



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12081

Hearing Date: March 26, 2024

Decision Issued: May 1, 2024

PROCEDURAL HISTORY

Grievant was removed from employment effective January 8, 2024, following an unsatisfactory three-month re-evaluation period.

On February 5, 2024, Grievant timely filed a grievance to challenge the Agency's action. The matter advanced to hearing. On February 12, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On March 26, 2024, a hearing was held at Agency offices in Verona, Virginia.

During the hearing, Grievant objected to the admission into the record of Supervisor's notes¹ regarding Grievant's performance. The basis for Grievant's objection to this exhibit was that Grievant believed a request for documents she made to the Agency pursuant to the Freedom of Information Act (FOIA) was broad enough that the Agency should have included the notes as part of its production of responsive documents to that request. The Agency asserted that it did not interpret Grievant's FOIA request as including the Supervisor's notes, although it appears that at least a portion of the Supervisor's notes may have been provided to Grievant in response to one of her requests. Prior to the hearing, Grievant had requested the Hearing Officer issue an order for the production of certain documents. That request and the order that followed did not include a request or order for the Supervisor's notes. The Agency provided the Supervisor's notes as part of the exhibits it provided to Grievant before the end of the day on March 15, 2024 (the deadline the Hearing Officer had established for the exchange of exhibits). Grievant had opportunity to review the exhibit and prepare her case accordingly. Grievant also had the

¹ Agency Ex. at 81-154.

opportunity to question witnesses about the exhibit during the hearing. The Hearing Officer admitted the Supervisor's notes into the record as they contained relevant evidence. To the extent portions of the contents of the Supervisor's notes were not relevant to the issues of the grievance, those portions were not considered and are not referenced in the decision.

APPEARANCES

Grievant
Grievant's Advocate
Agency Advocate
Agency Party Designee
Witnesses

ISSUES

1. Whether the Agency's re-evaluation of the Grievant's performance was arbitrary or capricious?
2. Whether the Agency complied with State policy (DHRM Policy 1.40) to remove Grievant from employment?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its re-evaluation was not arbitrary or capricious and that it complied with State policy to remove Grievant. The employee has the burden of raising and establishing any affirmative defenses. 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:

Prior to her dismissal, Grievant was a Support Enforcement Specialist Senior (SES-Sr) in a District Office for a Division of the Agency. As an SES-Sr, Grievant's role required that she manage a caseload of child support enforcement cases and that, as needed, she create and conduct training for staff and provide assistance to other staff. Because of the duties Grievant may be called upon to perform in addition to managing a caseload, Grievant's caseload was smaller to that of a Support Enforcement Specialist (SES).² As an SES-Sr, Grievant was expected to maintain a caseload of approximately

² Agency Ex. at 15-35 and 36-55; Hearing Recording at 1:24:37-1:30:02.

500-700 cases. An SES was expected to maintain a caseload of approximately 1100-1200 cases.

The Employee Work Profile for SES-Srs and SESs included an addendum developed by the Division that set forth specific requirements for employees in those positions across the Commonwealth, including specific requirements for the number of Quality Data Clean Up Case Reviews³ to be completed and time frames for responding to or addressing specific activities and providing customer service.

Prior to becoming an SES-Sr, Grievant had held the position of an SES in the District Office.

As part of its performance management efforts, the District provided employees with interim performance evaluations.

On April 21, 2023, Supervisor issued an "Interim Evaluation Form" to Grievant dated April 15, 2023. Under a section entitled "Performance Areas Identified for Improvement/Substandard," Supervisor noted the following:

Caseworkers with an average caseload of 600 or less cases are expected to complete an average of 60 [Quality Data Clean Up Case Reviews] each month. [Grievant] has completed an average of only 8 [Quality Data Clean Up Case Review] Checklists per month. If [Grievant] makes a concerted effort to complete an average of 4.5 per working day she can still meet her annual performance goal.

