

Issue: Separation from State (Below Contributor Rating on Re-evaluation); Hearing Date: 08/01/17; Decision Issued: 09/05/17; Agency: Va Tech; AHO: Thomas P. Walk, Esq.; Case No. 10977; Outcome: No Relief – Agency Upheld.

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

IN RE: CASE NO. 10978

DECISION OF HEARING OFFICER

HEARING DATE: AUGUST 2, 2017

DECISION DATE: SEPTEMBER 5, 2017

I. PROCEDURAL MATTERS

The grievant commenced this matter by filing her Form A on January 10, 2017, challenging her termination from employment for unsatisfactory work performance. It was consolidated for hearing with Case No. 10977 by the Director of the Department of Equal Employment and Dispute Resolution on February 24. I was appointed as Hearing Officer for the consolidated matters on March 8. A prehearing conference was held and my initial prehearing order was issued on March 30. The grievant submitted an email request for the production by the school of several documents. To address those documents, I issued a supplemental prehearing order on April 25, 2017. The grievant requested a compliance ruling from the Director of the Office of the Equal Employment Dispute Resolution on July 20. He issued his compliance ruling on July 28, 2017. As indicated by me prior to that ruling and consistent with it, at the conclusion of the hearing the grievant was given leave to file supplemental exhibits by August 18. Both parties submitted large binders of exhibits prior to the hearing. The documents behind Tab 6 of the school's exhibits numbered 32, 33, and 34, were withdrawn and not accepted into evidence. All other exhibits provided, both before and after the hearing, were admitted into evidence.

II. APPEARANCES

The school was represented by legal counsel. It presented two witnesses and numerous exhibits. The grievant represented herself and presented two witnesses in addition to her own testimony. She further presented numerous documents as exhibits.

III. ISSUE

Whether the grievant was properly terminated from employment for unsatisfactory work performance?

IV. FINDINGS OF FACT

The grievant was employed by a State University as an Applications Developer. At the time of her termination she was serving in the Business Intelligence Systems group. She had been employed by the school for approximately ten years.

On October 3, 2016, the school issued the grievant her annual performance evaluation. That evaluation cited numerous deficiencies in her performance. Her Supervisor gave her an overall rating of "Unacceptable." She filed a grievance of that evaluation. By decision entered today in Case No. 10977 I have upheld that evaluation.

To attempt to improve the performance of the grievant, the school issued a performance plan and evaluation (Form P112). The plan included the following specific areas of goals related to her job responsibilities:

- Coordinate transfer of all WebJob/WebDist responsibilities to another employee and working group;

- Take over primary responsibility for all sponsored program MicroStrategy needs and provide support for her group as needed;
- Time management and communication;
- Professional conduct and building strong relationships and cohesiveness with the team of the departments, and the university community.

Numerous metrics were included under each of these goals. The supervisor of the grievant and the Human Resource Manager for the Department met with her to discuss the improvement plan. She gave the impression that she did not agree with certain of the expectations of management. She also appeared not to appreciate the possible consequences of not meeting those expectations.

The Departmental Human Resource Manager had a cubicle near that of the grievant. Although the Human Resource Manager was not in her cubicle but for only a relatively small portion of each work week, when in that area she noted the grievant being frequently absent, often distracted, and having little engagement with her supervisors. The Human Resource Manager gave advice to the grievant's supervisor as to how to address certain issues with her. The grievant requested a transfer from her work group and the Human Resource Manager worked with her to attempt to arrange that. One opening was found, which opportunity was declined by the grievant.

Following the development of the performance improvement plan, the grievant's supervisor had weekly meetings with her. He decreased her work load in other areas so that she could focus on the goal of taking over primary responsibility for MicroStrategy (a business intelligence tool used by the school) needs and providing support to the group.

Despite the efforts of the supervisor, continuing issues with the performance of the

grievant were noted. In particular, the following matters were being seen as deficiencies of the grievant:

- She continued to miss work deadlines, causing other employees to be required to take on additional duties;
- She exhibited poor time-to-task and time management skills, spending an unreasonable amount of time away from her desk;
- There was no consistent communication with her supervisors regarding the status of her work in progress or legitimate issues to be addressed with the supervisors;
- She used various metrics and procedures when such were unauthorized or she had been specifically told not to use them;
- Exhibiting poor communication skills with users of the work group;
- Assigning work to herself despite having been directed not to do so;
- Giving the appearance of making little effort to improve her work performance.

The Supervisor was cautious in authorizing leave for the grievant because he did not want to set her up to miss deadlines. The grievant, during the review period, received an additional Group I Written Notice for failure to follow instructions regarding deadlines. That matter remains pending and I make no finding as to whether it was appropriate.

V. ANALYSIS

This matter arises under Chapter 30 of Title 2.2 of the Code of Virginia which provides certain protections to State employees. The Department of Human Resource Management has promulgated a Grievance Procedure Manual further setting out the rights an employee and responsibilities of a State Agency, as well as that of a hearing officer. This matter is governed by

the Grievance Procedure Manual made effective on July 1, 2012, despite recent revisions being made to it.

Section 4.1(A)(2) of the Manual allows an employee to grieve a termination for unsatisfactory work performance. Section 5.8(2) of the Manual prescribes that the agency shall have the burden of going forward with the evidence in a grievance for termination on that basis and shall have the burden of proof by a preponderance of the evidence.

The University has met its burden. The school has been found to have properly given the grievant a rating of “Unacceptable” in her October, 2016 evaluation. It then developed an improvement plan which was in place for approximately three months. During that time, the grievant was given the opportunity to improve her performance. She met regularly with her supervisor. She had been fully apprised of the expectations imposed on her. The preponderance of the evidence is that she failed to meet them or significantly improve her performance. I believe that the expectations imposed were reasonable. As such, I am required to give them appropriate deference. See *Rules for Conducting Grievance Hearings*, Section VI(B)(1).

The grievant presented evidence that her immediate supervisor had spoken publicly with a co-worker about the tenuous job status of the grievant. The co-worker testified in the consolidated matter, denying any such conversation occurred. I found her testimony to be vague, evasive, and not convincing. However, the supervisor also denied that the conversations took place. I found his testimony to be at least as credible as that of the grievant. Therefore, I find that the grievant has not established such a hostile environment existed within the working group that her work performance should be excused and warrant the termination set aside as a way of mitigation.

VI. DECISION

For the reasons stated above, I hereby uphold the termination of the grievant.

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.^a

[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].

ORDERED this September 5, 2017

Thomas P. Walk, Hearing Officer
