

Issue: Termination due to poor performance; Hearing Date: 06/04/14; Decision Issued: 06/12/14; Agency: VEC; AHO: Thomas P. Walk, Esq.; Case No.10354; Outcome: No Relief – Agency Upheld.

**VIRGINIA: IN THE DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: DHRM-OEDR CASE NUMBER 10354

DECISION OF HEARING OFFICER

I-PROCEDURAL BACKGROUND

The grievant commenced this proceeding by the filing of her Form A on April 4, 2014. I was appointed as the Hearing Officer on May 5. I conducted a prehearing conference by telephone on May 12. I conducted the hearing on June 4. The hearing lasted approximately five hours.

II-APPEARANCES

The agency presented three witnesses and twenty-five exhibits. Legal counsel represented it. A lay advocate represented the grievant. She testified and presented four additional witnesses. She introduced sixteen exhibits.

III-ISSUE

Whether the agency acted properly in terminating the grievant from employment on March 5, 2014 for unsatisfactory work performance?

IV-FINDINGS OF FACT

The agency terminated the grievant from employment on March 5, 2014. The

grievant began working as a fact finder with the agency in 2010. At the time of her termination, the grievant was serving as a hearing officer in training.

A hearing officer for the agency has the duties of scheduling and conducting hearings on claims filed by employees or former employees of businesses in the Commonwealth of Virginia. After conducting the hearing, the hearing officer must then render a timely decision. The United States Department of Labor conducts reviews of the decisions of the hearing officers. The reviews are performed periodically and use random samples. Fixed, objective criteria for reviewing the decisions are used, the standards having been developed by the Department of Labor. The decisions are reviewed (as far as is relevant here) for the proper determination of benefits, timeliness of the process, and quality of the decision (hereafter "BTQ").

A hearing officer submits her decisions for review by a certified hearing officer prior to the decision being released to the parties. Only after the trainee becomes certified is she allowed to release decisions without the review of a certified hearing officer. In addition to that review of every decision, a sampling of the decisions of the hearing officer in training is conducted by the agency in accordance with the BTQ standards used by the federal authorities.

Beginning October 1, 2012, the agency put in place a policy that all hearing officers in training were required to pass a BTQ review during the annual performance review period. The BTQ review process was in place prior to that date and the grievant had failed her review in 2011. The agency placed the grievant under a BTQ review

period in May, 2012. The results of that review were not known at the time for the grievant to undergo her annual evaluation in 2012. On December 3, 2012 she reviewed and signed her employee work profile for the 2012-2013 period. This performance plan included as a core responsibility “progress forward in goal to successfully pass BTQ requirements established by DOL and become agency certified hearings officer.” The performance plan noted that “failure to meet this requirement may result in removal from the position.”

The agency finally told the grievant the results of the May, 2012 BTQ review in June, 2013. She had not passed. The office manager for the agency directly supervising the grievant requested and obtained permission to defer the annual performance evaluation of the grievant because of the lengthy delay in providing the May, 2012 BTQ results to the grievant. She received a new mentor. A new BTQ review of her decisions was performed in October, 2013. She failed this review. On November 18, 2013 the supervisor issued the Performance Evaluation of the grievant, assigning to her an overall rating of below contributor. He noted that her performance otherwise continued to improve, that she managed her time effectively, and had received no complaints during the evaluation period. On December 5, he gave the grievant a performance improvement plan that provided she would have 90 days to improve her performance and pass her BTQ review. The grievant failed the BTQ review conducted during the 90 day time frame.

V-DISCUSSION AND ANALYSIS

The Commonwealth of Virginia has created a process for state employees to use to challenge certain management decisions. Virginia Code Sections 2.2-3000, *et seq.* The Department of Human Resource Management has promulgated a Grievance Procedure Manual (“GPM”) and Rules for Conducting Grievance Hearings (“Rules”). Section 4.1(A) of the GPM provides that a dismissal for unsatisfactory performance automatically qualifies for a grievance hearing. Section 5.8 of the GPM establishes that in cases of dismissal for unsatisfactory performance the agency has the burden of going forward with the evidence and the burden of proving by a preponderance of the evidence that its action was justified and appropriate under the circumstances. Section VI of the Rules places the burden of proof on the grievant in non-disciplinary actions where termination has not occurred. I find that this burden of proof applies to affirmative defenses raised by the grievant in this termination action. It is important to note that this grievance does not arise under the Standards of Conduct (DHRM Policy No. 1.60), the termination not being a disciplinary action for which a Written Notice for issued.

The agency proved that the grievant failed to pass the BTQ review required by the December 5, 2013 performance improvement plan. The grievant has not challenged the policy of possible termination for failing to pass a BTQ review. I do not find that the policy, on its face, is arbitrary or capricious. The standards used by the agency are those required by the federal government. Although one can quibble over certain aspects of the scoring system used, my task is not to serve as a “super-personnel officer.” Rules, Section VI(A). In the absence of any evidence to the contrary, I will apply a presumption

of regularity to them. In scoring a decision by a hearing officer, the standards do include a somewhat subjective element in determining whether one or more aspects of the decision are satisfactory. This determination is similar to that used by professors in grading an exam and, necessarily involves some discretion. I cannot substitute my discretion for the individuals reviewing the decisions unless it is shown that those decisions are arbitrary or capricious.

In her Form A, the grievant states three issues. The first one listed by her is “reconsideration of overturning one of three failed cases to reverse my BTQ score to a passing score.” In particular, she cites one or more cases where an obvious typographical error was made by her. The response of the agency is that the errors cannot be ignored, but the case documentation for that claim not reflecting that proper procedures were followed. If such documentation had been included, the grievant would have a stronger argument. The expectation by the agency of strict compliance may be harsh, but I do not find it to be arbitrary or capricious.

The second issue raised in defense by the grievant is that she was treated differently from other deputies in training and the BTQ reviews. The agency has not disputed that other deputies may have received more mentoring than did the grievant. The agency provided no explanation for why it took approximately thirteen months to provide the results of the May, 2012 BTQ review. These facts are linked to the third issue raised by the grievant, that she received inadequate BTQ training.

The evidence establishes that the mentor originally assigned to work with the

grievant did not provide substantial feedback to her. The second mentor spent more time with her but provided feedback that conflicted with the findings of the BTQ reviewers.

The record shows no intentional effort by the agency to set up the grievant to fail. After she was determined to have failed the 2012 BTQ review, she was given two additional opportunities to pass. The agency deferred her performance evaluation until the first of the additional reviews could be conducted. She points to no possible animus or discriminatory motive of the agency in her training. At best, the evidence as a whole shows that she did not receive optimal training. She attended training sessions in 2011 and 2012. Whether she would have benefitted from learning the results of the 2012 BTQ review earlier, or whether it would have resulted in her being placed under a performance improvement plan at an earlier date, is matter on which I cannot speculate.

I have found no legal authority that requires a state agency to provide more than a bare minimum amount of training before terminating an employee for poor performance. The grievant came very close to passing her BTQ review. This is strong evidence that the agency met its minimal training requirements. If the grievant had shown evidence of being given improper training, then this case would be much closer. The strongest evidence in that regard is the statement by the second mentor “he must be failing BTQ as well.” if the grievant was failing. I do not believe that on such a slim reed I can substitute my judgment for that of the agency.

VI-DECISION

For the reasons stated above, I uphold the decision of the agency of March 5, 2014 to terminate the grievant for poor performance.

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](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.¹

RENDERED this June 12, 2014.

THOMAS P. WALK, Hearing Officer