

Issues: Arbitrary/capricious performance evaluation, and termination due to Below Contributor rating on re-evaluation; Hearing Date: 06/10/14; Decision Issued: 06/16/14; Agency: DPOR; AHO: Cecil H. Creasey, Jr., Esq.; Case No. 10364; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH of VIRGINIA**  
**Department of Human Resource Management**  
**Office of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In the matter of: Case No. 10364

Hearing Date: June 10, 2014  
Decision Issued: June 16, 2014

PROCEDURAL HISTORY

Grievant was a licensing specialist for the Department of Professional and Occupational Regulation (“the Agency”). On March 20, 2014, the Agency terminated the Grievant’s employment, following the results of a re-evaluation period under DHRM Policy 1.40. The Grievant timely filed a grievance to challenge the Agency’s action. On May 7, 2014, the Office of Employment Dispute Resolution, Department of Human Resource Management, (“EDR”) appointed the Hearing Officer. During the pre-hearing conference, the grievance hearing was scheduled for June 10, 2014, on which date the grievance hearing was held, at the Agency’s office location. This was the first available date available to the parties.

Both the Grievant and the Agency submitted documents for exhibits that were accepted into the grievance record, and they will be referred to as Agency’s or Grievant’s Exhibits, respectively. Agency Exhibit 31 was withdrawn. The hearing officer has carefully considered all evidence presented.

APPEARANCES

Grievant  
Counsel for Grievant  
Representative for Agency  
Counsel for Agency  
Witnesses

## ISSUES

1. Was Grievant's three-month performance re-evaluation retaliatory, arbitrary and capricious, or a misapplication of policy?
2. Did Grievant's removal from state employment comply with policy?

Through her grievance filings, the Grievant challenged her re-evaluation and has requested reversal of the termination, reinstatement, back pay, and attorney's fees.

## 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 in accordance with State policy. Grievance Procedure Manual ("GPM") § 5.8. In all other actions, such as claims of retaliation and discrimination, the employee must present his evidence first and must prove his claim by a preponderance of the evidence. *In this termination action, the burden of proof initially is on the Agency.* The burden of proof is on the Grievant to show by a preponderance of the evidence that her performance evaluations were either a misapplication of policy, retaliatory, or arbitrary and capricious. 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.

## APPLICABLE LAW AND OPINION

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. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent 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 employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

The Agency relied on DHRM Policy 1.40, which governs Performance Planning and Evaluation. Under this policy, an employee who receives an overall rating of Below Contributor

on an annual evaluation must be re-evaluated in 90 days. At the beginning of the 90 day period, the employee must be given a workplan describing the Agency's expectations of the employee's work performance during the 90 day period. When the employee is re-evaluated at the end of the 90 day period, the employee may be removed from employment if the employee's overall performance rating remains as Below Contributor.

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.

Va. Code § 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 § 2.2-3005.1 provides that the hearing officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the hearing officer's statutory authority is the ability to determine independently whether the employee's alleged conduct, if otherwise properly before the hearing officer, justified the discipline. The Court of Appeals of Virginia in *Tatum v. Dept. of Agr. & Consumer Serv.*, 41 Va. App. 110, 123, 582 S.E. 2d 452, 458 (2003) (quoting Rules for Conducting Grievance Hearings, VI(B)), held in part as follows:

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."

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

#### Factual Findings

The Agency employed Grievant as a licensing specialist, with many years tenure. On October 23, 2013, the Grievant's supervisor issued the Grievant a Notice of Improvement Needed, citing low production of license applications processed, excessive numbers of mistakes, and failing to follow instructions. Agency Exh. 13. On November 14, 2013, the Grievant received her annual performance evaluation that was an overall rating of below contributor. The Agency issued a re-evaluation plan on November 22, 2013. Agency Exh. 16. The Grievant appealed her performance review, and, as a result, the performance evaluation was changed but remained at an overall below contributor level. Agency Exh. 14, 15.

