

Issues: Separation from State (due to low contributor rating on re-evaluation), Discrimination (age), and Retaliation (other protected right); Hearing Date: 04/19/16; Decision Issued: 09/08/16; Agency: DARS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10779; Outcome: No Relief – Agency Upheld; **Administrative Review**: EDR Ruling Request received 09/26/16; EDR Ruling No. 2017-4420 issued 10/18/16; Outcome: AHO's decision affirmed; **Administrative Review**: DHRM Ruling Request received 09/26/16; DHRM Ruling issued 10/26/16; Outcome: AHO's decision affirmed; **Judicial Review**: Appealed to Culpeper County Circuit Court (11/22/16); Outcome: AHO's decision affirmed (05/04/17) [CL-16-1325-00].



# **COMMONWEALTH of VIRGINIA**

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 10779**

Hearing Date: April 19, 2016  
Decision Issued: September 8, 2016

#### **PROCEDURAL HISTORY**

On January 21, 2016, the Department of Aging and Rehabilitative Services removed Grievant from employment due to Grievant's unsatisfactory work performance following a three month re-evaluation.

On February 17, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On March 7, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 19, 2016, a hearing was held at the Agency's office.

#### **APPEARANCES**

Grievant  
Grievant's Counsel  
Agency Party Designee  
Agency's Representative  
Witnesses

#### **ISSUES**

1. Whether the Agency's evaluation of Grievant was arbitrary or capricious?
2. Whether the Agency complied with State policy to evaluate and remove Grievant from employment?

3. Whether the Agency discriminated and retaliated against Grievant?

**BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that it complied with State policy to remove Grievant from employment. The burden of proof is on Grievant to show that the Agency's evaluation of his work performance was arbitrary or capricious. The burden is on Grievant to show the Agency discriminated and retaliated against him. 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 Department of Aging and Rehabilitative Services employed Grievant as a Certified Rehabilitation Counselor. Grievant began working for the Agency's predecessor in July 1, 1972. The purpose of Grievant's position was:

In partnership with persons with disabilities, provides comprehensive vocational rehabilitation services which result in employment and enhanced independent living in compliance with federal, state, and agency policy and procedures. Core case management services may include guidance and counseling, training, physical/mental restoration, and job placement services. Caseload consists of individuals with disabilities.<sup>1</sup>

Grievant's duties included providing timely and quality vocational services for employment to persons with disabilities. Grievant provided career counseling, job readiness training, job placement and monitoring to the Agency's clients.

Grievant reported to the District Manager from July 2014 to April 2015. He began reporting to the Unit Supervisor beginning April 2015. The Unit Supervisor reported to the District Manager. The Unit Supervisor supervised seven employees.

Grievant is 73 years old. The Unit Supervisor was aware of his age.

AWARE is a case management computer system used by agency employees to enter data about clients and track their vocational rehabilitation progress. The Agency

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<sup>1</sup> Agency Exhibit 1.

implemented AWARE in March 2008. Grievant received AWARE training when the system was implemented.

In October 2014, Grievant took medical leave in order to recover from surgery. He was out of work from approximately October 2014 through January 2015. He returned to work on a physician-modified schedule and then returned to work full time on February 9, 2015. During Grievant’s absence from work, the Agency upgraded its computer system. Grievant missed the training and transition period afforded other employees.

On October 31, 2014, the Agency’s ISO sent an email to Agency AWARE system users advising that the system would be “down” for a day for the installation of a major release. The email added that “the majority of which DO NOT have a direct impact on you.”<sup>2</sup>

A Vocational Counselor typically met with a client to obtain background information regarding the client’s living circumstances and disabilities. The Vocational Counselor would then enter that information into AWARE. The Vocational Counselor had 60 days to determine if the client was eligible for services from the Agency.

