

Issue: Termination due to Below Contributor Rating on Re-Evaluation; Hearing Date: 05/16/14; Decision Issued: 07/07/14; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10317; Outcome: Partial Relief; **Administrative Review: DHRM Ruling Request received 07/22/14; DHRM Ruling issued 08/29/14; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10317

Hearing Date: May 16, 2014

Decision Issued: July 7, 2014

PROCEDURAL HISTORY

Grievant was removed from employment on February 4, 2014 following an unsatisfactory three-month performance re-evaluation. Grievant timely filed a grievance to challenge the Agency's action on March 5, 2014. The matter proceeded to hearing. On April 1, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 16, 2014, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representative
Agency's Counsel
Witnesses

ISSUES

1. Whether Grievant's re-evaluation and removal was consistent with State policy?
2. Whether Grievant's re-evaluation was arbitrary or capricious?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its re-evaluation and removal of Grievant was warranted and appropriate under the 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 Virginia Employment Commission employed Grievant as a Hearings Officer¹ at one of its offices. The purpose of her position was to:

render monetary and non-monetary determinations concerning claimant’s eligibility or qualification for unemployment benefits based on findings of facts from claimants and employers and application of law and regulations.²

Grievant’s position was Non-Exempt under the Fair Labor Standards Act.

Many of the Agency’s operations depend on standards set forth by the U.S. Department of Labor (DOL). One of those standards is the Benefits, Timeliness, & Quality (BTQ) standard for resolving unemployment compensation claims.

Employees hired by the Agency as hearings officers begin as non-certified hearings officers. Non-certified hearings officers are responsible for issuing approximately six cases per day. Non-certified hearings officers must have their decisions reviewed and approved by a certified hearings officer who then “issues” the decision. A non-certified hearings officer can become a certified hearings officer by passing a BTQ review. Certified hearings officers are responsible for issuing approximately eight cases per day. Certified hearings officers issue their own decisions without review by anyone else.

BTQ reviews are conducted by a separate unit within the Agency. To ensure consistency of reviews among employees in the unit, the Agency provides them with a quality review manual drafted by the U.S. Department of Labor as well as training regarding how to conduct quality reviews. Employees within the BTQ unit evaluate the reviews conducted by other employees by trading scored cases to see if they achieve the same review score. In addition, employees periodically participate in regional state

¹ The Agency also referred to employees holding Grievant’s position as Deputies.

² Agency Exhibit 3.

quality reviews where BTQ analysts of different states meet to compare how they are applying the DOL manual to cases.

Approximately a third of a hearings officer's cases are "pulled" for BTQ review with the objective of selecting 20 cases with separation issues and 20 cases with non-separation issues. Cases with separation issues include disputes involving why an employee stopped working for an employer. A separation issue would include, for example, why an employee voluntarily quit employment. Non-separation issues included disputes regarding whether an employee remained eligible for benefits.

To evaluate an individual claim, BTQ analysts use a Quality Data Collection Instrument. This form serves as a checklist for issues to be addressed by the hearings officer when writing the decision. The reviewing BTQ analyst does not know anything about the case prior to it being pulled for review. A passing score for an individual claim is at least 95 points out of 100.

In order to pass the BTQ review, 75% of a hearings officer's separation and non-separation cases must receive a passing score.

The Agency provided training for hearings officers from May 21, 2012 through May 25, 2012. All aspects of claim determinations were covered during that training. The training was designed to enable them to meet the BTQ standards. Grievant attended the training.

The Acting Chief of Benefits sent non-certified Hearings Officers including Grievant a memorandum stating:

Please be advised that we have updated the EWP for all hearing officer positions statewide for those individuals who have not yet achieved a passing score on BTQ. The new EWP indicates that if you have not achieved certification by the end of the upcoming performance cycle, disciplinary action, up to and including termination will occur. Performance Improvement Plans may also be instituted as an action taken prior to the end of this performance cycle as individuals move through the certification process without success during the year or if other performance issues surface.

Due to this change, you are strongly encouraged to closely review and adhere to the handouts and notes provided during the various training sessions that you have attended, feedback provided on score sheets from prior BTQ case reviews, the Guide for Effective Unemployment Insurance Adjudication, VEC Guidance Document (Benefits), the Unemployment Insurance Benefits Manual, the Virginia Unemployment Compensation Act, and the Regulations and General Rules Affecting Unemployment Compensation.

Any future position announcements for hearing officer positions will include the same one-year certification requirement and will indicate that failure to achieve certification will result in termination.

Please be sure that you read your new EWP thoroughly when it is presented for your signature sometime between now and December 1, 2012.³

Grievant received her October 1, 2012 EWP. The EWP described Competencies for the position to include:

Knowledge of the Virginia Employment Compensation Act and related rules and regulations governing eligibility. Ability to obtain and evaluate evidence and render eligibility determinations; to effectively communicate orally and in writing; and to deal effectively with claimants, employers, and the general public. Secure required knowledge and ability for position, make progressive advancement, and become certified as a Hearing Officer for the Agency no later than the completion of this performance cycle. Failure to meet this requirement may result in removal from the position.