The time [Grievant] has devoted to training new staff has impacted her responding to critical worklists within required timeframes. It is recommendation that she arrange a training plan with the 2nd [SES-Sr] for any future training classes where they conduct active training for 1/2 a day and assignments for the 2nd half as much as possible in order to keep up with her casework and meet timeframes on critical worker actions. Additionally, they should arrange to assist each other with critical worklists and customer service as needed when the other is conducting the training.⁴

On or about June 2, 2023, Supervisor issued a "Counseling Memorandum" to Grievant. Supervisor noted "[b]ased on your caseload, you have an EWP requirement to complete a minimum of 60 [Quality Data Cleanup Case Review] Checklists on average per month . . . [y]ou completed a total of 5 in April, all between April 25 and April 28. You completed only 13 in May, which brought you to a monthly average of 8." Supervisor went on to state, "it is crucial that you focus on meeting timeframes and the needs of your clients by responding to customer service inquiries in your assigned caseload, processing mail timely and working priority worklists timely. Time management and finding a routine

³ Quality Data Clean Up Case Reviews and checklists are referred to as quality data case reviews or CSSM data clean up and refer to a requirement in the Employee Work Profiles for SESs and SES-Srs to verify the data fields in the Agency's case management system for a specific quantity of their cases throughout the performance year.

⁴ Agency Ex. at 58-59.

that ensure all critical areas of case management are met daily is an essential part of being a support enforcement specialist. As a [SES-Sr], you serve as a lead member of the team.” Supervisor identified specific work that was out of compliance. Finally, Supervisor advised Grievant that:

My desire is for you to be a successful [SES-Sr] for the [Division.] As you are fully aware, my door is always open, and I am more than willing to assist or provide guidance in maintaining the workflow of your caseload.

Beginning the week of June 12 . . . we will begin meeting weekly on Wednesdays when I am in the office to go over your progress and to discuss any concerns or questions you may have on any outstanding items.

I look forward to working with you and as stated above, my goal is to resolve these issues fully and have you functioning as a confident and productive caseworker. I know you have the ability and I want to ensure you succeed.⁵

On or about August 2, 2023, Supervisor provided Grievant with an “Interim Evaluation Form” dated July 30, 2023. Supervisor identified specific work that was out of compliance. Finally, Supervisor advised Grievant that:

Caseworkers with an average caseload of 600 or less cases are expected to complete an average of 60 [Quality Data Cleanup Case Reviews] each month. [Grievant] has completed an average of only 11 [Quality Data Clean Up Case Review] Checklists per month. She needs to make a concerted effort to complete these [Quality Data Cleanup Case Reviews] every day as she works her cases.

As a [SES-Sr], it is also [Grievant's] responsibility to assist the Supervisor with reviews of the [Quality Data Cleanup Case Reviews] completed by other members of the team. Supervisor has assigned her minimal ... supervisor reviews to complete in hopes it would assist her in meeting her goal. She will however be expected to take on that part of her responsibilities going forward through the last quarter of the performance year.

[Grievant] has not been consistently working her critical worklists within the required timeframes. In order for her cases to stay in compliance and for her to meet her customer service expectations, it is anticipated this will not continue to be an area of concern.⁶

On August 23, 2024, Grievant sent an email to District Manager with a copy to Supervisor. Grievant stated:

⁵ Agency Ex. at 60-61.

⁶ Agency Ex. at 62-63.

In light of recent events and given the many changes that have occurred within the [District Office] over the last several months, I don't believe the position of [SES-Sr] is a fit for me any longer. At this time, I would like to request to be moved into one of the vacant [SES] positions in our office as I feel that is more suitable for me.⁷

On or about August 31, 2023, Supervisor issued an "Interim Evaluation Form" to Grievant dated August 30, 2023. Supervisor noted again that Grievant was not completing the expected number of [Quality Data Case Review] Checklists each month such that she was behind on her monthly average and that Grievant was not consistently working her critical Worklists within the required timeframes and had continued to be out of compliance on both her Worklists and her Perceptive mail. Supervisor also identified a concern related to Grievant's number of worker actions and the ability of other employees to be able to reach Grievant during the day. In her comments on the Interim Evaluation Form, Grievant took specific exception to the concerns about gaps in her worker actions during the day and to concerns about the ability of other employees to reach Grievant.⁸

The Agency denied Grievant's request for a demotion on September 7, 2023. District Manager advised Grievant of the decision by email stating: "Your request to return as a Enforcement Specialist is denied. You will remain in your current position and continue your current job duties."⁹

Grievant replied to District Manager on that same day stating:

With this decision, I believe I'm entitled to an explanation as to why my request has been denied. Especially as there were or are vacancies/positions available at the time of my request. By denying my request, I feel this could be setting me up for future failure.¹⁰

District Manager replied that "[t]his decision is based on our office business needs."¹¹

Grievant received a Group II Written Notice of disciplinary action on September 7, 2023, for failure to follow supervisor's instructions and/or comply with agency policies and procedures.¹² Grievant did not grieve that written notice.

