

Issue: Arbitrary & capricious performance evaluation, and termination due to inability to meet minimum requirements; Hearing Date: 05/31/01; Decision Date: 06/04/02; Agency: Dept. of Environmental Quality; AHO: David J. Latham, Esq.; Case No. 5169/5178; **Administrative Review: Hearing Officer Reconsideration Request received 06/13/02; Reconsideration Decision date: 06/21/02; Outcome: No basis to amend or reverse decision; Administrative Review: EDR Ruling requested 06/13/02; EDR Ruling Date: 07/11/01 (Ruling No. 2001-119); Outcome: HO did not abuse discretion or exceed authority; Administrative Review: DHRM Ruling requested 06/13/02; DHRM Ruling Date: 07/24/01; Outcome: No policy violation – no basis to interfere with decision; Judicial Review: Appealed to the Circuit Court in the City of Richmond on 07/20/01; Outcome:**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Grievance Nos. 5169  
5178

Hearing Dates: May 31 & June 1, 2001  
Decision Issued: June 4, 2001

**PROCEDURAL ISSUES**

Due to illness of the agency's legal representative, the hearing had to be postponed from the first docketed date of May 4, 2001. Due to availability of the participants, the hearing could not then be docketed until the 55<sup>th</sup> day following appointment of the hearing officer.

Grievant had filed two separate grievances. In the first, he grieved his performance evaluation for the 2000 performance cycle; in the second, he grieved his January 16, 2001 discharge from the agency. The Director of the Department of Employment Dispute Resolution, pursuant to the *Grievance Procedure Manual*, concluded that consolidation of these two grievances would promote judicial economy and a more comprehensive understanding of the disputed issues.<sup>1</sup>

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<sup>1</sup> Qualification Ruling of Director, *In the matter of Department of Environmental Quality/ No 2001-13, 2001-052*, issued April 3, 2001. (This ruling is part of Exhibit 4).

## APPEARANCES

Grievant  
Attorney for Grievant  
One witness for Grievant  
Observer for Grievant  
Legal Representative for Agency  
Department Manager  
Two witnesses for Agency  
Observer for Agency

## ISSUES

Was the grievant's performance evaluation for the 2000 performance cycle arbitrary or capricious? Was the grievant's performance during the 90-day period subsequent to his 2000 performance evaluation such as to warrant discharge from employment pursuant to the Commonwealth of Virginia Performance Planning and Evaluation Policy?

## FINDINGS OF FACT

The grievant filed timely appeals both from his 2000 performance evaluation and from his discharge from employment effective January 16, 2001 because his performance failed to meet minimum expectations. Following failure to resolve either grievance at the third resolution step, the grievances were qualified for a hearing.

The Department of Environmental Quality (hereinafter referred to as "agency") has employed the grievant most recently as an environmental engineer senior. He has been employed by the agency for a total of 11 years. Grievant has both a B.S. and a M.S. in geology, and is a Certified Professional Geologist. He has substantial experience in the field of geology, both at the agency and in the private sector prior to employment by the agency. At the time of discharge, the chief objective of grievant's position was, "To provide thorough and technically sound review and evaluation of groundwater monitoring plans, corrective action plans, permit amendments and variances."<sup>2</sup> The position description also states that the position requires skill in oral and written communications.

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<sup>2</sup> Exhibit 1. Position description for grievant, signed by grievant on October 26, 1998.

## 2000 Performance Evaluation

In mid-1999, seven months after his transfer to the department, grievant was given an interim evaluation of "Does Not Meet Expectations." During the 1999 performance cycle, the grievant's annual performance evaluation initially rated his overall performance as "Fair but Needs Improvement." Grievant appealed this rating. The agency believed that its initial evaluation was accurate but conceded that it did not have sufficient documentation to substantiate this rating. Therefore, the evaluation for 1999 was revised to "Meets Expectations." During the 2000 performance cycle, the grievant's supervisor documented the grievant's performance much more thoroughly. During the spring of 2000, the grievant was given training at a community college to help him improve his writing ability. Seven months into the 2000 performance cycle, grievant's supervisor met with him on May 31 and June 6, 2000 to counsel him and to provide mid-cycle feedback regarding grievant's performance. These meetings were documented in writing<sup>3</sup> and addressed in considerable detail the areas in which grievant's performance was not meeting expectations.