Under the EWP, Grievant was expected to devote approximately 60% of her time to the Core Responsibility of:

Conducts fact-finding proceedings with claimants and employers, witnesses, and legal representatives, and determines claimant's eligibility for benefits based on the application of law, regulations, and legal rulings.

Measures to determine whether Grievant had satisfied this Core Responsibility included:

Fact-finding documentation will meet DOL quality performance standards on a minimum of 75% of cases sampled by management during the performance year.

On May 8, 2013, the Acting Chief of Benefits sent all hearings officers an email with numerous examples of the types of questions a Hearings Officer should ask during cases involving discharge and voluntary quit cases.

On October 23, 2013, Grievant received an overall rating of Below Contributor on her 2012-2013 annual performance evaluation. Agency managers decided Grievant should be subject to a three-month re-evaluation.

³ Agency Exhibit 3.

Grievant received a Performance Re-Evaluation Plan on November 1, 2013. The Plan stated, in part:

The DOL quality minimum pass rate in each individual category, separation and non-separation, is 75%.

[Grievant] will be re-evaluated in the following areas:

- A. Conducts fact-finding proceedings with claimants and employers, witnesses, legal representatives and other interested parties to determine claimant's eligibility or qualification for benefits based on application of law, regulations and legal rulings. Fact-finding documentation will meet DOL quality performance standards on a minimum of 75% of cases on separation issues and 75% of cases on non-separation issues sampled by management during the review period.
- B. Issues non-monetary determinations on all issues that affect a claimant's right to past, present, and future benefits accurately and promptly. Correctly applies federal and state law and regulations on all issues affecting a claimant's entitlement to benefits in no less than 90% of cases sampled by management during the review period.
- C. Pass BTQ requirements established by DOL and become Agency Certified Hearings Officer.

Specific Improvement plan:

[Grievant] will take the following steps over the next 90 days to assist her in meeting the above standards.

- 1. She will review agency resources, which include but are not limited to: the Guide for Effective Unemployment Insurance Adjudication, the Precedent Decision Manuals, and agency training materials to maintain current knowledge of laws, regulations, DOL standards, and agency procedures.
- 2. She will apply all feedback provided by her trainer or designee concerning the quality of her determinations.
- 3. She will review her previous BTQ cases and apply the comments made by the reviewer concerning the quality of her determinations.
- 4. She will review and use the FFI questions recently provided by the Acting Chief of Benefits to enhance the fact-finding process.

Timeline

Her case will be under review for the next 30 days by her Mentor, located in the Norfolk local Office, Certified Hearing Officer [Ms. M] weekly. (11/1/13 to 12/1/13).

The second 30 days she will work without a reviewer/monitor. (12/2/13 to 12/31/13).

Between the 60-90 day periods, her work will be pulled for BTQ. (1/1/14 to 1/31/14).

Once the BTQ results have been received, she will be re-evaluated in the above areas. Failure to pass BTQ with a 75% pass rating on separation and a 75% pass rating on non-separations will lead to termination.⁴

A Certified Hearings Officer, Ms. W, provided assistance to Grievant during the re-evaluation period. She reviewed Grievant's written determinations to ensure their accuracy. She met with Grievant periodically but often communicated with Grievant by email and telephone. During the first thirty days of the re-evaluation period, Ms. W provided in-depth reviews of Grievant's cases. It is unclear what level of review, if any, Ms. W had during the second thirty day period. During the final 30 day period, Ms. W did not review Grievant's cases at all.

On January 14, 2014, a User Request Form was submitted to the Agency's Information Technology unit seeking cases from December 2, 2013 through January 9, 2014. Grievant conducted 110 separation issue cases and 32 non-separation issue cases during that time frame.

The Agency's practice was to select 20 separation cases and 20 non-separation cases for review. The Agency selected 21 of Grievant's separation cases for review.⁵ Grievant passed 15 cases and, thus, had a 71% pass rate instead of the 75% rate required by the Agency. The Agency selected 20 non-separation cases. Grievant passed all 20 of those cases for a 100% pass rate. Because Grievant did not pass 75% of her separation cases, she did not pass the BTQ review.

Agency managers considered whether Grievant could be demoted and transferred to another open position within the Agency. They determined that removal was an appropriate course of action.

Grievant was removed from employment on February 5, 2014. She was treated similarly to other non-certified hearings officers who failed the BTQ review. The Supervisor sent Grievant a letter stating, in part:

⁴ Agency Exhibit 13.

⁵ The Acting Chief of Benefits was unsure why the Agency reviewed 21 instead of 20 cases.

As we have discussed you have not passed your performance plan that was discussed with you on November 1, 2013. We have considered a transfer or a demotion in accordance with the state performance policy. These are not an option since we have no other positions available. Effective at close of business today you are being terminated for failure to meet your performance expectations and failure to pass BTQ.⁶

CONCLUSIONS OF POLICY

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.

