

**COMMONWEALTH OF VIRGINIA  
Department of Human Resource Management**

**Office of Employment Dispute Resolution**

**DECISION OF HEARING OFFICER**

**In re:  
Case Number: 11806**

Hearing Date: April 18, 2022  
Decision Issued: April 21, 2022

**PROCEDURAL HISTORY**

By letter dated January 11, 2021 (correct date being January 11, 2022) from the Financial Program Manager, the Grievant's employment was terminated effective immediately due to the Grievant being rated Below Contributor on the Grievant's overall evaluation for the 2021 performance cycle and pursuant to the 90 day performance re-evaluation plan dated October 18, 2021.

Grievant timely filed Grievance Form A to challenge the Agency's action. The Hearing Officer in this matter upon being appointed effective February 24, 2022, conducted a pre-hearing telephone conference on March 7, 2022 and set a hearing date of April 18, 2022.

In the letter from the Hearing Officer dated March 8, 2022, it was set out that a copy of exhibits, in the form of hard copy, a party intends to introduce at hearing and a list of witnesses to be called was to be provided to the Hearing Officer and the other party no later than April 11, 2022. The Agency provided a notebook with the Agency's exhibits and list of witnesses to be called. The Grievant did not submit any exhibits or list of witnesses to be called.

**APPEARANCES**

Grievant  
Agency's Party Designee  
Agency's Advocate

## **ISSUES**

1. Whether the Agency's evidence supported the Agency rating the Grievant as "Below Contributor" on Grievant's overall evaluation for the 2021 performance cycle?
2. Whether the Agency's evidence supported the Agency's determination that the Grievant was rated "Below Contributor" for the 90 day performance re-evaluation plan dated October 18, 2021?
3. Whether the Agency's termination of the Grievant's employment was consistent with law and policy?
4. Whether the issues and considerations set out by the Grievant in Grievant's Form A are a basis for the Hearing Officer to reverse the termination of employment or otherwise modify the Agency's action?

## **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its termination of the Grievant's employment was warranted and appropriate under the circumstances. The Grievant has the burden of raising and establishing that the Agency's action was arbitrary and capricious. Grievance Procedure Manual (GPM) section 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not.

## **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in one notebook with the following contents:

1. Grievant's Form A
2. Termination Notice
3. Policy 1.40-Performance Planning and Evaluation
4. Standards of Conduct
5. Organization chart
6. Employee Work Profile/Performance Plan effective date 11/1/2020
7. Interim Performance April 10, 2019
8. Employee Work Profile/Performance Evaluation 10/29/19
9. Employee Work Profile/Performance Evaluation 10/20/20
10. Notice of improvement needed 3/17/21
11. Notice of improvement needed 9/9/21
12. Employee Work Profile/Performance Plan 10/18/21
13. Notice of re-evaluation and performance plan 10/18/21

14. Employee Work Profile/Re-Evaluation Performance Plan, effective date 11/1/21
15. Notes by supervisor and Grievant 10/18/21-1/11/22
16. Supporting documents, 231 pages
17. Supporting document, Project Agreement
18. Supporting document, Project Agreements
19. Supporting document, Project Agreements

The Grievant did not submit any Exhibits.

### **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 Agency employed Grievant as a Grants Financial Analyst. As such, Grievant's core responsibilities included the following:

1. Develops grant agreements and ensures that grant agreements are written accurately, issued, executed and managed appropriately. (40% of employee's time)
2. Assist lead financial compliance analyst in managing federal funding sources on behalf of Grantees. (35% of employee's time)
3. Maintains a significant knowledge base in financial compliance best practices and .... Grant policies and procedures across programs. (5% of employee's time)
4. Assist the development and management of the annual program and update. (5% of employee's time)
5. Special projects. (5% of employee's time)
6. Communication, collaboration and interpersonal relationships. (10% of employee's time) (Agency Exhibit 6)