Up to this time, grievant had been working only four days per week (10 hours per day) as an accommodation to him. Grievant operated an outside consulting business and requested the flextime schedule to allow him more time to pursue his personal business interest. During the May 31-June 6 meeting, it was determined that a mentor would be assigned to the grievant for the next 90 days. It was suggested that grievant work the same hours as his mentor (7:00 a.m. to 3:30 p.m., five days per week). Grievant refused to change his hours and continued to work only four days per week. An offer was made to the grievant to share an office with a coworker to facilitate exchange of ideas and to get questions answered promptly. Grievant also refused to agree to this suggestion. The grievant was asked to demonstrate his commitment to the efforts being made to assist him by signing the memorandum that documented the discussions of the May 31-June 6 meeting; grievant refused to sign the memorandum.

Between June and September 2000, grievant's mentor worked diligently to assist grievant in improving his work product. The mentor reviewed grievant's draft correspondence and offered suggestions for changes, both technical and grammatical. He also made himself available to answer questions from the grievant at any time.

At the end of the 2000 cycle, the grievant's overall evaluation was, "Does Not Meet Minimum Expectations." Grievant refused to sign his evaluation and again appealed. The evaluation and grievant's objections were reviewed by his supervisor, the department manager and the Deputy Director. The Deputy Director concluded that the evaluation ratings, both individual elements and the overall rating, were correct. He directed that two minor comments be removed

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<sup>3</sup> Exhibit 6, page 337.

from the appraisal because one was inappropriate to be in an evaluation and one was irrelevant. Other than the two deletions of comments, the Deputy Director upheld the performance evaluation as written.

Grievant's performance was adjudged to be not meeting expectations in each of the six elements of his performance plan. The 2000 performance evaluation provides detailed comments of the deficiencies in each element as well as overall performance comments. Particularly telling are some of the overall performance comments found in Section I:

[Grievant's] overall performance does not meet expectations. He must be asked several times to complete an assignment. He has told his manager that he did not read the annual reports that he was required to evaluate and respond to. He told his mentor that he added extra hours to the [name redacted] amendment project and he often misplaces reports and letters. ... The manager had to request a plan with quality performance assurance from [grievant] several times before he put one together, demonstrating less than adequate commitment to his position.<sup>4</sup>

One of grievant's major functions was the review of annual reports submitted by customers and the drafting of a response letter to provide the customer with feedback regarding the adequacy of the report and the need to correct any deficiencies found in the report. The established production standard for this process was a maximum of four hours for each review and letter, although the process could often be accomplished in substantially less than four hours. The draft letter was expected to be a finished product ready for supervisory review and release. Grievant's letters frequently contained both technical and grammatical/format errors that required rewriting. Grievant also frequently exceeded the four-hour maximum to complete a review and write an acceptable letter.

A second major function was to provide effective customer support. During the performance cycle, several customers made complaints to the agency about the untimely and inefficient service from grievant as well as incorrect information provided by grievant. The established standard to respond to correspondence from customers was a maximum of 30 days. Grievant failed to meet this requirement on a substantial majority of his correspondence, taking several months and, on some occasions, more than one year to answer inquiries. Customers felt that grievant's responses were, in some instances inaccurate and, in other situations, passed the buck to someone else.

During the spring of 2000, the agency implemented a computer environmental data system that is intended to make available to the public data regarding the waste permitting process for each waste site in the

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<sup>4</sup> Exhibit 5. Performance Evaluation for the 2000 performance cycle.

Commonwealth. Each of the environmental engineers, including grievant, was instructed in May 2000 to obtain computer access to the system and begin inputting data for the sites they supervised. By September 2000, grievant had neither obtained access nor input any data into the system.

When grievant was first assigned to this area in November 1998, he was given 20 facilities to supervise; his two coworkers each had 135 facilities. By August 1999, grievant was considered sufficiently experienced to handle 76 facilities while his coworker had 115 sites. During the first two months of 2000, two newly hired engineers were each given 32 sites. In July 2000, grievant's workload was reduced to 56 sites, the two new engineers were each given 52 sites and grievant's mentor was given 87 sites.