Because of Supervisor's concerns with Grievant's performance, Supervisor provided Grievant with an Employee Improvement Plan on September 29, 2023. The Employee Improvement Plan identified Grievant's core responsibilities and the areas where Grievant needed to improve her performance. The Employee Improvement Plan included recommendations and actions for Grievant to take to improve her performance.¹³

⁷ Grievant Ex. 4 at 1.

⁸ Agency Ex. at 64-65.

⁹ Grievant Ex. 4 at 5.

¹⁰ Grievant Ex. 4 at 4-5.

¹¹ Grievant Ex. 4 at 4.

¹² Agency Ex. at 66-68.

¹³ Agency Ex. at 69-71; Hearing Recording at 2:17:00-2:21:08.

On or about October 18, 2024, Grievant received her Annual Performance Evaluation for the 2022-2023 performance year. Grievant received an overall rating of Below Contributor.¹⁴ Grievant did not grieve the Annual Performance Evaluation she received in October.

The Agency created a Performance Re-Evaluation Plan¹⁵ for the period October 20, 2023, through January 18, 2024. The plan listed Core Responsibilities and Measures of Core Responsibilities.

Core Responsibilities	Measures for Core Responsibilities
WORKPLACE ENGAGEMENT. Responds to day-to-day supervision and management practices to engage in a safe and healthy, productive and successful workplace.	Degree to which individual: •Engages in the performance planning and evaluation system. •Responds in a fair and considerate manner to supervisor efforts to successfully enhance the efficiency, effectiveness and impact of own work. •Complies with safety procedures and instructions. •Per EWP Addendum, meets workplace engagement standards by responding to day-to-day supervision and management practices to engage in a safe and healthy, productive, and successful workplace.
CASELOAD MANAGEMENT. Establishes and maintains assigned child support cases in accordance with federal and state policies, procedures and audit requirements. Proactively manages a substantial caseload in volume and complexity drawing on a range of case management processes to achieve positive results.	•Contributes to efforts by team, district and division to meet goals related to federal OCSE performance measures. •Assists team operation by assuring coverage, running/working reports and other team duties assigned by supervisor. •Per EWP Addendum, proactively manages individual caseload efforts in order to meet percentage goals and taking the appropriate action and responding within required timeframes to worklists.
CASELOAD COMPLIANCE. Case review shows that timely, accurate and complete actions were taken to maintain compliance status of assigned cases in accordance with federal and state policies, procedures and audit requirements.	•Assists team members as assigned by supervisor with compliance matters related to critical inquiries, case reviews and program guidance updates. •Per EWP Addendum, meets designated case review compliance standard for cases processed. CSSM Data Cleanup Checklist is to be completed on a specific number of cases each month to ensure the accuracy of specific case data fields. Ten random case reviews will be completed by the Supervisor each month to verify the data fields are

¹⁴ Hearing Recording at 2:18:40-2:26:15.

¹⁵ See Agency Ex. at 11-13. Although one of the copies of the plan provided as part of the Agency exhibits included electronic signatures for the Grievant, Supervisor, and District Manager dated October 20, 2023, that document and the other copy of the Performance Re-Evaluation (Agency Ex. at 76-78) also included "Comments on Results Achieved" from the re-evaluation of Grievant's performance. The Agency asserted that the Performance Re-Evaluation Plan was maintained as an electronic document and that once the performance re-evaluation had been completed, the Agency Advocate was unable to produce the plan as a separate document without the comments on results achieved. Hearing Recording at 4:24:00-4:28:27.

