grievant's work performance prior to the beginning of the reevaluation period. This matter must be remanded to the Agency for the Agency to consider only Grievant's work performance during the reevaluation period. If the Agency concludes the Grievant's work performance is satisfactory, Grievant must be reinstated with back pay, benefits, and seniority. If the Agency concludes the Grievant's work performance remains as a Marginal Contributor, the Agency must make a good-faith effort to determine whether Grievant can be demoted to another position within the Agency or transferred to another position within the Agency. In the event these alternatives are not available, the Agency may remove Grievant from employment.

Grievant argued that the Agency did not give her a "fresh start" when they transferred her to the new Division because the Agency subsequently moved supervisors from her previous division into the Division. This argument is not sufficient to change the outcome of this case. The Agency is free to transfer supervisors in accordance with its business needs. No evidence was presented that the Agency acted in a manner with the intent to undermine Grievant's work performance.

DECISION

For the reasons stated herein, this matter is **remanded** to the Agency to repeat its assessment of Grievant's work performance during the reevaluation period.

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.²

[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

² Agencies must request and receive prior approval from EDR before filing a notice of appeal.