### Three-month reevaluation period

Following the 2000 performance evaluation meeting, a new Performance Plan was developed setting forth specific expectations for the 90-day reevaluation period. Included were the expectations that two annual report letters were to be completed each day and that groundwater data for one assigned facility would be input into the database each day.<sup>5</sup>

It had become apparent during the first half of 2000 that the relationship between grievant and his supervisor was less than ideal. This had resulted in the three-month trial of a mentor from June through August 2000. In September 2000, it was determined that the mentor would become grievant's direct supervisor. The mentor would report to a different supervisor for purposes of providing oversight supervision of the grievant. The former supervisor was taken out of the grievant's supervision loop.<sup>6</sup>

In early October 2000, the mentor/new supervisor determined that all unanswered correspondence that had been accumulating in the grievant's office should be inventoried and prioritized. This provided a tool for the grievant to begin answering the most important correspondence in priority order. The supervisor also prepared a schedule so that grievant could finish all of the correspondence within 90 days.

During the first month of the 90-day period, grievant submitted nine letters for review. All of the letters were unacceptable and required at least one rewrite; some required as many as four rewrites. During the second month, grievant submitted six letters; each required one or more rewrites. During the third month, grievant submitted 37 first drafts that the mentor did not have sufficient time to review. During the 90-day period grievant entered data into the database for only 26 sites instead of the 48 expected. The supervisor's review found that 66

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<sup>5</sup> Inputting data into the database is allowed a maximum of 1.5 hours per facility.

<sup>6</sup> However, because the former supervisor was charged with the accuracy of outgoing annual report letters, he did see the final letters that had been approved by the mentor.

percent of the sites contained incomplete, inaccurate or misleading data. In addition, grievant insisted on entering data in a format different from the format established by the department and being utilized by all other engineers. As this database was intended for public access, the department felt that all data should be entered in one consistent format.

After one month into the 90-day period, grievant's mentor and the mentor's supervisor conducted a performance counseling meeting with grievant on November 16, 2000.<sup>7</sup> The grievant's progress to date was evaluated and he was informed that he was falling significantly short of the schedules that had been established. Grievant was asked what could be done to help him improve; grievant laughed and said he would answer that question in writing after the meeting but he failed to ever do so. Grievant said that his time was accounted for on timesheets but it was pointed out to him that he was not utilizing his time efficiently. For example, most annual report reviews can be completed in significantly less than the four-hour maximum allowed but grievant always recorded at least four hours per review. Grievant also recorded 24 hours on his timesheet for technical reviews of groundwater monitoring plans even though such reviews generally require only five to ten hours each.

Grievant's mentor/supervisor created a precise and detailed evaluation by which to evaluate grievant's correspondence during the 90-day period.<sup>8</sup> Of 44 letters reviewed, 71 percent of the grievant's drafts contained either technical errors (39%) or poor customer service (32%). No first drafts received from grievant were of the quality that could be released for mailing.

The supervisor's performance evaluation dated January 11, 2001 provides a detailed recitation of the deficiencies in grievant's performance. Especially noteworthy is a full page of overall performance comments on page 8. Pertinent observations include:

He does not seem be able to work independently or as a team player. ... [Grievant's] attitude did not convey that of a worker committed to the Agency. ... In addition, during the October 31<sup>st</sup> conversation, [grievant] said he had 24 hours to perform a technical review and since he had completed it in eight hours, he had 16 hours to relax and look at the map and report. ... The first drafts appeared to be hurriedly written without regard to technical accuracy or grammatical correctness.<sup>9</sup>

## APPLICABLE LAW AND OPINION

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<sup>7</sup> Exhibit 7.

<sup>8</sup> Exhibit 9. Pages 124-127. Examples: pages 129-155.

<sup>9</sup> Exhibit 8.

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.1-110 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653, 656 (1989).

Code § 2.1-116.05(A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.1-116.09.

In disciplinary actions and dismissals for unsatisfactory performance, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>10</sup> The following procedural due process is required before disciplinary action:

- Prior to . . . any disciplinary suspension, employees must be given
1. an oral or written notice of the offense,
  2. an explanation of the agency's evidence in support of the charge, and
  3. a reasonable opportunity to respond.<sup>11</sup>

To establish procedures for evaluation of employees of the Commonwealth of Virginia and pursuant to § 2.1-114.5 of the Code of Virginia, the Department of Personnel and Training promulgated Performance Planning and Evaluation Policy No. 1.40 effective September 16, 1993.<sup>12</sup> The objective of the policy is to provide for the establishment and communication of performance expectations, for the evaluation of employees' work performance, and for an incentive pay program to reward employees according to their performance. Performance evaluations are conducted annually for the period of November 1 through October 31. The agency has promulgated its own version of this policy that is similar to the state policy but tailored to the specific needs of the agency.

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<sup>10</sup> § 5.8 Department of Employment Dispute Resolution, *Grievance Procedure Manual*.

