

Issues: Arbitrary/Capricious Performance Evaluation, Misapplication of Policy, Retaliation; Hearing Date: 12/03/08; Decision Issued: 05/21/09; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 8604; Outcome: No Relief – Agency Upheld in Full. **Administrative Review: AHO Reconsideration Request received 06/04/09; Reconsideration Decision issued 07/24/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 06/04/09; EDR Ruling #2009-2335 issued 10/01/09; Outcome pending: Remanded to AHO; Remand Decision issued 12/23/09; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 06/04/09; DHRM Ruling issued 01/20/10; Outcome: AHO’s decision affirmed; Administrative Review: EDR Ruling Request on Remand Decision received 01/06/10; EDR Ruling #2010-2500 issued 03/12/10; Outcome: AHO’s decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 8604

Hearing Date: December 3, 2008
Decision Issued: May 21, 2009

PROCEDURAL HISTORY

On October 19, 2006, Grievant filed a grievance against the Agency. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. The Agency Head denied qualification. On April 5, 2007, the EDR Director issued Ruling 2007-1538 qualifying the grievance for hearing regarding the issues of retaliation, misapplication or unfair application of policy and whether Grievant's evaluation was arbitrary or capricious. The EDR Director denied Grievant's request to address the issue of discrimination based on political affiliation. Grievant's appealed the EDR Director's Ruling to the local Circuit Court. On January 24, 2008, the local Circuit Court affirmed the EDR Director's Ruling. On October 2, 2008, the Department of Employment Dispute Resolution assigned this grievance to the Hearing Officer. On December 3, 2008, a hearing was held at the Agency's regional office.

Subsequent to the hearing, Grievant sought an additional opportunity to present evidence regarding his case. Grievant asserted that most of the evidence he presented during the hearing related to his evaluation. He seeks to present additional evidence regarding his claim of retaliation. The Hearing Officer denies this request. Grievant did not properly manage his time during the hearing. He was given ample opportunity and more time than the Agency to present his case in chief. To the extent he did not fully present his case regarding retaliation, it was because he presented redundant and unnecessary information regarding misapplication of policy and his evaluation. Even with the time allowed to Grievant regarding his claim of retaliation, there is no reason to believe Grievant lacked sufficient time to present that aspect of his claim. The Hearing Officer fully understands Grievant's position in this grievance regarding his claim of retaliation.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency retaliated against Grievant?
2. Whether the Agency misapplied or unfairly applied policy?
3. Whether Grievant's performance evaluation was arbitrary and capricious?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the relief he seeks should be granted. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of State Police employs Grievant as a Trooper. He has been employed by the Agency since 1998.

The Agency rates employee's performance using five ratings as follows:

| | |
|---------------------------|--|
| Extraordinary Contributor | Work that is characterized by sustained exemplary accomplishments throughout the rating period; performance that is considerably and consistently well above the criteria of the job function. |
| Major Contributor | Work that is characterized by strong performance of basic job duties, accented by numerous extra efforts which exceed basic job performance. |
| Contributor | Work that is characterized by successfully performing job |

| | |
|----------------------|---|
| | responsibilities; independently demonstrating appropriate knowledge, skills and abilities; and demonstrating required work and behavior competencies. |
| Marginal Contributor | Work not quite at the Contributor level, but demonstrating the capability to improve with additional training. |
| Below Contributor | Work that fails to meet the criteria of the job function. |

On September 29, 2005, Grievant signed an Employee Work Profile effective November 1, 2005. The EWP listed Grievant's Core Responsibilities as:

- A. Performs Bomb/Explosives Canine Specialty
- B. Promote Highway Safety
- C. Complete and File Reports
- D. Investigate Crashes
- E. Investigate Criminal Activity
- F. Public Liaison and Other Agency Cooperation
- G. Maintain Equipment and Professional Standards¹

Grievant had been working as part of the canine program for approximately three years. In the fall of 2005, Grievant was issued a particular vehicle to use for his duties with a canine. He altered the vehicle without obtaining the Agency's permission. He altered the vehicle in a manner to improve the conditions for the dog and to enable Grievant to safely operate the vehicle, according to Grievant. When Grievant returned the vehicle after approximately one month to the State Police garage, an Agency employee observed the alteration and notified Agency managers who began an investigation. On January 23, 2006, Sergeant D notified Grievant of a complaint that he had altered an Agency vehicle and that the complaint had been referred to Sergeant D for investigation.² Grievant and Sergeant D met on February 3, 2006. During that meeting, Grievant admitted he altered the Agency's vehicle. Sergeant D told Grievant to remove the items he had installed in his vehicle and return the vehicle to its original configuration. Grievant provided written justification for his actions to Sergeant D by memorandum dated February 5, 2006.³

On March 16, 2006, Sergeant D made a routine vehicle inspection of Grievant's vehicle. Sergeant D noticed that Grievant had not removed the divider as instructed.