The Agency's first witness, the Grants Financial Manager testified that the Grievant was supervised by the Senior Grants Financial Analyst, who in turn answered to the Grants Financial Manager (AKA: Financial Programming Manager) (Agency Exhibit 5, Organization Chart). Following Grievant's employment in October 2018, an initial performance evaluation form was completed on April 10, 2019 (Agency Exhibit 7). At that time, the Grievant's strengths and weaknesses were set out including the observation that "...Because this is an analyst position, we need (Grievant) to take more initiative in learning about the various systems we have ... and the data we are responsible for ... Also, due to the very detailed nature of this work, attention to detail is important; (Grievant) needs to make sure to check (Grievant's) work." The interim performance evaluation form from the meeting on April 10, 2019 also noted "(Grievant) has had

several personal issues take time away from work, which we hope will improve as time goes on.” Six months later, on October 29, 2019, another performance evaluation was completed (Agency Exhibit 8). In core responsibility categories which account for 85% of the employee’s time, the Grievant was rated as “Marginal Contributor”. At that time, the Grants Financial Manager noted “(Grievant) needs to take more initiative in learning (Grievant’s) job, and use the tools that are available... If (Grievant’s) performance does not improve, then perhaps this job is not a good fit for (Grievant’s) skill level.”

Another performance evaluation was completed in October 2020 at which time the Grievant was rated as a “marginal contributor” in all categories. The comments included on the Performance Evaluation went into great detail as to the Grievant’s deficiencies and note little to no improvement in skill level or level of knowledge even after two years of employment. The Grants Financial Manager noted that “(Grievant) still requires a lot of supervision and requires a lot of help to complete tasks. All (Grievant’s) work requires a thorough review. I do not think (Grievant’s) skill level matches the requirements of this job.” (Agency Exhibit 9)

The witness next reviewed a Notice of Improvement Needed/Substandard Performance (Agency Exhibit 10). The Notice set out in detail multiple examples of the Grievant not following proper procedures, making serious errors on reports and specifically noting the following:

- On Thursday, you reported everything was now ready for submission... When I reviewed the letter on Friday, I noticed you put an incorrect amount; after correcting the letter, we were able to finally submit the package later that day this close out process took a week, when it usually should take only a couple of hours to process.
- Furthermore, you sent multiple bond reports by email, and it was never clear whether you were asking a question, asking for verification, or stating it was the correct bond report. Therefore, subsequently, the Lead Analyst had to create the bond report and re-send it...on your behalf. This report could have been sent...on time if you had been more concise with your communication to me and the Lead Analyst, so we could provide you guidance on how to resolve the issue on your own.
- All of your work has had to be reviewed very carefully by the Lead Analyst and Program Manager due to the consistent errors found, as well as missed deadlines. Thus, requiring the Lead Analyst and the Program Manager to take on additional tasks to ensure all responsibilities in this department are completed.

Exhibit 10 concluded with a specific five point improvement plan.

The witness next reviewed Agency Exhibit 11 Notice of Improvement Needed/Substandard Performance dated September 10, 2021. The Notice describes specific performance deficiencies and improvements needed based on work assignments throughout August 2021. The witness testified that there was no significant improvement in the quality of Grievant's work between March 2021 and September 2021.

On October 18, 2021 the Grievant had another performance evaluation at which time he was rated "Below Contributor" in every category except in the category "assist in the development and management of the annual (Plan). However, even in that category it was noted as follows:

In order to help (Grievant) focus on completing (Grievant's) other job duties in an accurate and timely manner, (Grievant) was not assigned to work on the annual (plan) this year. His only task...was to check the final (plan) for errors, the same task given to the Lead Analyst and the members of the Operations staff in the Agency.