<sup>11</sup> Cleveland Board of Education v. Loudermill et al, 470 U.S. 432 (1985).

<sup>12</sup> Exhibit 3.



An employee who receives a rating of "Does Not Meet Minimum Expectations" must be reevaluated, as outlined below:

1. The supervisor of an employee who receives a rating of "Does Not Meet Minimum Expectations" must give the employee a new Performance Plan within two weeks of the date of the evaluation. The supervisor should also give the employee a Developmental Plan if the employee does not have the skills necessary to satisfactorily perform the job.
2. The employee must be re-evaluated three months from the date of the original evaluation. If the employee's rating continues to be "Does Not Meet Minimum Expectations", the employee may be laterally transferred or demoted to another position. If at the end of the next two months, the Agency cannot, or has elected not to, implement either of the options, the employee must be removed from state service.<sup>13</sup>

The evidence in this case establishes that the agency properly followed the process required by Policy 1.40. Following evaluation of the grievant's performance as not meeting minimum expectations, a performance plan of action was developed by the supervisor, and approved by the reviewer on October 10, 2000.<sup>14</sup> Three months later, grievant's performance was reevaluated and still found to be not meeting minimum expectations. The agency considered other possible positions to which grievant might possibly be either transferred or demoted. The agency determined that the only two possible openings were not suitable for the grievant and elected to terminate his employment.

The grievant's mentor/supervisor concluded that grievant was determined to set his own timelines and perform work in his own manner, regardless of the instructions and assistance being given him by supervision. He observed that grievant seemed to be going through the motions, was lackadaisical in his approach to tasks and was just unwilling to work. Grievant was also observed to spend an inordinate amount of time on the telephone taking care of personal matters and/or his outside employment. He carried a beeper that was not related to agency work. All of the agency's witnesses are convinced that the grievant has ample educational background, professional qualification and experience in the agency as well as private industry to perform the requirements of the position.

Grievant asserted several defenses for his failure to achieve the expectations of his position. He complained that his letters were more closely scrutinized during the 90-day period than other employees were. The agency countered that other employees produced initial drafts that required little or no

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<sup>13</sup> Exhibit 2. Department of Environmental Quality Policy 5-1, *Employee Performance Planning and Evaluation*, effective March 1, 1997.

<sup>14</sup> Exhibit 8.

correction while the grievant's letters contained numerous problems. Grievant contends he was "marked" for criticism, however, the overwhelming weight of documentary evidence and testimony reflects that such criticism was warranted. Grievant states that he was not allowed to work overtime during a several-week period in the fall of 2000. During that time, the files of the agency were being audited. The auditors required that all files be locked at night thereby making it impossible for anyone to work overtime.

Grievant believes that his 1999 and 2000 rankings with regard to element number two are inconsistent. His rating in 1999 was "fair but needs improvement" when he failed to meet the timeliness standard (four hours per review) and had technical errors. His rating in 2000 was "does not meet" when he did meet the timeliness standard but still had technical errors. The agency explained that in 1999 he was still new in the department and had been given some leniency due to having less experience than others. By 2000, however, he was now the second most experienced and should have been making few technical errors. Because he was still making a significant number of technical errors, the ranking was deemed appropriate.

Grievant also contended that Policy 5-1 was not followed, however, he has not identified any specific element of that policy. The Hearing Officer finds that the policy was complied with by the agency. Grievant had indicated that his discharge was inappropriate under the Standards of Conduct (Policy 1.60). In fact, however, grievant's discharge occurred pursuant to the Performance Planning and Evaluation policy (1.40), not the Standards of Conduct. Grievant also intimates that racial discrimination was a factor in his discharge but he presented no witnesses or documentation to substantiate his allegation. Mere allegation without some evidence to support the charge is insufficient.

In his grievance of the 2000 performance appraisal, grievant attached a list of eight concerns. Attachment B to the grievance provides a detailed four-page response to each of the grievant's concerns.<sup>15</sup> A substantial preponderance of the evidence presented during the hearing supports the agency's response. Therefore, a discussion of those issues is unnecessary in this decision.

Finally, grievant asserts that the punishment was too harsh. The evidence in this case demonstrates otherwise. Grievant knew in 1999 that the agency considered his performance to be substandard. Although he successfully obtained a change in his performance rating that year, the change was made because of a lack of documentation not because his performance was satisfactory. In any case, there could be no doubt after May 2000 that the grievant's performance was viewed as unsatisfactory. The assignment of a mentor, the 2000 performance evaluation and the assignment of a new

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<sup>15</sup> Exhibit 4. Grievance filed on November 27, 2000.

supervisor all put grievant on notice that he must significantly improve his performance in a short time.