The Agency's witnesses, including the board administrator, testified consistently with the memorandum of October 23, 2013, from the board administrator to the Grievant. Agency Exh. 13, p. 1. The memo and detailed attachments described the Grievant's performance deficiencies and the Notice of Improvement Needed/Substandard Performance, issued the same date, set forth an improvement plan. Agency Exh. 13, p. 4. The subsequent below contributor annual evaluation included a re-evaluation plan. Agency Exh. 16. The re-evaluation plan addressed the same work deficiencies identified in the Notice of Improvement Needed, including core responsibilities for serving the call center, processing applications, handling board mail, and administration, with corresponding measures. The board administrator testified that the Grievant, more so than any other staff member, struggled with the new EAGLES system that was implemented in February 2013. He testified that the Grievant was provided with formal and informal training on the EAGLES system, consistent with all other staff members. Agency Exh. 7.

The board administrator testified that, in order to assist and support the Grievant, he had already assigned the Grievant the simplest applications to process, and there was no option to reduce the Grievant's job responsibilities because all licensing specialists are required to do the same responsibilities. He also testified that there were no other jobs or openings to which the Grievant could be moved.

The board administrator testified that the re-evaluation period was extended, in accord with Policy 1.40, because the Grievant was absent during the re-evaluation period for 17 consecutive days. The revised end of the re-evaluation period was March 10, 2014. Agency Exh. 24. The three month re-evaluation was issued on March 6, 2014, and it noted particularly low productivity and resulted in an overall below contributor rating. Agency Exh. 25. The re-evaluation referenced data showing improvement in reducing mistakes, but continued inadequate compliance with the measured expectations for such responsibilities as processing applications and working in the call center.

The board administrator testified that he has counseled other staff members regarding productivity and mistakes, but the Grievant's poor performance was the most severe. No other staff member had a performance evaluation with an overall below contributor rating.

The EAGLES office director testified to the formal and informal training provided to the Grievant and all other staff members. She testified that the Grievant was slow to catch on to the EAGLES system compared to other staff members—that no one else struggled as much as the Grievant did. She also testified to her observation that the board administrator was patient with the Grievant's slow progress and was always supportive. She testified that, while some glitches in the EAGLES system were present in the beginning of the implementation, the glitches were fixed within a few days of implementation and would not explain the Grievant's ongoing mistakes in the system.

The human resources director testified that the process under Policy 1.40 was followed, and that the Agency director made the final decision that termination was the appropriate response to the Grievant's below contributor re-evaluation. She also testified that the Grievant had recognized skills in customer service.

The acting Agency director for the termination decision testified that he considered all available information and that, while demotion and reassignment were considered, the Agency had no such alternatives available. Some years earlier, the Grievant had already been demoted once. He testified that the Grievant's performance deficiencies were considered very serious and that they affected negatively the Agency's operations. He testified that the timing of the Notice of Improvement Needed was simply a function of the Agency's accumulated observations of the Grievant's performance issues.

The board administrator, human resources director, and acting Agency director all testified that they followed Policy 1.40, and that they concluded that termination was the appropriate option when the re-evaluation was overall below contributor. Other options of demotion and transfer were considered but neither feasible nor available.

Testifying on the Grievant's behalf, another licensing specialist, D.C., testified that she received advance training on the new EAGLES system as a "tester" for her department. She testified that she did not like the EAGLES system, but she learned to accept it. She testified that she worked closely with the Grievant, was aware of the Grievant's problems with performance, but she did not consider the Grievant's issues serious. She testified that the Agency training on the EAGLES system was adequate.

The Grievant testified to her job performance and history, including years of annual performance evaluations with an overall contributor rating until the evaluation in October 2013. Grievant's Exh. 3-9. She testified to her appeal of the performance evaluation rating and the Agency's ultimate decision modifying the performance evaluation that left intact the overall below contributor rating. The Grievant testified that the EAGLES training was inadequate, and other staff members had similar performance issues without similar consequence. The Grievant's responses to management's complaints are set forth in her Exhibits 14 and 15, including her request for a job transfer.

The Grievant testified that the EAGLES system had persistent problems and that those system glitches caused much of her underperformance issues. She testified to documentation that showed other employees also made mistakes in their jobs. The Grievant was almost the oldest employee in her department, and she believed her termination was age discrimination, disability discrimination, or both. (The Grievant was medically excused from use of the telephone for three days in October 2013. (Grievant's Exh. 39.)) Further, the Grievant asserted that her termination constituted disparate treatment. On cross-examination, the Grievant conceded that her job demands accuracy and that she did not deny her mistakes.