Captain M wrote Grievant a memorandum dated March 17, 2006 which stated, in part, "Effective immediately you are relieved from the Explosives Detection Canine Program."⁴

¹ Grievant Exhibit 11.

² Grievant Exhibit 1.

³ Grievant Exhibit 2.

⁴ Grievant Exhibit 22.

On March 18, 2006, Grievant wrote a letter to Sergeant C regarding safety concerns in the canine program.

Grievant wrote a memorandum dated March 18, 2006 to Captain M asking “to meet with the head of the Bureau of Field Operations of the Virginia Department of State Police, relating to matters of public safety and my involuntary removal from the Virginia State Police’s canine program.”⁵

Captain M wrote Grievant a memorandum dated March 20, 2006 stating, in part,

You are being removed from the Explosive Detection Canine Program due to the fact you continue to demonstrate you are not suitable for such a trusted position. ***

There is nothing more important in specialty work than close adherence to policy and you have demonstrated you are either unwilling or unable to comply with the Standards of Conduct.⁶

Grievant was assigned a new vehicle on March 16, 2006. Grievant wrote a memorandum to Sergeant D dated March 24, 2006 in which he listed items needing repair and indicating that he would have those repairs made.

On April 5, 2006, Grievant and Sergeant D met in Sergeant D’s office.⁷ They discussed several matters including Grievant’s new EWP which was signed by Grievant and Sergeant D at that time. The EWP had been signed by the Reviewer on March 20, 2006.⁸ Sergeant D also mentioned to Grievant that there appeared to be a down turn in Grievant’s enforcement activities. Grievant was advised of the lack of enforcement efforts on his part. They decided to review Grievant efforts again in 30 days. Sergeant D drafted a memorandum to Grievant outlining the discussion they had during the meeting.⁹ Grievant drafted a memorandum dated April 7, 2006 outlining what he and Sergeant D discussed and expressing his belief that he was being harassed and intimidated. In addition, Grievant wrote, “I request an interim Performance Evaluation for my first three quarters of this fiscal year.”¹⁰

⁵ Grievant Exhibit 22.

⁶ Grievant Exhibit 22.

⁷ Sergeant D first approached Sergeant T to discuss his concerns about Grievant’s performance. Sergeant T told Sergeant D to have a meeting with Grievant and to document the meeting.

⁸ Grievant Exhibit 5.

⁹ Agency Exhibit E.

¹⁰ Grievant Exhibit 6.

Sergeant D and Grievant were scheduled to meet on May 30, 2006 regarding Grievant's work performance. That meeting was not held. On June 14, 2006, Grievant wrote a memorandum to Sergeant T expressing his frustration with Sergeant D. He also mentioned that he asked for an interim performance evaluation from Sergeant D but had not yet received it.

In June 2006, Grievant and the Virginia Troopers Union, by counsel, filed a complaint in the local Circuit Court seeking injunctive relief. The Defendants were the Commonwealth of Virginia, the Colonel, and Captain M. Grievant sought an injunction to prevent his removal and further damage to the Virginia Troopers Union. Grievant alleged the defendants violated his rights under the Constitution of Virginia and the Virginia Right to Work Law.¹¹

On July 6, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension and transfer for insubordination or serious breach of discipline in violation of General Order 19, paragraph 14(B)(4). The Written Notice arose from Grievant's failure to follow Sergeant D's instruction given on February 3, 2006 to return his vehicle to its original condition. As part of its disciplinary determination, the Agency seeks "endorsements" from various supervisors and managers in the Agency. Sergeant D wrote an endorsement stating, in part:

I am unable to find any mitigating circumstances which justify [Grievant's] retention as a member of this Department. [Grievant's] continued disruptive behavior indicates that he is unwilling and incapable of following procedures outlined by this Department or orders given to him by supervision. This makes [Grievant's] continued employment with the Virginia Department of State Police a liability. Given the totality of [Grievant's] employment record with the Department, it is my opinion the retention of [Grievant] would have grave negative consequences. I recommend the immediate termination of his employment. Anything else would be malfeasant.¹²

Grievant appealed the discipline and alleged retaliation because he had achieved prominence as the President of the Virginia Trooper's Alliance. On October 3, 2006, the Hearing Officer reduced the Group III to a Group II Written Notice. The suspension was upheld but the transfer was reversed. Grievant's request for relief due to alleged retaliation was denied.¹³

On July 6, 2006, Grievant filed a discrimination complaint with the DHRM Office of Equal Employment Services.¹⁴ His claim was later denied.

¹¹ Grievant Exhibit 31.

¹² Grievant Exhibit 19.

¹³ Grievant's claim for discrimination and workplace harassment was also denied by the Hearing Officer.

¹⁴ Grievant Exhibit 32.