On October 26, 2015, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

The Unit Supervisor drafted a re-evaluation plan for Grievant. The plan was reviewed by the District Manager and a human resource employee. On October 29, 2015, Grievant received the re-evaluation plan. The re-evaluation plan provided:

	<b>Core Responsibilities</b>	<b>Measure for Core Responsibilities</b>
20%	Employment Services	Employment Outcomes: Employment services result in 6 DRS eligible persons becoming successfully rehabilitated. ***
20%	Caseload Management	Community activities ensure that sufficient applications are taken. Works in a timely manner to acquire documentation to certify eligibility. In 100% of cases, an eligibility determination will be made within 60 days or the client will be moved into Application-E, Application-T, or Application-T. Services and progress measures are identified with consideration of internal resources and cost effectiveness. 10 IPEs indicate actions taken by counselor to plan and provide customized services to the client. In 85% of the cases IPEs are developed within 90

<sup>2</sup> Agency Exhibit 8.

		<p>days of eligibility determination.</p> <p>Adheres to casework policies and procedures and applies them consistently throughout cases.</p> <p>Rehabilitation rate for caseload should be higher than 56%.</p>
20%	Case Documentation	<p>Makes clear and thorough case documentation and case continuation notes that meet required standards immediately following case action or within 24 hours but no later than 5 calendar days. Documentation reflects maximum input of customer, informed choice, and substantial impact of DRS services on employment outcomes. The next step to be take in the case is documented as well as how it will be accomplished allowing other staff to determine what has been done or needs to be done when reviewing case records.</p>
15%	Resource Management	<p>Monthly reviews show that cases were adequately funded and expenditures were appropriate and within budget projections. Appropriate internal resources, (WWRC, ESSS, Placement Counselor, Vocational Evaluator, BDMs) were used. Actions comply with applicable laws, regulations, policies, and procedures.</p>
10%	Knowledge of Community Resources	<p>Counselor has attended networking and community organization events and has met with current and potential employers. Has provided/participated in training and educational events for other community organizations (ESOs, employers, workforce centers, etc.)</p>
15%	Electronic File Management	<p>Demonstrates understanding of requirements for entry and use of AWARE case notes and narrative text fields on datapages according to agency policy and procedures by accurately entering case information. ***</p>

A section of the re-evaluation plan addressed Learning Steps/Resource Needs and stated:

Unit supervisor will meet with employee as needed during the months of November, December, and January to discuss job performance and progress towards meeting goals and expectations. One to two weeks prior to the end of this plan, employee will be re-evaluated. An overall below contributor rating on the re-evaluation plan in January will subject the employee to termination of employment for unsatisfactory job performance.

The Unit Supervisor met with Grievant and read the re-evaluation plan to Grievant. She allowed Grievant an opportunity ask questions. She explained that he would be subject to removal if he did not satisfy the terms of the re-evaluation plan.

The Unit Supervisor met with Grievant several times during the re-evaluation period. She met with him on October 29, 2015, October 30, 2015, November 25, 2015, November 30, 2015, December 7, 2017, and December 16, 2015. The Unit Supervisor spoke with Grievant on a daily basis. Grievant was not absent more than 14 days during the re-evaluation period.

On December 29, 2015, the Unit Supervisor completed a case review of Grievant's cases. She observed numerous cases receiving cost services without proper documentation. She noticed a number of case notes lacked substance showing the guidance and counseling given by Grievant.

Grievant determined the eligibility of 19 of 28 clients in 60 days during the three month re-evaluation period. He was expected to have determined eligibility for all of the 28 clients.

Grievant closed nine cases during the re-evaluation period. His goal was to close six cases. On January 6, 2016, the Unit Supervisor reviewed eight of Grievant's closed cases. All of the case had at least one concern to the Unit Supervisor. The biggest concern was the lack of counselor involvement in the cases or lack of case notes involvement/counseling and guidance. Several cases were missing closure letters. Several clients were employed during the last performance year, much longer than 90 days.

Grievant did not document his cases to the Unit Supervisor's satisfaction. Grievant was expected to use AWARE to document all of his duties relating to client cases. He sometimes failed to enter all of the required information into the AWARE system.

The Unit Supervisor reviewed Grievant's cases and concluded he did not have a good command of the Agency's financial policies. She observed that several of Grievant's cases were missing R 13 forms. These forms were to be used to establish proof of a client's income and determine how much a client may have to pay for certain services.