### Conclusions

The grievance hearing is a *de novo* review of the evidence presented at the hearing, as stated above. The Agency has the burden to prove that its termination action was consistent with applicable policy. The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency

management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4<sup>th</sup> Cir. 1988).

I find that the Agency has met its burden of proving the Below Contributor re-evaluation. Given the circumstances of the Grievant's performance issues and the applicable policy, DHRM Policy 1.40, I find that the Agency has acted within the policy's bounds. Policy 1.40 provides:

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.

The Agency conceivably could have exercised options other than job termination, but it is not bound to do so. Such decision falls within the discretion of the Agency so long as it is not arbitrary or capricious. Based on the manner, tone, and demeanor of the witnesses, I find the Agency witnesses credible, and I find the Notice of Improvement Needed, the annual performance evaluation, and the three-month re-evaluation to be corroborated and documented. Based on the evidence presented, I conclude that the Agency has met its burden of proving the overall rating of below contributor for the re-evaluation period.

#### Grievant's Assertions of Retaliation, Discrimination, Disparate Treatment

The Agency had leeway to demote or transfer in lieu of termination. However, the Agency expressed its inability to implement any sanction other than termination. The Grievant asserts that the Agency engaged in disparate treatment, discrimination, and retaliation motivating her below contributor ratings and termination. On these issues, the Grievant has the burden to raise and establish these factors.

For a claim of retaliation to succeed, the Grievant must show (1) she engaged in a protected activity; (2) she suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, whether management took an adverse employment action because the employee had engaged in the protected activity. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 67-68 (2006); *see, e.g.*, EDR Ruling Nos. 2007-1601, 2007-1669, 2007-1706 and 2007-1633. If the Agency presents a nonretaliatory business reason for the adverse action, then the Grievant must present sufficient evidence that the agency's stated reason was a mere pretext or excuse for retaliation. *See EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 405 (4<sup>th</sup> Cir. 2005). Evidence establishing a causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) (Title VII discrimination case).

The Grievant's protected activity is her voiced complaints of the EAGLES system and the inadequacy of the training. However, the Grievant's own witness testified that the EAGLES system and training were adequate. Assuming the Grievant has shown she engaged in a protected activity and subsequently suffered an adverse employment action, there is nothing to

show that the Agency's handling of this termination was in any way retaliatory beyond the Grievant's mere allegation. Grievant has not presented sufficient evidence to show that the Agency's adverse action was motivated by improper factors. Rather, it appears that the determinations were based on the Grievant's actual job performance issues, all of which actions were primarily within the Grievant's control. Similarly, the Grievant has not borne her burden to prove that the termination decision was motivated by any discriminatory intent. Finally, while the Grievant presented some data and conclusions from data regarding the productivity of other staff members, there is an insufficient showing of any similarly situated employees receiving disparate treatment.

There is no requirement for an Agency to exhaust all possible lesser sanctions or, alternatively, to show that removal was its only option. While the Agency could have justified or exercised demotion or transfer, I find no circumstances that render the Agency's action arbitrary or capricious, or based on any discrimination or retaliation. Accordingly, I find no circumstances that allow the hearing officer to reverse the Agency's action.

Under the EDR's Hearing Rules, the hearing officer is not a "super-personnel officer." Therefore, the hearing officer should give the appropriate level of deference to actions by Agency management that are found to be consistent with law and policy, even if he disagrees with the action. Even if the hearing officer would have levied a lesser sanction, the Agency has the management prerogative to act within a continuum, as long as its actions are not arbitrary or capricious. In this case, the Agency's action of removal is not shown to be arbitrary or capricious. The Hearing Officer, thus, lacks authority to reduce or rescind the disciplinary action.

### DECISION

For the reasons stated herein, without the authority to reverse the Agency's action, the Agency's removal of Grievant based on an unsatisfactory 90 day re-evaluation 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>1</sup>

I hereby certify that a copy of this decision was sent to the parties and their advocates shown on the attached list.



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Cecil H. Creasey, Jr.  
Hearing Officer

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<sup>1</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.