On July 19, 2006, Sergeant D gave Grievant an interim performance evaluation. It was reviewed and signed by Sergeant W on July 19, 2006. Grievant did not sign the evaluation because it was placed in his mailbox. The interim evaluation showed Grievant's work performance in all categories but one to be "Contributor" with an overall rating of "Contributor. With respect to the Core Responsibility of "Maintain Equipment and Professional Standards", Grievant received a rating of "Marginal Contributor." In the Comments section, Sergeant D wrote, "[Grievant] during this period was disciplined for altering his assigned patrol vehicles."¹⁵ On July 21, 2006, Grievant sent a memorandum to Sergeant T asking for reconsideration of that interim evaluation.

Sergeant D remained Grievant's supervisor until July 25, 2006 when Sergeant S assumed those duties.

On August 20, 2006, Grievant submitted a self evaluation for his 2006 evaluation. He listed his supervisor as Sergeant S. He rated himself as "Extraordinary Contributor" for all of his core responsibilities. He rated is overall performance as "Extraordinary Contributor."

On October 7, 2006, Grievant was given an evaluation by Sergeant D describing his overall rating as "Contributor".¹⁶ In particular, his evaluation read, in part:

| Core Responsibilities | Rating | Comments |
|---|---------------------------|---|
| Promote Highway Safety | Contributor | |
| Investigate Crashes | Contributor | |
| Investigate Criminal Activity | Extraordinary Contributor | [Grievant] had 22 felonies, seven narcotic and 33 misdemeanor arrests during this reporting period. |
| Complete and File Reports | Major Contributor | [Grievant] submits complete reports in a neat and timely fashion. |
| Public Liaison and Other Agency Cooperation | Contributor | |
| Maintain Equipment and Professional Standards | Marginal Contributor | [Grievant] has twice been disciplined for altering his patrol vehicle. |

On October 10, 2006, Grievant sent a memorandum to Sergeant T asking for reconsideration of the October 7, 2006 evaluation.¹⁷

On October 10, 2006, Grievant returned to the Area and resumed being supervised by Sergeant D.

¹⁵ Grievant Exhibit 9.

¹⁶ Grievant Exhibit 10.

¹⁷ This evaluation showed the effective date of November 1, 2005.

On October 11, 2006, Grievant filed an SP-103 Complaint/Request/Incident Report alleging Sergeant D:

selectively [misapplied] policy and procedure by returning reports to me for reasons only applied to myself. These actions are retaliation for participating in the grievance process and requesting reconsideration on my annual performance evaluation. This harassment and retaliation impedes my ability (and in turn the ability of the Department) to perform stated duty.¹⁸

On November 8, 2006, Lieutenant Colonel S responded to a letter dated October 29, 2006 from Grievant seeking reinstatement into the explosives/weapons detection canine program as a handler. The response stated, in part:

The Department reserves the right to manage all specialty operations to include the canine program in a way that benefits the Department and the citizens of the Commonwealth. This management includes appointments, operations, and deployments of specialty programs. Your removal from this program did not adversely impact your seniority or opportunity for career progression and you suffered no loss of compensation.

Your failure to follow established policy and written instructions precludes me from returning you to the canine program.¹⁹

Grievant sent the Colonel a memorandum dated November 28, 2006 stating:

In accordance with Grievance Procedure rules and applicable law, I respectfully request to be promoted to Senior Trooper with the effective date in June of 2006 or earlier, when I was first eligible and not properly promoted.²⁰

On December 7, 2006, the Colonel denied Grievant's request for promotion because, "you do not meet the requirements of General Order 74, paragraph 3.a.(2)."²¹

On December 7, 2006, Grievant received through inter-agency mail another evaluation.²² The evaluation was effective March 20, 2006. This evaluation stated, in part:

¹⁸ Grievant Exhibit 50.

¹⁹ Grievant Exhibit 22.

²⁰ Grievant Exhibit 22.

²¹ Grievant Exhibit 22.

²² Grievant Exhibit 13.

| Core Responsibilities | Rating | Comments |
|---|---------------------------|---|
| Promote Highway Safety | Contributor | |
| Investigate Crashes | Contributor | |
| Investigate Criminal Activity | Extraordinary Contributor | [Grievant] had 22 felonies, seven narcotic and 33 misdemeanor arrests during this reporting period. |
| Complete and File Reports | Major Contributor | [Grievant] submits complete reports in a neat and timely fashion. |
| Public Liaison and Other Agency Cooperation | Contributor | |
| Maintain Equipment and Professional Standards | Marginal Contributor | [Grievant] has been disciplined for Alteration of Vehicle and Failure to Obey a Director Order during this rating period. |

In section 36 of the evaluation, Sergeant D wrote:

During the approximately first six months of this performance evaluation period, [Grievant] was assigned as an explosives canine handler. This evaluation takes the performance of this specialty into consideration including input from the Virginia State Police Academy Canine Coordinator for matters addressed in item F of Section 33.