	<p>correct. A pass/fail rating will be determined. The ratings will be averaged for the performance year to calculate the annual rating.</p> <ul style="list-style-type: none"> •Communicates with the supervisor any issues with compliance or performance with team members that indicate there is a potential for failure in performance or compliance.
<p>CUSTOMER SERVICE. Delivers professional and proficient service to clients, often in difficult, complex and adversarial situations, to support successful case management.</p>	<p>Provides outstanding customer service to every person every day. Supervisory observation and/or review of written and interpersonal interactions with internal and external customers. Handles critical customer concerns that are elevated beyond the Specialist as assigned by supervisor. Promotes positive relationships with partner agencies and other groups. Written and interpersonal interactions with clients demonstrate:</p> <ul style="list-style-type: none"> •Respectful, supportive communications. •Success in clarifying client obligations, shaping client expectations and responding to client needs. •Per EWP Addendum, meets customer service standards: Daily communicate through most direct method available; Respond in no later than 3 workdays on customer service requests received; Review and take all possible follow-up steps on incoming correspondence in no later than 5 workdays; Completes printing, scanning, and mail processing of district correspondence as assigned and in accordance with the office schedule.
<p>PRODUCTIVITY. Takes initiative to improve efficiency and effectiveness of case management for self or team.</p>	<p>Degree to which individual contributes effectively and efficiently to achieve positive results:</p> <ul style="list-style-type: none"> •Develops and/or carries out special projects to impact individual/team/ agency case management success. •Orients, trains and retrain team members on case management practices and routines as assigned by supervisor. •Shares knowledge of best practices that have shown the potential to positively impact results. •Per EWP addendum, initiates critical worker actions that have the potential to significantly impact performance. Worker is expected to complete a specific quantity of CSSM Data Clean Up case reviews, ensuring no duplicate reviews, each month.

The Performance Re-Evaluation Plan was electronically signed by Grievant, Supervisor and District Manager on October 20, 2023.

Throughout the re-evaluation period, Supervisor continued to meet approximately weekly with Grievant to discuss Grievant's work, including discussing Grievant's progress

and outstanding worklists, and helping Grievant to identify critical items and workflows and other work issues.

On December 5, 2023, Grievant sent an email to District Manager with a copy to Regional Manager and Supervisor acknowledging that she was not meeting expectations and again requesting to be demoted, Grievant stated:

I am again requesting to step down from my current position of SES-Sr to an SES position. There are current openings still at this time for those positions that I should be able to step in to and would not have to be trained for.

It is clear to me that I am unable to meet the expectations you have set down in my current position. Therefore, it would be for the best for all involved that I be permitted to step down or be demoted.

When I was previously an SES, I did not have the same kinds of struggles that I am encountering now and did a much better job in that position. [Regional Manager] expressed concern about whether I could maintain a larger caseload, and this was part of the reason for having my request denied before. But I can assure you that if you were to look back at my performance records as an SES, you will see that I performed much better as an SES. This is another reason that I believe the change would be for the best.

I have been employed with Division for 18 years, 3 approximately as a contract worker and 15 with the state. I have never, until now, had a reprimand or disciplinary action on my record. What I feel is happening at this point is that I am being left in the SES-Sr position to continue to struggle and fail which could then lead to my termination. This is after I have requested to make changes to avoid just such a thing. And now it is becoming a growing concern that I may be forced to resign from the Division to avoid a termination or further reprimand, which again I have made requests for change to try to avoid. I had not intended to leave the Division, but I would also like to think that I am not being left in a situation where I am being set up for failure after all my years of work for the [Agency].¹⁶

District Manager responded by email to Grievant on December 7, 2023, stating:

On 10/20/23 you were issued a Performance Re-Evaluation Plan. While you are under this correction action plan you are not eligible for any changes regarding your employment or position.¹⁷

¹⁶ Grievant Ex. 4 at 7.

¹⁷ Grievant Ex. 4 at 6.