As a result, the Grants Financial Manager on October 18, 2021 directed a memorandum to the Grievant advising that the Grievant was being placed on a Performance Improvement Plan effective October 18, 2021 in accordance with Policy No. 1.40 which requires that an employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed. The memorandum further advised that the start of Grievant's three month re-evaluation period will be October 18, 2021 and the Grievant would be re-evaluated on January 4, 2022. The memorandum concluded by advising that if the Grievant's performance does not improve and Grievant receives a re-evaluation rating of "Below Contributor", the Agency shall have the option to demote, reassign, or terminate Grievant's employment by the end of the three month period. (Agency Exhibit 13). Accordingly, the Re-evaluation Performance Plan was created and signed by the Grants Financial Manager on October 18, 2021.

The witness next reviewed Agency Exhibit 15 which included daily reports starting October 18, 2021 and ending on January 11, 2022 when the Grievant was terminated from employment. The notes included the Grievant's report of his daily activities and the Supervisor's observations regarding Grievant's continued poor performance. The witness's testimony went on to review in detail the supporting documents at Agency Exhibits 16, 17, 18 and 19.

The witness concluded testimony by stating that although it was the intent to re-evaluate the Grievant on January 4, 2022, concern was raised that the Grievant may have been exposed to Covid, resulting in the re-evaluation being delayed to January 11, 2022, at which time the Grievant's performance was rated as "Below Contributor" in all categories and Grievant was terminated from employment. The witness testified that due to the small size of the operation (essentially three people), demotion was not a possibility. The witness further testified that the termination was in compliance with Policy 1.40 which requires that the Supervisor demote,

reassign, or terminate the employee by the end of the three month re-evaluation. (Agency Exhibit 3)

The Agency's second witness was the Grievant's immediate supervisor, the Senior Grants Financial Analyst. The witness corroborated the testimony of the Grants Financial Manager and agreed with the descriptions of the Grievant's job performance and the decision to terminate the Grievant's employment.

The Agency's final witness was the Human Resource Client Manager who testified that he advised the Grants Financial Manager during the Grievant's performance evaluation process and that the termination was not arbitrary or capricious and was in accordance with Agency policy.

The Grievant then testified, asserting these arguments:

1. Grievant in the performance evaluations was not given credit for the good work the Grievant did.
2. Grievant was not adequately trained.
3. COVID created difficulty with working remotely and problems with computers.
4. Some performance problems were caused by Grievant's partial vision impairment.
5. Some of Grievant's job performance problems were caused by personal problems and travel out of the country.
6. Grievant should have had until the end of January to improve performance deficiencies.

Grievant set out in Grievant's Form A in part the following:

1. I have family problems and vision issues that cause my performance to shift, however the situation reversed in December (vision issues).
2. I have been treated as a victim of discrimination.
3. My work loads were not taken into consideration during my evaluation.
4. The end date of my evaluation was compromised.

Finally, Policy Number: 1.40-Performance Planning and Evaluation was effective during the Grievant's period of employment (Agency Exhibit 3). The Policy sets out a procedure for re-evaluation of an employee who receives a rating of "Below Contributor". The procedure provides that the supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three months and must be re-evaluated within approximately two weeks prior to the end of the three month period. Further, the policy provides that 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.

The Agency's evidence established by a preponderance of the evidence that the Grievant struggled from the time of his hiring until his termination to meet the core responsibilities set out in the Grievant's Employee Work Profile. The Agency's evidence overwhelmingly demonstrated that the Grievant simply could not perform the tasks required of a Financial Compliance Analyst.

The Grievant did not by credible evidence support his claims that the Grievant was unfairly evaluated or unfairly and prematurely terminated.

### DECISION

For the reasons stated herein, the Agency's termination of the Grievant's employment is upheld.

### APPEAL RIGHTS

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

Please address your request to:

Office of Equal Employment and Dispute Resolution  
Department of Human Resources 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.

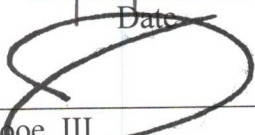
You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

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.[1]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

ENTERED: 4/21/2022  
Date

  
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John R. Hooe, III  
Hearing Officer

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[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.