While Grievant was a canine handler, he missed a sufficient amount of canine training time such that the Canine Training Coordinator believed the best rating Grievant could receive regarding training/maintenance that occurred at the State Police Academy was Contributor.

As part of the Step Process, the Third Step Respondent changed the comment in the Maintain Equipment and Professional Standards part of Grievant's evaluation to read:

[Grievant] has twice been disciplined for altering his patrol vehicle.

The rating for that Core Responsibility did not change. The Third Step Respondent also determined that the, "statement should include a brief assessment of performance and rating for canine related job duties as described on the work profile dated September 29, 2005."²³

On January 1, 2006, Grievant formed the Virginia Troopers Union. In August 2006, the organization was renamed the Virginia Troopers Alliance. The mission of the organization is "to be a highly ethical, nonprofit, sworn employee's labor organization, sponsoring Departmental change in order to better the professional and personal lives

²³ Agency Exhibit A.

of Virginia Troopers and to voice and promote positive change regarding job related issues that affect employee welfare and Departmental mission accomplishments. The mission is also to “work with and support the International Union of Police Association and their affiliates.”²⁴ Grievant served as the President of the Virginia Troopers Alliance. The union was featured in a local newspaper article. In the article, the Colonel said he met with the three founding members of the union to discuss their plans. The Colonel said:

‘It was cordial,’ he said of the meeting. ‘It doesn’t offend me at this point as long as it doesn’t breed any divisiveness.

The article also quoted a spokesman for the Governor who said, “the governor is opposed to unionizing public safety employees.”²⁵ The Virginia Troopers Alliance issues a quarterly newsletter and has a website.

Many Agency employees have a close relationship with the Virginia State Police Association (VSPA). The VSPA was formed in 1974. There are approximately 2000 members in the VSPA. On February 18, 2006, the Board of Directors of the VSPA made a unanimous resolution that:

this organization is adamantly opposed to the formation of any public safety union by public employees in the Commonwealth of Virginia, be they state or locally based. Such organizations inherently oppose the Commonwealth’s prohibition of collective bargaining or strikes by public employees.

The Virginia State Police Association, Inc., formed in 1974, is not now, has not been, and will not be a union, and is in no way related to the purported Virginia Troopers Union.²⁶

On February 26, 2007, Colonel F wrote a memorandum to the file regarding a sole source procurement. He wrote, in part:

The Department of State Police and the Virginia State Police Association (VSPA) have a mutual desire to establish a retail store within the Department of State Police Academy ... known as room 329. This location is convenience to persons attending or visiting the academy. *** There would be no need or desire to establish a store operated by any other vendor. *** The term of the lease began on September 29, 2006 and

²⁴ Grievant Exhibit 53.

²⁵ Grievant Exhibit 54.

²⁶ Grievant Exhibit 39.

terminates on September 29, 2008. The lease is automatically renewed and continued from year to year, unless otherwise terminated.²⁷

The lease had been approved by the Senior Assistant Attorney General on November 30, 2006.

In April 2007, Grievant went to “Motor School” to become a member of the Motor Program. This program involves four troopers who ride motorcycles. They work during the day time and usually have weekends off. They attend parades and funerals as well as conducting enforcement activities. Sergeant D had become the supervisor of the program prior to Grievant’s transfer there in August 2007. Captain P could have denied Grievant’s request to enter the Motor Program but he spoke with Sergeant D who indicated he did not object to having Grievant as a Trooper in the program.

On April 11, 2008, Grievant initiated a request for an investigation under the Fair Labor Standards Act regarding alleged violations by the Virginia State Police.²⁸

As part of Grievant’s 2008 performance evaluation, Sergeant D rated Grievant overall as an Extraordinary Contributor.

CONCLUSIONS OF POLICY

Grievant raises three issues for consideration. When the facts are taken as a whole and considered under existing Agency policy, Grievant has not established a basis to grant relief.

Misapplication or Unfair Application of Policy

General Order 11 governs the Agency’s performance management system.²⁹ General Order 11 defines, “Core Responsibility” as:

A statement used to describe a major duty and/or objective of an employee’s job, specific to the assignment of an employee during the rating period.

An “Evaluating Supervisor” is defined as:

²⁷ Grievant Exhibit 61.

²⁸ Grievant Exhibit 66.

²⁹ The Agency presented General Order 11, revised July 1, 2006, as Agency Exhibit H. Grievant did not present a copy of General Order 11.

The person who has responsibility and authority to direct and monitor work activities and work performance of the employee and has been assigned to conduct the performance evaluation.

General Order 11 establishes the performance cycle as beginning on October 25th and ending on October 24th of the following year.