On January 8, 2024, Grievant received the Performance Re-evaluation¹⁸ with an overall rating of Below Contributor:

Core Responsibility & Rating Earned	Comments on Results Achieved
WORKPLACE ENGAGEMENT. Rating earned: Below Contributor	Supervisor has found [Grievant] to be unreceptive to supervisor's guidance and directives.
CASELOAD MANAGEMENT. Rating earned: Below Contributor	[Grievant] is not proactively managing her caseload. She fails to take appropriate actions on cases to assist the district office in meeting the [Federal Office of Child Support Enforcement (OCSE)] Performance Goals.
CASELOAD COMPLIANCE. Rating earned: Contributor	EWPs were amended to require 5 random case reviews by Supervisor each month with an average of 3 found to be without errors. [Grievant] has met this requirement with an average of 3 without error.
CUSTOMER SERVICE. Rating earned: Below Contributor	During the evaluation period [Grievant] has consistently not met the required timeframes on customer service inquiries and processing incoming correspondence.
PRODUCTIVITY. Rating earned: Below Contributor	EWP requirement is an average of 50 CSSM Data Cleanup Checklist completed per month. In the 1 st 3 months of the new performance year [Grievant] has averaged only 8 per month.

Supervisor and District Manager met with Grievant and Supervisor provided Grievant with a letter dated January 8, 2024, confirming that Grievant had received a Below Contributor rating on her re-evaluation. Supervisor stated in the letter that "you are being terminated from employment effective immediately."¹⁹

CONCLUSIONS OF POLICY

The Agency may remove Grievant from employment only if its re-evaluation was not arbitrary or capricious and it followed State policy.

Whether the Agency's re-evaluation of Grievant was arbitrary or capricious

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

¹⁸ See Agency Ex. at 11-13.

¹⁹ Agency Ex. at 79.

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.

Grievant's inability or failure to meet the Agency's performance expectations does not appear to be an issue in dispute in this case.

During the Performance Re-evaluation period, Grievant continued to fail to meet the Agency's expectations for her performance. The Agency presented credible evidence, including witness testimony, showing that Grievant continued to have performance issues throughout the re-evaluation period. Supervisor credibly testified regarding Grievant's continued performance issues. Supervisor met weekly with Grievant to discuss Grievant's work, including offering suggestions as to how Grievant could approach her tasks, but she found that Grievant was not receptive to her efforts. Grievant continued to have work that was not meeting the Agency's expectations with respect to managing and taking required actions on her cases, meeting required deadlines for responding to inquiries and processing mail, and completing Quality Data Case Reviews.²⁰

During the hearing, Grievant acknowledged her performance problems and her inability to meet the Agency's expectations for an SES-Sr. Grievant did not dispute that her performance during the re-evaluation period did not meet the Agency's expectations and that her performance during the re-evaluation period merited a "Below Contributor" rating. Grievant did not present evidence that would suggest that the Agency's re-evaluation of her performance was arbitrary or capricious. Grievant appeared to argue that she did not find Supervisor's efforts to offer assistance or suggestions to be helpful in the absence of a change to her duties through a demotion. Grievant argued that she continued to struggle with her performance because the Agency had not given her the demotion she requested, thus she continued to have duties, such as training and assisting other staff, that affected her ability to meet expectations related to her case work.²¹

The Agency's re-evaluation of Grievant was neither arbitrary nor capricious. The Agency considered Grievant's Core Responsibilities and performance expectations for the three-month re-evaluation period. The Agency monitored Grievant's work performance during the three-month re-evaluation period and then compared that work performance to Grievant's Core Responsibilities and performance expectations.

Whether the Agency complied with State policy

DHRM Policy 1.40²² provides that an employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed as follows:

²⁰ Hearing Recording at 2:30:57-2:33:26, 2:59:42-3:00:44, 3:22:44-3:24:45, 3:46:08-3:52:20, 4:24:00-4:28:27; see also Agency Ex. at 125-153, 191-193, 315-316, 224-229.

²¹ Hearing Recording at 7:56:15-7:59:43, 8:02:51-8:06:43, 8:08:25-8:09:40, 8:19:44-8:21:20, 8:28:02-8:38:15; see also Grievant Ex. 4 at 7.

²² DHRM Policy 1.40, Performance Planning and Evaluation.

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.

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 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 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.²³

The Agency developed a Performance Re-Evaluation Plan for Grievant. The Performance Re-Evaluation Plan was electronically signed by Grievant, Supervisor and District Manager on October 20, 2023. Although the Reviewer, District Manager, electronically signed the Performance Re-Evaluation Plan after Grievant, I find this to be harmless error. District Manager was aware of Grievant's performance issues and Supervisor's efforts to address those issues and District Manager reviewed and signed the Re-Evaluation plan on the same day at Grievant. The Performance Re-Evaluation Plan was sufficient in detail to properly inform Grievant of the Agency's expectations for her work performance during the three-month period, particularly as the Agency had also provided Grievant with an Employee Improvement Plan with recommendations designed to help Grievant improve her performance.

