

Issue: Termination due to Below Contributor Rating on Re-Evaluation; Hearing Date: 05/20/14; Decision Issued: 07/07/14; Agency: VEC; AHO: Carl Wilson Schmidt, Esq.; Case No. 10325; Outcome: No Relief – Agency Upheld; **Administrative Review: EDR Ruling Request received 07/21/14; EDR Ruling No. 2015-3947 issued 08/19/14; Outcome: AHO’s decision affirmed; Administrative Review: DHRM Ruling Request received 07/21/14; DHRM Ruling issued 08/22/14; 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: 10325**

Hearing Date: May 20, 2014

Decision Issued: July 7, 2014

#### **PROCEDURAL HISTORY**

Grievant was removed from employment on January 24, 2014 following an unsatisfactory three-month performance re-evaluation. Grievant timely filed a grievance to challenge the Agency's action on February 23, 2014. The matter proceeded to hearing. On April 15, 2014, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 20, 2014, a hearing was held at the Agency's office.

In addition to the re-evaluation, Grievant sought to challenge his annual performance evaluation. Grievant received his annual performance evaluation on October 7, 2013 but did not file a grievance within 30 days of receiving the evaluation as required by Section 2.2 of the Grievance Procedure Manual. Accordingly, the Hearing Officer will not consider the merits of Grievant's annual performance evaluation.

#### **APPEARANCES**

Grievant  
Agency 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 Officer<sup>1</sup> at one of its offices. The purpose of his 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.<sup>2</sup>

Grievant's position was Non-Exempt under the Fair Labor Standards Act. Grievant began working for the Agency on July 10, 2010.

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 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 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

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<sup>1</sup> The Agency also referred to employees holding Grievant's position as Deputies.

<sup>2</sup> Agency Exhibit 3.

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 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 issued. 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 January 24, 2011 through January 28, 2011. 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. Grievant also received training on May 21, 2012 through noon of May 23, 2012. The training focused on, "understanding the BTQ process and various factors contributing to you achieving a passing score."<sup>3</sup>

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 achieves 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 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.

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<sup>3</sup> Agency Exhibit 21.

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.<sup>4</sup>

Grievant received his 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 his 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.

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<sup>4</sup> Agency Exhibit 6.

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.

Grievant received a Performance Re-Evaluation Plan on October 18, 2013. The Plan stated, in part:

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

**After 90 days, [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 him in meeting the above standards.

- 1. He 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. He will apply all feedback provided by his trainer or designee concerning the quality of his determinations.

3. He will review his previous BTQ cases and apply the comments made by the reviewer concerning the quality of his determinations.
4. He will review and use the FFI questions recently provided by the Acting Chief of Benefits to enhance the fact-finding process.

### **Timeline**

[Grievant's] cases will be under review for the next 30 days by the Supervisor of the Adjudication Center [Ms. S] or her designee.

The second 30 days he will work without a reviewer/monitor.

Between the 60-90 day periods, his work will be pulled for BTQ.

Once the BTQ results have been received, [Grievant] 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.<sup>5</sup>

Grievant was on leave from November 3, 2014 through November 8, 2013, from November 12, 2013 through November 15, 2013, and from November 18, 2013 through November 19, 2013. Because of his absences, Grievant's three-month re-evaluation period was extended to February 3, 2014.

A Certified Hearings Officer, Ms. S, provided assistance to Grievant during the re-evaluation period. She had been Grievant's trainer and mentor since October 2012. She worked as the Acting Supervisor for the Adjudication Center. Some of her duties included training new hearings officers. She reviewed Grievant's written determinations to ensure their accuracy and then released them to the parties. From October to December 2013, Ms. S only reviewed Grievant's cases but provided some training to another hearings officer.

On January 7, 2014, a User Request Form was submitted to the Agency's Information Technology unit seeking cases from December 3, 2013 through January 3, 2014. Grievant conducted 66 separation issue cases and 4 non-separation issue cases during that time frame. Ms. L, an Agency Management Analyst Senior, conducted the BTQ review and submitted it to the Acting Chief of Benefits on January 21, 2014.

The Agency's practice was to select 20 separation cases and 20 non-separation cases for review. The Agency selected 20 of Grievant's separation cases for review. Grievant passed 12 cases and, thus, had a 60% pass rate instead of the 75% rate required by the Agency. The Agency selected 7 non-separation cases. Grievant passed only 5 of those cases for a 71% pass rate. Because Grievant did not pass 75% of his separation and 75% of his non-separation cases, he did not pass the BTQ review.

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<sup>5</sup> Agency Exhibit 11.

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 January 24, 2014. He was treated similarly to other non-certified hearings officers who failed the BTQ review. The Supervisor sent Grievant a letter stating, in part:

As we have discussed you have not passed your performance plan that was discussed with you on October 18, 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.<sup>6</sup>

### **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.

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<sup>6</sup> Agency Exhibit 13 and Grievant Exhibit 17.



- 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-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. The Agency placed Grievant on notice that he was expected to become a certified hearings officer during the performance cycle beginning

October 1, 2012. If he failed to become a certified hearings officer, he could become subject to a performance improvement plan and be at risk for removal.

Grievant received an overall rating of Below Contributor on his annual performance evaluation thereby justifying the Agency's decision to re-evaluate his work performance over a three-month period. Grievant received a detailed re-evaluation performance plan reaffirming his 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 re-evaluation period was extended because Grievant was absent more than 14 days during the review period.

The Agency conducted a BTQ review but that review was inadequate with respect to non-separation cases. The Agency pulled 4 non-separation cases even though its practice was to review 20 non-separation cases when possible. The Agency then pulled an additional three cases but could not adequately explain the time period from which the cases were selected. Ms. L speculated that the three additional cases were selected from a week after January 3, 2014 and, thus, represented Grievant's work independent of any Mentor review. She was unable to confirm her assertion, however. The Agency's selection of seven non-separation cases was without a reasoned basis.

The Agency adequately reviewed Grievant's separation cases. Twenty cases were pulled but Grievant did not pass 75% of those cases.

Grievant was obligated to pass 75% of the separation cases and 75% of the non-separation cases. If the Hearing Officer assumes for the sake of argument that Grievant passed 100 percent of his non-separation cases, Grievant still did not pass the BTQ review. Grievant failed to pass 75% of his separation cases. Grievant's failure to pass the BTQ review following the re-evaluation period justifies the Agency's decision to remove Grievant.

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 the 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 him with adequate training to pass the BTQ. The evidence showed, however, that the Agency provided Grievant with extensive and comprehensive training in 2011 and 2012. Grievant was provided with several lengthy manuals and guidance documents explaining all aspects of hearing decision-making. He had a Mentor devoting a significant amount of her time to helping Grievant 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 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 him 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 has not met the DOL requirement regarding the number of cases passing BTQ. Whether the Agency has met its obligation with respect to the Federal government is irrelevant regarding Grievant's obligation to pass the BTQ. Presumably, reducing the number of poorly performing hearings officers would increase the likelihood that the Agency would meet the Federal requirements.

## DECISION

For the reasons stated herein, the Agency has substantially complied with State policy. The Agency's evaluation of Grievant was not arbitrary or capricious. The Agency's decision to remove Grievant must be **upheld**. Grievant's request for relief 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 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>7</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>7</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.