At the beginning of the performance cycle, the supervisor should schedule a performance planning meeting with each employee within 30 days from the beginning of each performance cycle. Supervisors are to review the Employee Work Profile (EWP) for each employee to ensure core responsibilities and performance measures are appropriate. The EWP is signed by the supervisor, reviewer and then by the employee. The original EWP is to be retained in the Division/Unit supervisor's file until the end of the performance cycle.

Changes may be made to the core responsibilities during the performance cycle. As changes occur in the duties of the position, the supervisor shall review and revise the EWP, sign the document, and forward it to the reviewer. When changes are made to the EWP, the effective date shall also be revised. Once the reviewer signs the EWP, the supervisor shall meet with the employee and discuss the changes. The revised EWP must be signed by the employee. The EWP shall be marked "Revised" and forwarded to the Personnel Division of the Agency.

Interim performance evaluations provide an opportunity to give structured feedback to employee on their progress toward meeting performance expectations. They can be conducted at any time during the performance cycle. A supervisor must complete an interim evaluation when the supervisor is experiencing performance deficiencies with an employee and when the evaluation is requested by the employee. The word "INTERIM" shall be clearly written at the top of the EWP form used.

Once the interim evaluation is approved by the reviewer, the supervisor shall meet with the employee to discuss the results of the evaluation. The employee shall be given an opportunity to sign and make comments on the interim evaluation. If the employee refuses to sign the interim evaluation, the supervisor should note that on the evaluation. The employee is to be given a copy of the evaluation and the completed interim performance evaluation should be maintained in the supervisor's file.

Between August 10 and October 15, supervisors must have written annual performance evaluations finalized. If an employee transfers to a new assignment after the second week in August, the employee's previous supervisor remains responsible for the performance rating on the EWP. The rating should be completed, signed by the supervisor, reviewer, and employee. Employees are given the opportunity to complete a self-assessment. If the employee disagrees with the evaluation and cannot resolve the disagreement with the supervisor, the employee may appeal to the reviewer for reconsideration.

Grievant has not identified any reasons for the Hearing Officer to remand the matter to the Agency for reapplication of General Order 11. For example, Grievant contends the Agency should have considered his canine duties as part of the evaluation. The evidence showed that Sergeant D did consider Grievant's canine duties. Captain P contacted the Canine Coordinator to obtain input from him regarding Grievant's canine duties.

Grievant contends that Sergeant S should have conducted his October 2006 evaluation instead of Sergeant D. Sergeant D was Grievant's supervisor until July 25, 2006 when Sergeant S took over that responsibility. Supervisory responsibility returned to Sergeant D on October 10, 2006 when Grievant returned to the Area. At the end of the performance cycle on October 24, 2006, Sergeant D was Grievant's supervisor. Sergeant D had been Grievant's supervisor for the majority of the year. According to Grievant, Sergeant S supervised Grievant for only a few days and not several months as was the case for Sergeant D.

Grievant was given an evaluation on October 7, 2006 based on an EWP effective November 1, 2005. That EWP did not list his canine duties even though he had part of the canine program until March 17, 2006. When Grievant pointed out this error, the Agency corrected it. The 2006 evaluation under consideration in this appeal addresses Grievant's canine duties.

Grievant argues his performance evaluations were tampered with and falsified. Only the final 2006 annual performance evaluation is before the Hearing Officer for consideration of its merits. It was not falsified or tampered with. If the Hearing Officer assumes for the sake of argument that the prior drafts were falsified or tampered with, it would not affect the outcome of whether the final draft was consistent with policy.

Grievant has identified several ways in which the Agency failed to comply with General Order 11. None of these errors are material. None of them would otherwise affect the outcome of this case. None of them would require a revision of the 2006 annual performance evaluation. The errors identified by Grievant amount to harmless error.

For example, General Order 11 provides that "a supervisor should schedule a performance planning meeting with each employee within 30 days from the beginning of each performance cycle." This provision is discretionary. Grievant's supervisors did not consistently meet with him 30 days from the beginning of the performance cycle to review the core responsibilities of his position.

General Order 11 required Grievant's supervisor to keep copies of Grievant's EWPs in the supervisor's file. Sergeant D's file on Grievant did not contain all of Grievant's EWPs.

General Order 11 provides that Grievant's original EWP should be retained in the unit supervisor's file until the end of the cycle. This was not done.

Several versions of evaluations were given to Grievant without giving him the opportunity to review them. The signature line showed Grievant had refused to sign the evaluation even though the evaluation had not been given to Grievant for his signature.

General Order 11(4)(g) provides that when an EWP is revised during the performance cycle, the EWP should be clearly marked "Revised". Sergeant D would often not mark Grievant's evaluations as "Revised."

Grievant contends he should have been given two interim evaluations. The first one should have been given because he requested the interim evaluation. The second should have been given because he was transferred. Grievant was given only one interim evaluation. Even if the Hearing Officer adopts Grievant's interpretation of General Order 11(8), having an additional interim evaluation performed by Sergeant D would not likely have changed the final annual evaluation written by Sergeant D.