Department of Human Resource Policy 1.40 governs Performance Planning and Evaluation. Under this policy, an employee who receives a rating of "Below Contributor" on an annual performance 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.

⁶ Agency Exhibit 14.

The employee must be re-evaluated within approximately two weeks prior to the end of the three-month period. If an employee is absent for more than 14 consecutive days during the three-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-month re-evaluation period.

An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three-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.

When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the re-evaluation period, the action is considered a Performance Demotion and the agency must reduce the employee's salary at least 5%.

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 five percent.

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-month re-evaluation period.

In this case, the Agency has substantially complied with the procedural requirements of DHRM Policy 1.40. Nevertheless, this grievance must be remanded to the Agency to repeat Grievant's BTQ review.

The Agency placed Grievant on notice that she was expected to become a certified hearings officer during the performance cycle beginning October 1, 2012. If she failed to become a certified hearings officer, she could become subject to a performance improvement plan and be at risk for removal.

Grievant received an overall rating of Below Contributor on her annual performance evaluation thereby justifying the Agency's decision to re-evaluate her work performance over a three-month period. Grievant received a detailed re-evaluation performance plan reaffirming her obligation to pass the BTQ review in order to remain

employed by the Agency. Grievant was provided with a Mentor for the first 30 days of the re-evaluation period to provide any assistance Grievant needed.

The Agency conducted a BTQ review but that review was inadequate. The Agency's practice was to select 20 separation cases to review.⁷ The Agency chose 21 cases to review and could not provide an explanation as to why an additional case was selected for review. Grievant passed 15 cases. The Agency used 21 as the denominator in order to calculate the percentage of passing cases. If the Agency had used 20 as the denominator, Grievant would have scored 75% and passed the BTQ review to become a certified hearings officer. It is unclear which of the 21 cases was the extra case selected and whether Grievant passed or failed the extra case. It is certainly possible that Grievant passed the extra case thus benefiting Grievant by raising her passed cases from 14 to 15. It is also possible that Grievant failed the extra case thereby reducing Grievant's passing ratio to 71%. In short, by reviewing 21 instead of 20 cases, the Agency may have influenced whether Grievant passed the BTQ. The Agency's selection of 21 separation cases instead of 20 cases was without a reasoned basis.

The Agency must repeat Grievant's BTQ review using 20 separation cases instead of 21 cases. If Grievant passes at least 75% of her separation cases, the Agency should reinstate her and provided her with back pay. If she fails to pass 75% of her cases, the Agency's removal of Grievant would be appropriate.

Grievant argued that the Agency failed to obtain input from Grievant when it drafted the re-evaluation plan. The Agency explained that the re-evaluation plan was drafted for all of the non-certified hearings officers who did not pass the BTQ and would be re-evaluated. The Agency's failure to include Grievant's input is harmless error. Regardless of any comments from Grievant, the Agency's expectation was that Grievant pass the BTQ review in order to remain employed by the Agency. The re-evaluation plan clearly set forth this expectation.

Grievant argued that the Agency failed to provide her with adequate training to pass the BTQ. The evidence showed, however, that the Agency provided Grievant with extensive and comprehensive training. Grievant was provided with several lengthy manuals and guidance documents explaining all aspects of hearing decision-making. She received training in May 2012 and periodic feedback from other Agency employees. She had a Mentor dedicated to her during the first thirty days of the re-evaluation period.

Grievant argued that the BTQ review was subjective and could vary depending on who conducted the review. Performance evaluations are subjective because they are based on a supervisor's opinion regarding an employee's work performance. Reliance on a subjective scoring of separation claims would not in itself render the Agency's assessment of a hearings officer's work performance inadequate. The

⁷ The Agency selected 20 separation cases to review as part of Grievant's two prior BTQ reviews.

Agency has taken several measures to ensure that employees performing BTQ reviews consistently evaluate claims. Reviewers apply uniform standards after receiving extensive training. They trade cases with each other and their peers in other states to ensure consistency. The Agency's BTQ review process is sound.

Grievant argued that the Agency failed to demote and transfer her to one of at least six other positions open for recruitment with the Agency. The Agency's obligation under DHRM Policy 1.40 is not to place automatically an employee in any open position. The Agency's obligation is to evaluate the feasibility of placing an employee in an open position and make a good faith effort to place an employee in an open position consistent with the Agency's business need. In this case, the Agency considered whether to demote and transfer Grievant but concluded doing so was not feasible. The Agency made its decision in good faith.

Grievant argued that the Agency erred by placing her on probationary status in 2012. Grievant should have filed a grievance in 2012 to address that concern. Grievant's status in 2012 is not an issue in this hearing.

DECISION

For the reasons stated herein, this grievance is **remanded** to the Agency for the Agency to repeat the BTQ review using 20 separation cases instead of 21 cases. If Grievant passes at least 75% of the separation cases, she should be reinstated to her former position and receive back pay, benefits, and seniority that would otherwise have accrued. Grievant's request for relief with respect to other aspects of her grievance is denied.

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.⁸

[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

⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.

Agency Exhibit 3.