The 90-day performance plan given to him in October 2000 established clear goals, objectives and deadlines. Grievant acknowledged during the hearing that it was inappropriate for him not to have followed agency procedures and, in effect, to write his own rules. Grievant had his own view of how the work should be accomplished. Unfortunately, he failed to recognize that one should perform work in the manner prescribed by the agency, especially when one is faced with possible termination of employment. While grievant appears to have made some effort to improve, his performance, both quantitative and qualitative, fell significantly below the performance plan and below the minimum expectations of the agency. The agency therefore had no choice but to take the action it did.

### DECISION

The decision of the agency is hereby affirmed.

The performance evaluation for the 2000 performance cycle is held to be neither arbitrary nor capricious. The preponderance of available evidence supports the evaluation as written and therefore, the evaluation is AFFIRMED.

The discharge of the grievant effective January 16, 2001 because his performance did not meet minimum expectations during the 90-day reevaluation period is supported by the evidence and is, therefore, AFFIRMED.

### APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in

state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.

3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.
4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, **a challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

#### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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David J. Latham, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Grievance Nos: 5169  
5178

|                                   |                       |
|-----------------------------------|-----------------------|
| Hearing Dates:                    | May 31 & June 1, 2001 |
| Decision Issued:                  | June 4, 2001          |
| Reconsideration Request Received: | June 13, 2001         |
| Response to Reconsideration:      | June 21, 2001         |

**PROCEDURAL ISSUES**

An attorney represented grievant during the hearing. Grievant has filed a pro se request for reconsideration of the Decision and has therefore apparently decided to represent himself in this matter.

Grievant failed to comply with the requirement to provide the other party (agency) with a copy of his request for reconsideration (see Applicable Law cited below). However, in the interest of assisting grievant to understand the Decision, the Hearing Officer will respond to grievant's request.

**APPLICABLE LAW**

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 10 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of the request must be provided to the other party. This request must state the basis for such request; generally, newly

discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.<sup>16</sup>

The Grievance Procedure Manual further provides that a hearing officer's decision becomes final as follows:

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.<sup>17</sup>

### OPINION

This reconsideration responds to the points of grievant's request in the same enumerated sequence as presented in the request.

1. Grievant objects that the agency did not offer the testimony of expert witnesses. The burden of proof in grievance hearings is a preponderance of the evidence.<sup>18</sup> The agency is therefore not required to present expert witnesses. The number of witnesses and quality of evidence presented by the agency with regard to the grievant's job performance outweighed the grievant's testimony and evidence. Grievant makes reference to "DPT policy 1.40 VI.2.b"; as there is no such section, it is assumed he intended to cite section VI.A.2.b. This section of policy 1.40 addresses the requirement that a supervisor discuss recommendations for meeting expectations; it does not require the creation of a separate standard in the performance plan.<sup>19</sup>
2. Grievant observes that his 2000 performance evaluation rated him lower than his 1999 performance evaluation and infers that the lower evaluation was related to his speaking out against discrimination and his filing of a lawsuit. The grievant failed to offer any evidence to show a correlation between his evaluation and his outspokenness or filing of litigation. The evidence does support a finding, however, that the unsatisfactory evaluation was amply supported by the documentation amassed by the agency.
3. Grievant states that the writing skills training course provided to him by the agency was unrelated to his job requirements. No such objection was raised during the hearing on this point. He also contends that he requested "proof writing" training which was denied to him. Grievant has not explained the term "proof writing" and, he also failed to raise this issue during the hearing.

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<sup>16</sup> § 7.2 Department of Employment Dispute Resolution *Grievance Procedure Manual*, effective July 1, 2000.

<sup>17</sup> § 7.2(d) *Ibid.*

<sup>18</sup> § 5.8 *Ibid.*

<sup>19</sup> DHRM Policy 1.40, *Performance Planning and Evaluation*, September 16, 1993.