Grievant contends he should have been given his interim evaluation more timely after his request on April 5, 2006 to Sergeant D. He contends he would have been able to improve his work performance with the interim evaluation. This argument is untenable. On April 5, 2006, Sergeant D informed Grievant that his work performance was lacking in terms of enforcement. Grievant rejected that opinion and rejected the opinion of Sergeant D when Sergeant D ultimately issued the interim evaluation in July 2006. There is no reason to believe that Grievant would have altered his work performance had Sergeant D issued the interim evaluation more timely.

Arbitrary or Capricious Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their employees. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

Grievant received an annual evaluation for 2006. He appealed that evaluation and the Agency revised the evaluation. It is the final draft of the 2006 evaluation that is under consideration as to whether it is arbitrary or capricious.

Grievant argues that his 2006 evaluation was arbitrary and capricious and that this conclusion can be discerned by comparing his evaluations prior to and after 2006. The Agency argues that Grievant's work performance before and after the 2006 performance cycle was Extraordinary but his work performance in 2006 decreased.

For the Core Responsibility of Promote Highway Safety, Grievant received a rating of Extraordinary Contributor for his 2005 evaluation. He wrote 654 summonses for a daily average of 7.98.³⁰ In 2006, however, Grievant's self evaluation showed that he wrote 549 summons with a daily average of 5.4. For his 2007 evaluation, Grievant received a rating of Extraordinary Contributor. He wrote 865 summons and arrests with a daily average of 9.0 despite having extra duties such as being a Field Training officer. Grievant received a Contributor rating for that Core Responsibility in 2006. The Agency's opinion that Grievant's work performance in 2006 was less than Extraordinary Contributor for the Core Responsibility of Promote Highway Safety is supported by the evidence because his daily average in 2006 (as a contributor) was much lower than his daily average in 2005 and 2007 (as an extraordinary contributor).

The Agency contends Grievant's work performance "dipped" beginning in the middle of the performance cycle which resulted in a meeting on April 5, 2006 between Sergeant D and Grievant. During that meeting, they discussed Grievant's "apparent down turn in enforcement efforts."³¹ This opinion is confirmed by Grievant's per day average of total arrests and summons. In the period from August 2005 through October 2005, Grievant had a 4.85 average. From November 2005 through January 2006, Grievant's average increased to 6.07. From February 2006 through April 2006, however, Grievant's average dropped to 3.71. The decrease from 6.07 to 3.71 supports the Agency's assertion that Grievant's enforcement activity decreased during the performance cycle.³²

For Core Responsibility of Investigate Crashes, Grievant received a rating of Extraordinary Contributor for his 2005 evaluation. He investigated 166 traffic crashes with a charge rate of 100%. On his 2006 evaluation, Grievant received a Contributor rating. According to his self-evaluation, Grievant worked 62 reportable crashes and 111 non-reportable crashes with a charge rate of 100%. On his 2007 evaluation, Grievant received a rating of Extraordinary Contributor. He investigated 114 crashes with 73 of them reportable. It is unclear whether the statistics as presented by Grievant are the same as those presented in Grievant's evaluation by the Agency. For example, in Grievant's 2005 evaluation, the Agency stated Grievant investigated 166 crashes. It does not distinguish between reported and non-reported crashes. In 2007, the Agency indicates Grievant investigated 114 crashes with 73 of them reportable. Presumably 41 of them were non-reportable (114 minus 73 = 41). Of the 166 traffic crashes mentioned in the 2005 evaluation, it is unclear how many are reportable or non-reportable. Based on the evidence presented, it is possible that Grievant received a lower rating for Investigate Crashes than he should have. The Hearing Officer is unable to form this

³⁰ On Grievant's self-evaluation for 2005, he wrote that he had a daily average of 12.7. See Grievant Exhibit 16.

³¹ Agency Exhibit E.

³² Agency Exhibit D. In addition, from May 2006 through July 2006, Grievant's average dropped further to 3.22.

conclusion with certainty given it is unclear whether the same statistics are being compared from year to year.

For the Core Responsibility of Investigate Criminal Activity, Grievant received a rating of Extraordinary Contributor on his 2006 evaluation.

For the Core Responsibility of Complete and File Reports, Grievant received a rating of Major Contributor on his 2006 evaluation. Grievant did not receive an Extraordinary Contributor rating because he turned in two reports with errors that needed to be returned to him for correction.³³

For the Core Responsibility of Public Liaison and Other Agency Cooperation, Grievant received a rating of Contributor on his 2006 evaluation. One of the Measures for Core Responsibilities for this core responsibility is:

Effective working relationships are established with supervisors, co-workers, clients, and/or customers.