Although an employee whose performance during the re-evaluation period is documented as not improving may be demoted, reassigned or have reduced duties, in this case, the Agency determined that there were no alternatives to demote, reassign, or reduce Grievant's duties and that termination based on unsatisfactory re-evaluation was the proper action.²⁴

Grievant argued that the Agency should have demoted her into one of the Agency's vacant SES positions, as she had requested. Grievant argued that by keeping her in the SES-Sr role when she was not meeting performance expectations, the Agency was setting her up for failure. Grievant asserted that she had successfully performed in an SES role prior to her promotion to SES-Sr. To support her argument, Grievant provided performance evaluations which indicated that the Agency found Grievant's performance in that role to be satisfactory during the 2017-2018, 2019-2020, 2020-2021 performance evaluation periods.²⁵

Grievant argued that since she has left, the remaining SES-Sr and some of the SESs appear to be managing smaller caseloads. Supervisor credibly testified that the District Office was directed to restructure staffing for particular cases following the Agency's failure to meet requirements for federal funding and the changes Grievant appeared to be describing were a result of that effort. Supervisor also credibly testified that those employees had specific metrics they were required to meet.

²³ DHRM Policy 1.40, Performance Planning and Evaluation.

²⁴ Agency Ex. at 79.

²⁵ Grievant Ex. 1 at 2-9.

The Agency considered whether demoting Grievant into a SES position was a viable option but concluded that it was not. The Regional Manager and District Manager credibly testified that based on Grievant's performance during the performance re-evaluation period and Grievant's inability to keep up with the smaller caseload (approximately 500-700 cases) of an SES-Sr, they had significant concerns about Grievant's ability to successfully manage the much larger caseload, approximately 1100-1200 cases, required of an SES.²⁶ Additionally, one of the performance requirements that Grievant was unable to successfully meet related to the number of Quality Data Case Review and checklists that Grievant completed each month, a performance requirement that District Manager and Grievant testified is now required of SES-Srs and SESs, but had not been required of SESs when Grievant was in that role.²⁷

Grievant also argued that the Agency was treating her differently than other employees because other employees had been allowed to take demotions. Grievant provided very little evidence to support her assertion. Based on Grievant's questioning of District Manager, however, the other employees were described as SESs who were demoted to program support specialists.²⁸ This Hearing Officer does not consider employees working in a position that differs from Grievant to be similarly situated to Grievant for purposes of assessing inconsistent treatment. Grievant argued that other employees were not meeting performance requirements with respect to the Quality Data Case Reviews. Supervisor, however, credibly testified that performance issues with other employees were being addressed through the Agency's performance management processes.²⁹

The Agency's re-evaluation and dismissal of Grievant was consistent with policy. Accordingly, the Agency's decision to remove Grievant must be upheld.

The Supervisor provided Grievant with a letter date January 8, 2024, confirming that Grievant had received a Below Contributor rating on her re-evaluation. The Supervisor stated, "you are being terminated from employment effective immediately."³⁰

DHRM Policy 1.40 provides, "[t]he employee who receives an unsatisfactory reevaluation will be terminated at the end of the three (3)-month re-evaluation period." The re-evaluation period ended January 18, 2024. Thus, the Agency erred by terminating Grievant's employment prior to the end of the re-evaluation period. Grievant is entitled to back pay and benefits to the extent the Agency prematurely removed her from employment.

²⁶ Hearing Recording at 5:10:06-5:17:38, 6:07:53-6:11:30.

²⁷ Hearing Recording at 5:10:06-5:17:38, 7:25:50-7:27:15.

²⁸ Hearing Recording at 5:49:35-5:58:56.

²⁹ Hearing Recording at 4:00:42-4:06:47.

³⁰ Agency Ex. at 79.

DECISION

For the reasons stated herein, the Agency's decision to remove Grievant is **upheld**. However, the removal is effective January 18, 2024 and Grievant is awarded back pay and benefits to the extent the Agency prematurely terminated her employment.

APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

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 must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.³¹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

³¹ 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.