4. Grievant correctly notes that in the spring of 2000, his supervisor verbally acknowledged some improvement in job performance.<sup>20</sup> However, grievant's overall performance for the entire 2000 performance cycle reflects that the limited improvement in May 2000 was insufficient to outweigh the year's overall substandard performance.
5. The two-letter per day requirement established during the 90-day reevaluation period was a schedule developed to help grievant overcome his substantial backlog of unanswered correspondence. During this time, grievant was not assigned new cases and, based upon the weight of evidence, should have easily been able to respond to two letters per day. Grievant's supervisor was not always able to respond within the five-day goal he had set for himself because he had his own full workload (greater than any other environmental engineer) in addition to overseeing and reviewing grievant's work.
6. The supervisor's written comments on grievant's draft correspondence were self-explanatory and did not require discussion. Grievant could have gone to his supervisor at any time if he had questions about the written comments but did not do so.
7. Grievant did not proffer to this hearing officer any evidence from a handwriting expert. All exhibits proffered by grievant are in the file. It is presumed that grievant is referring to a rejected exhibit (Grievant's Tab 21) consisting of a transcript from a prior grievance hearing conducted by another hearing officer. That transcript includes a discussion about a handwriting expert. Grievant cites Section 2.1-116.05 of the Code of Virginia (which addresses the grievance procedure, not the grievance hearing process), but fails to identify what section he is alleging was violated. A hearing officer has the power to "exclude irrelevant, immaterial, insubstantial, privileged, or repetitive proofs, rebuttals, or cross-examinations."<sup>21</sup> In this case, testimony from another grievance hearing was deemed irrelevant because the case had already been adjudicated and, because the subject matter does not have direct relevancy to grievant's performance during either the 2000 performance cycle or the subsequent 90-day reevaluation period.
8. The documents proffered by grievant do not include a Group II Written Notice. The rejected exhibit found behind grievant's Tab 9 is a grievance relating to the Group II Written Notice. This exhibit was rejected because it was part of a grievance that has been previously adjudicated. Grievant cites exhibit 19 in support of his contention that he was not allowed to enter the office after normal working hours. However, that memorandum notes that the reason for management's request was that a file audit was being conducted during that period of time. Testimony during the hearing further established that no other employees were allowed to work during this time because the files were locked each night during the audit. Testimony also established that no other employees requested overtime or had a need for overtime because they were able to complete their duties and responsibilities during normal working hours.

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<sup>20</sup> Exhibit 29.

<sup>21</sup> § 2.1-116.07.C.5, Code of Virginia.

9. The completion of annual reports within the allowable maximum of four hours is only one aspect of the performance element. The correspondence generated by grievant in response to the annual reports contained errors more than 50 percent of the time. The agency has an obligation to provide report assessments that are free from errors, particularly errors related to the technical issues addressed in the annual reports.

Grievant contends that there were employees with more than seven years of experience but had only 25 sites to oversee but he fails to identify who those employees were. The agency provided testimony and evidence that the only employees with fewer sites were those with less than seven months' experience or the one part-time employee (MW) who had responsibilities in another unit.<sup>22</sup> Grievant did not discuss his exhibit 23 during the hearing. He also did not provide any evidence that MW had not been counseled regarding delays in answering correspondence.

10. It is undisputed that when grievant first attempted to use the CED system, he experienced difficulty. However, grievant was told to start using the system in May but did not attempt to use the system until August 2000. Moreover, when he was unable to access the system in August, he did not immediately request assistance from the Information Technology department to resolve the problem.
11. Grievant alleges a hostile work environment but has provided no evidence to substantiate his allegation. One of the two new hires referred to by grievant was hired on December 25, 1999 and the other was hired on February 25, 2000. As of February 25, 2000, both were assigned 32 sites.<sup>23</sup> The grievant did not raise, either in his own testimony or on cross-examination of the agency witnesses, the question of what the person hired in December 1999 was doing until February 25, 2000.
12. The 90-day performance plan states that annual reports are to be completed within four hours. Testimony during the hearing established that completion includes review of the annual report and generation of a letter that is free from technical, grammatical and typographical errors. Generation of a letter that requires multiple rewrites does not meet the requirement.
13. The issue of grievant's supervision was discussed at length during this hearing. Grievant's objection to the rejection of an exhibit (Tab 21) consisting of a partial transcript of the prior hearing may have some merit. The excerpt from the prior hearing contains relevant information regarding the unusual supervisory relationship created in September 2000. However, given the extensive explanation of this supervisory relationship provided in testimony by both grievant and the agency's witnesses, the rejection of this particular exhibit is, at most, harmless error.