Sergeant D testified he initially gave Grievant a rating of Marginal Contributor but met with the reviewer and decided to raise it to Contributor. Sergeant D testified that during the evaluation period, he was met with hostility from Grievant. When he tried to find out why Grievant was having so many problems, Grievant responded with hostility. For example, Sergeant H asked to meet with Grievant and told Grievant that he had been a good trooper in the past and wanted to know what was going on now with Grievant. The following day Grievant writes a letter saying he was not free to leave the meeting because the door was closed. Sergeant D testified that Grievant shut the door and never asked to leave during the meeting. The degree of conflict Grievant showed towards Sergeant D is a sufficient fact upon which the Agency could rely to conclude that Grievant should receive a Contributor rating for this core responsibility.

For the Core Responsibility of Maintain Equipment and Professional Standards, Grievant received a rating of Marginal Contributor on his 2006 evaluation. This rating was appropriate because Grievant was counseled for altering the equipment on vehicle 12³⁴ and disciplined for altering vehicle 127 and disregarding an instruction to restore the vehicle to its original condition.

Grievant contends the Agency should have given him an overall rating of Extraordinary Contributor on his 2006 evaluation. General Order 11(11)(c)(3) provides that to, "achieve an overall rating of 'Extraordinary Contributor', an employee shall not have a 'Marginal Contributor' or 'Below Contributor' rating on any core responsibility." Grievant received a Marginal Contributor rating for the Core Responsibility of Maintain

³³ See Agency Exhibit F.

³⁴ See Agency Exhibit B.

Equipment and Professional Standards. Accordingly, Grievant could not have been given an overall rating of Extraordinary Contributor on his 2006 evaluation.

Grievant contends the Agency should have given him an overall rating of at least Major Contributor on his 2006 evaluation. General Order 11(11)(c)(2) provides that to, “achieve an overall rating of ‘Major Contributor’, an employee shall have ratings of ‘Major Contributor’ or above on at least 50% of all core responsibilities and no more than one rating at the marginal or below contributor level.” Grievant received one Major Contributor and one Extraordinary Contributor on his 2006 evaluation. Thus, two of six (or 33%) of his core responsibilities were above contributor. Grievant could not have been given an overall rating of Major Contributor on his 2006 evaluation.

Grievant argues that the Agency scheduled his court dates during the K-9 training and, thus, he could not attend the training. He contends the Agency’s assessment of his K-9 duties as being at a “contributor” level is arbitrary. If the Agency had scheduled Grievant’s court dates intentionally so that he would miss the K-9 training, Grievant may have an argument towards retaliation. The evidence is unclear how Grievant’s court dates were set and by whom. What is clear is that Grievant did not attend the K-9 training. The absence of such training would be a fact for the Agency to consider when concluding to rate Grievant’s work performance on the K-9 unit as “contributor”.

Grievant has not established that the Agency’s evaluation of his work performance was arbitrary or capricious.

Retaliation

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;³⁵ (2) suffered a materially adverse action³⁶; and (3) a causal link exists between the adverse action and the protected activity; in other words, management took an adverse action because the employee had engaged in the protected activity. If the agency presents a nonretaliatory business reason for the adverse action, retaliation is not established unless the Grievant’s evidence shows by a preponderance of the evidence that the Agency’s stated reason was a mere pretext or excuse for retaliation. Evidence establishing a

³⁵ See Va. Code § 2.2-3004(A)(v) and (vi). The following activities are protected activities under the grievance procedure: participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before the Congress or the General Assembly, reporting an incidence of fraud, abuse or gross mismanagement, or exercising any right otherwise protected by law.

³⁶ On July 19, 2006, in Ruling Nos., 2005-1064, 2006-1169, and 2006-1283, the EDR Director adopted the “materially adverse” standard for qualification decisions based on retaliation. A materially adverse action is, an action which well might have dissuaded a reasonable worker from engaging in a protected activity.

causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.³⁷

Grievant had engaged in several protected acts. For example, he has filed grievances to challenge disciplinary action. He has formed a union with co-workers and actively participated in that organization.³⁸ He filed legal proceedings in Circuit Court against the Agency and several employees. Grievant wrote a memorandum to Sergeant C describing his concerns with safety in the canine program. He filed complaints of discrimination and retaliation.

Grievant suffered a materially adverse action. His work performance in 2006 was rated lower than the prior year.

The EDR Director qualified the issue for the Hearing Officer to consider as:

(1) whether a causal connection exists between his past protected acts and his 2006 performance evaluation; and (2) whether the agency's stated reason for the grievant's performance rating was an excuse for retaliation.