On January 26, 2016, Grievant received a three month re-evaluation with an overall rating of Below Contributor. The re-evaluation provided:

	<b>Core Responsibilities</b>	<b>Measure of Core Responsibilities</b>
	Employment Services: Below Contributor	Employment Outcomes: Cases were not closed in a timely manner. [Grievant] achieved 9 successful outcomes (goal of 6) during this 90 day re-evaluation period, however, 6 of those were working in the

		<p>previous performance year but due to lack of communication from counselor this went unnoticed. Of the 9 successful closures, 7 exceeded 90 days of employment (range 136 days to 434+ days) as notes in the case notes. Successfully closed cases do not show a customer focus or a clear association between services provided and the successful employment result. Counselor involvement in most of these cases is significantly lacking and in some cases it is unclear as to how the consumer benefited from DARS services at all. Required closure letters are missing in 5 of 9 cases. 2 cases lack employment verification of some sort.</p>
	<p>Caseload Management Below Contributor</p>	<p>Community activities ensure that sufficient applications are taken. 28 applications have been taken since 10/1/2015.</p> <p>[Grievant] does not work in a timely manner to acquire documentation to certify eligibility. 100% of eligibilities were not determined within the 60 day period (12/28/ based on point in time reviews).</p> <p>[Grievant] has begun to App-E appropriately during this rating period.</p> <p>Improvement has been noted in service planning. However, [Grievant] has provided cost based services without regard to customer financial participation policy in 16 cases. Inconsistencies in completion of the RS-13, RS-25, and collecting proof of income are still noted.</p> <p>There is limited evidence that [Grievant] provides career exploration and vocational counseling via necessary and appropriate evaluations or gathering labor market information to guide consumers in choosing viable vocational goals.</p> <p>[Grievant] continues to not adhere to casework policies and procedures. Persistent problems exist in not informing clients of eligibility and Order of Selection, financial policy, release of information completion for SE vendors, employment verifications and consistent documentation, utilization of closure letters, following up with 30 days closure letters, proper movement through case statutes, understanding/use of substantial amendments.</p> <p>Currently [Grievant's] rehabilitation rate for his case load is 32% (goal 56%).</p>

	Case Documentation Below Contributor	While [Grievant] enters case notes into AWARE every 90 days, this supervisor has provided significant supervisory counseling to [Grievant] on the need to document his impact on the case in his case notes without noticeable improvement. It is imperative that he show how he assisted the client in overcoming or coping with barriers to employment and achieving his/her employment goal based on the counseling and services received. Case notes are not consistently entered within 5 calendar days of appointment/event and continue to lack specifics regarding guidance and counseling (especially regarding major steps in the VR process) and how the consumer has benefited from his services.
	Resource Management Below contributor	[Grievant] utilizes internal resources such as VE, Placement Counselor, and ESS. He staffs cases regularly with placement counselor to review case progress. In relation to fiscal resources, [Grievant] does not appear to have a good command on financial policies and regulations and a review of his case load revealed many instances where cost based services were provided at length with limited regard to policy, comparable benefits, or cost containment when appropriate. A recent review of cases receiving cost services show documentation missing such as RS 13 and/or proof of income in multiple cases. Supervisor has provided significant direction of financial policy to [Grievant] and has had to intervene with cases to insure services and funding were provided within policy and procedure.
	Knowledge of Community Resources  Contributor	[Grievant] is familiar with local community resources and an active member of the community. He works with [names] both in terms of referrals and service coordination.
	Electronic File Management  Contributor	[Grievant] seems to have an understanding of scanning processes and electronic file management. However, the ESS in the office is primarily completing this activity as part of her duties.

Grievant received Below Contributors ratings in four of the six categories. The Agency concluded he should receive an overall rating of Below Contributor for the re-evaluation period.