The Hearing Officer carefully considered this supervisory relationship in his deliberations. Given the personnel available, the assignment of grievant's mentor to be his supervisor was probably the best available option. Because the mentor continued to report to the former supervisor regarding the mentor's own work, and because the former supervisor had oversight responsibility for the work product of

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<sup>22</sup> Exhibit 4, agency page 000308.

<sup>23</sup> *Ibid.*



the groundwater department, it was inevitable that there would be occasions when the former supervisor would provide direction to the mentor on technical issues. Nonetheless, the mentor provided the day-to-day supervision, working under the new supervisor to whom the mentor reported in matters involving the grievant.

14. The agency has provided extensive examples<sup>24</sup> which demonstrate that rewrites of grievant's correspondence were necessary to correct technical errors and/or errors in grammar, syntax and format. The time allowance of 24 hours to complete a groundwater-monitoring plan is a maximum. The supervisor's testimony established that most such plans could, and should, be completed in ten or less hours, although a particularly long plan might require up to 24 hours. Grievant felt that he could work at a leisurely pace on every plan and use up the full 24 hours irrespective of the size of the plan.
15. Grievant presented no evidence to substantiate his allegation of ridicule when he completed a project within the allowable time.
16. Grievant cites DPT policy 5.05<sup>25</sup> as a basis for his contention that a "Developmental Plan" should have been provided to him. Grievant's reliance on this policy is misplaced. Policy 5.05 is intended primarily to address the ongoing training conducted by all agencies to develop employees who become more efficient and give them skills necessary to achieve future positions. The immediate focus for grievant was not development for a future position but rather the achievement of a satisfactory level of performance in his existing position. Thus, the applicable policy is found in Section III.A of DPT policy 1.40, which required the development of a new "Performance Plan" for the grievant. Such a plan was developed and it was grievant's failure to satisfactorily perform the job elements of this plan that resulted in his discharge from employment.

Grievant contends that he should not have been discharged until two months after the end of the reevaluation period. The relevant policy states, in pertinent part: "If at the end of the next two months, the Agency cannot, or has elected not to, implement either of the options, the employee must be removed from state service."<sup>26</sup> This same statement is found in DPT policy 1.40.VI.D. The clear language in this policy means that the agency has a maximum of two months within which to either transfer, demote or remove the employee. In this case, the agency promptly determined that neither transfer nor demotion was a viable option and it therefore elected to immediately remove grievant from state service.

Grievant also mistakenly relies on DPT Policy 1.60 (Standards of Conduct). This policy has no applicability in this case because grievant was discharged for failure to achieve minimum performance standards (Policy 1.40), not because of any disciplinary action under the Standards of Conduct.

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<sup>24</sup> Exhibits 6 & 9.

<sup>25</sup> DHRM Policy No: 5.05, *Employee Training and Development*, September 16, 1993.

<sup>26</sup> Exhibit 2. Department of Environmental Quality Policy 5-1, *Employee Performance Planning and Evaluation*, effective March 1, 1997.

Grievant contends that he possesses all nine skills and abilities cited in his position description.<sup>27</sup> Assuming, arguendo, that grievant has all of these skills and abilities, mere possession means only that one meets the entrance requirements for the job. To perform successfully in a position, one must have the ability, desire and work ethic to apply those skills and abilities to the duties and responsibilities assigned by the employer. Employers determine minimum acceptable standards (expectations) to ascertain whether an employee is satisfactorily achieving the assigned duties and responsibilities. In this case, the agency has demonstrated by a preponderance of evidence that grievant did not achieve the minimum expectations of his position.

17. As noted in the preceding paragraph, grievant's discharge was occasioned not by a disciplinary action but by a failure to perform at the minimum expectations. Thus, the mitigating circumstances found in Policy 1.60 are not applicable in this case.

Grievant further contends that unsatisfactory or inadequate performance should be addressed as a Group I offense under the Standards of Conduct Policy. The Standards of Conduct policy is intended to address specific instances of conduct deemed unacceptable. Group I is designated as the least severe type of offense and includes offenses such as: disruptive behavior, use of obscene language, unsatisfactory attendance, abuse of state time, and instances of unsatisfactory work performance. The agency could have given grievant a Group I Written Notice for each instance of unsatisfactory work performance. Upon accumulation of four Group I Written Notices, discharge would occur pursuant to the Standards of Conduct policy.<sup>28</sup> The agency elected to proceed under the Performance Policy, which afforded grievant far more time to address and correct his unsatisfactory performance.

### DECISION

After careful consideration of the grievant's request for reconsideration, it is concluded that there is no basis to amend or reverse the Decision issued on June 4, 2001. Therefore, the Hearing Officer's original decision has become FINAL pursuant to § 7.2(d) of the Grievance Procedure Manual.

### APPEAL RIGHTS

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director of the Department of Employment Dispute Resolution before filing a notice of appeal. The final date to appeal to circuit court is July 21, 2001.

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<sup>27</sup> Exhibit 1.

<sup>28</sup> DPT Policy No: 1.60.VII.D.1.b.(2).

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David J. Latham, Esq.  
Hearing Officer

July 24, 2001

Mr. Kelvin J. Hurdle  
5001 Hallmark Court  
Richmond, VA 23234

**RE: Kelvin J. Hurdle v. Department of Environmental Quality**

Dear Mr. Hurdle:

The Director, Ms. Sarah Redding Wilson, has asked that I respond to your letter in which you challenged the hearing officer's decision in the grievances that you filed against the Department of Environmental Quality (DEQ).

The DEQ gave you a "Does Not Meet Minimum Expectations" as the overall rating for your 2000 performance evaluation. Consequently, a new performance plan was developed and you were reevaluated at the end of a new 90-day period. You did not meet the expectations as spelled out in the new performance plan and were dismissed from DEQ. You filed two grievances, one that alleged that the performance evaluation was arbitrary and capricious and the other that challenged your dismissal from your job. The Director of the Department of Employment Dispute Resolution consolidated the grievances after they progressed through the management steps so the hearing officer could hear them at the same time. In his decision, the hearing officer determined that the 2000 performance evaluation was neither arbitrary nor capricious. He concluded that the preponderance of the available evidence supported the evaluation as written and, therefore, the evaluation was affirmed. He also ruled that you did not meet the minimum expectations during the 90-day re-evaluation period following the 2000 evaluation period and therefore your discharge, effective January 16, 2001, was affirmed.

Concerning your appeal to the Department of Human Resource Management (DHRM), you indicate that your challenge pertains to receiving a disciplinary action under a policy designed for performance planning and evaluation. You indicate that DEQ officials did not adhere to the respective steps of DEQ policy 5-1 as they relate to DHRM Policy 1.40. You aptly state that the Code of Virginia at Section 2.1-114.5 states that the objective of DHRM Policy No.1.40 is to provide for the establishment and communication of performance expectations, for the employee's work performance, and for an incentive pay program to reward employees in accordance to their performance. You contend that the objective of DHRM Policy 1.40 is not to implement disciplinary actions. Rather, DHRM Policy 1.60 is the relevant policy that gives guidance on disciplinary actions. You have concluded that the level of discipline should have been limited to a Group I Written Notice, unsatisfactory or inadequate performance.

In order to respond to your challenge, it is necessary to clarify the roles of the hearing officer and the Director of the Department of Human Resource Management.

Hearing officers have the authority to uphold, modify, or reverse an agency's disciplinary action. The Director of DHRM's role is to review hearing officers' decisions, if challenged, to ensure that they are consistent with written policy as promulgated by DHRM and other state agencies. The Director's authority, however, is limited to directing the hearing officer to revise the decision to conform it to a provision or mandate in DHRM or state agencies' written policy. The Director has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment of the evidence results in a decision that is in violation of state policy.

In the instant case, the hearing officer's decisions to uphold the performance evaluation and the disciplinary action (termination) fall within the authority granted to him by the grievance procedure and does not violate any provision or mandate in DHRM written policy. Concerning applying the provisions of DHRM Policy 1.40\* to dismiss you from your job, I refer you to Section VI D. of that policy. That section requires that after an unsatisfactory re-evaluation, the agency may consider, during the next two months, a lateral transfer to a suitable position or a demotion. If neither option is available, then the employee must be removed from state service. The evidence supports that you received a "Does Not Meet Expectations" upon re-evaluation, the agency was unsuccessful in placing you in a suitable position after the re-evaluation, and you were removed from your job. Because the termination was in accordance with the provisions of policy, there was no policy violation. Therefore, there is no basis for this agency to interfere in this decision.

While you may be disappointed with this decision, our decision was based on the authority granted to this agency under the grievance procedure. If you have any questions concerning this correspondence, please call me at (804) 225-2136.

Sincerely,

Ernest G. Spratley, Manager  
Employment Equity Services

cc: Sara Redding Wilson, Director, DHRM  
David J. Latham, Esq.

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\* The relevant policy, DHRM Policy 1.40, went into effect on 9/10/93.