The District Manager considered Grievant's improved work performance during the re-evaluation period but continued to believe his work performance showed significant inadequacies that demoting or transferring him to another position would not



be feasible. She concluded that removing some of Grievant's duties was not possible. The Unit Supervisor and a Human Resource employee were also involved in the decision to remove Grievant from employment.

Grievant improved his performance for some tasks during the re-evaluation period. For example, he increased his "applicant intake". After a client applies for services and is determined eligible, Grievant was responsible for developing a plan for employment for the client. Grievant had a goal of 10 during the re-evaluation period but he developed 22 plans.

On November 5, 2015, Grievant filed a complaint with the Equal Employment Opportunity Commission alleging that he was discriminated against because of his disability. He claimed the Agency retaliated against him because he took medical leave and because of his age.

The District Manager testified that Grievant's filing of a complaint did not affect her assessment of Grievant. Her testimony was credible. She also testified credibly that Grievant's age was not a factor in her conclusions regarding Grievant's work performance.

The Unit Supervisor learned of Grievant's complaint after she had completed the re-evaluation plan. Grievant's age and complaint did not affect how the Unit Supervisor evaluated Grievant.

### **CONCLUSIONS OF POLICY**

State agencies may remove employees from employment based on poor performance as documented in accordance with State policy. An employee who receives a rating of "Below Contributor" 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.

The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period. If an employee is absent for more than 14 consecutive days during the three (3)-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 (3)-month re-evaluation period.

An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-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 by 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 5%. 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 complied with State policy as part of its decision to remove Grievant from employment. Grievant received an overall rating of Below Contributor on his annual performance evaluation. He received a re-evaluation plan within 14 days setting for the Agency's expectations for his work performance in the subsequent three month period. Grievant was evaluated within the three month period with an overall rating of Below Contributor. The Agency considered alternatives to demotion and concluded removal was appropriate.

Grievant argued that the Agency terminated his employment prior to the conclusion of the three month re-evaluation period. The evidence showed that Grievant was re-evaluated during the two week period prior to the end of the three month re-evaluation period. This is consistent with State 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.

The Agency has presented sufficient evidence to show that it did not disregard any material facts of Grievant's work performance during the re-evaluation period. The Agency has presented sufficient evidence to show that its opinion of Grievant's work performance during the re-evaluation period was reasonable.

Grievant argued that his performance improved during the three month re-evaluation period such that he should have received an overall rating of Contributor. For example, Grievant received 28 applications since October 1, 2015. His goal was to receive 10 applications. The Agency considered this positive aspect of Grievant's performance in its assessment of his Case Management. The Unit Supervisor did not consider this accomplishment sufficient to outweigh the other unsatisfactory aspects of Grievant's work performance.

The evidence showed that Grievant's work performance improved with respect to some duties but remained deficient with respect to other duties. The Agency's re-evaluation showed it considered Grievant's successes and incorporated them into the re-evaluation. Grievant's successes, however, were insufficient to outweigh the deficiencies in Grievant's work performance.

Grievant argued that the Agency failed to properly train him regarding the AWARE system. He was absent from work in 2014 for several months and the computer system was upgraded. The evidence showed that Grievant received training in the AWARE system and had the opportunity to learn the system while working on the job. During his absence from work in 2014, only minor changes were made to the part of the AWARE system utilized by Grievant.

Grievant argued that the Agency retaliated against him for missing time from work and taking Family and Medical Leave. Grievant argued that the Agency discriminated against him and retaliated against him based on his age. The evidence is overwhelming that the Agency's decision to re-evaluate Grievant was based solely on his work performance and not for any improper purpose.

Grievant testified he received a threatening letter related to his age from an employee. He received the letter September 16, 2011 which was before the District Manager or Unit Manger were involved in supervising Grievant. Given that Grievant received the letter in 2011 and neither of his supervisors were involved in drafting the letter, the Hearing Officer cannot conclude that Grievant's removal related to age discrimination or retaliation.

Grievant's request for relief must be denied.

## DECISION

For the reasons stated herein, the Agency's re-evaluation of Grievant's work performance is **upheld**. The Agency's decision to remove Grievant from employment 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>3</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>3</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.