Grievant has not established a causal connection between his protected activities and his 2006 performance evaluation. Grievant has established the Virginia State Police Association had a preference that Grievant's union not flourish or advance. The VSPA includes many members of the State Police including supervisors and managers. This evidence standing alone is not sufficient to establish retaliation. The VSPA's dislike of Grievant's union is not materially different from the Governor's position to oppose unionizing public safety employees.³⁹ The Colonel expressed concern about the union but said it would be okay if the union did not bring about divisiveness. Having an aversion or dislike of unions does not by itself establish that the person who dislikes the union is willing to retaliate against someone in that union. In this case, the decisions regarding Grievant's 2006 evaluation were made by Sergeant D and those reviewing Sergeant D's opinion of Grievant's work performance. Grievant has not established that Sergeant D took action against Grievant because of Grievant's union activities. The reviewers of Sergeant D's opinion about Grievant's work performance were generally favorable to Grievant. The reviewers were inclined to raise the ratings of Grievant's work performance. If they wanted to retaliate against, Grievant they should have left Sergeant D's evaluation as it was originally drafted.

³⁷ This framework is established by the EDR Director. See, EDR Ruling No. 2007-1530, Page 5, (Feb. 2, 2007) and EDR Ruling No. 2007-1561 and 1587, Page 5, (June 25, 2007).

³⁸ Va. Code § 40.1-58 states the public policy of Virginia is "that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization."

³⁹ The Hearing Officer is assuming the newspaper article correctly presented the Governor's statements.

Grievant's 2006 evaluation was not an excuse or pretext for retaliation against Grievant. Based on the evidence presented, it appears that Grievant's work performance decreased in 2006 when compared to other years. Grievant's 2006 evaluation as amended by the Agency during its review process expresses fairly an opinion of Grievant's work performance during that period. Sergeant D and Captain P testified they did not retaliate against Grievant because of his protected activities. Their testimony was credible.

Grievant contends the Agency retaliated against him. He cites as examples the ongoing conflict he had with Sergeant D and other staff at the Agency. He believes that this conflict arose, in part, because of his union activities and resentment following from those activities. The conflict Grievant experienced with Sergeant D and several other staff at the Agency did not arise because of Grievant's union activities. Grievant's is unique in many respects. He is extraordinarily intelligent, hard working, and determined. He is by any objective measure, today and has been for many years, a "Trooper's Trooper". Although not expressly stated during the hearing, it was clear to the Hearing Officer that Grievant carried the well-earned respect of every witness. Along with Grievant's ability comes a confidence that sometimes leads to stubbornness. When Grievant believes he is correct and that a supervisor has made a mistake, Grievant is quick to point out the error and drive home the point. Some of the conflict he has experienced with superior officers resulted from Grievant's insistence on pointing out their errors (even minor errors) and demanding correction. Some of the conflict Grievant experienced with superior officers resulted from his disregard of their instructions. On January 21, 2005, Grievant disregarded the instructions of a Sergeant acting as Public Information Officer regarding how Grievant should treat a cameraman at a crash site. Grievant disregarded the instruction of Sergeant D given on February 3, 2006 to reverse the alterations Grievant made to his canine vehicle. The result of the tension between Grievant and some of his superior officers was tension. In short, the hostility Grievant may sometimes feel coming from Agency supervisors is primarily a result of a conflict of personality and not a result of resentment regarding Grievant's union participation.

DECISION

For the reasons stated herein, Grievant's request for relief is **denied**.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to 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:

Director
Department of Employment Dispute Resolution
600 East Main St. STE 301
Richmond, VA 23219

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 give a copy of all of your appeals to the other party and to the EDR Director. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for 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.⁴⁰

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

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8604-R

Reconsideration Decision Issued: July 24, 2009

RECONSIDERATION DECISION

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the aggrieved party until after the hearing ended. However, the fact that a party discovered the evidence after the hearing does not necessarily make it “newly discovered.” Rather, the party must show that:

- (1) the evidence is newly discovered since the date of the Hearing Decision;
- (2) due diligence on the part of the party seeking reconsideration to discover the new evidence has been exercised;
- (3) the evidence is not merely cumulative or impeaching;
- (4) the evidence is material; and
- (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the Hearing Decision to be amended.

Grievant restates statistics that support his assertion that his evaluation was arbitrary and capricious. Statistics are only part of the analysis and the Hearing Officer fully considered his arguments at the hearing. Grievant’s argument is not newly discovered evidence or evidence of an incorrect legal conclusion.

Grievant points out that he was transferred in 2006 and the transfer affected his work performance. This is the same argument Grievant made during the hearing. Grievant was not transferred in retaliation or for any improper purpose. Grievant admits

that the transfer affected his work performance. This supports the Agency's conclusion that Grievant's work performance decreased in 2006.

Grievant contends he was denied the opportunity to present his full case regarding retaliation.⁴¹ Grievant had more than an ample opportunity to present his case for retaliation. He presented many facts and arguments regarding retaliation. The Hearing Officer has no reason to believe Grievant failed to present any material evidence regarding his claim for retaliation. Grievant did not manage his time well during the hearing. He presented many irrelevant and redundant facts and assertions regarding his performance evaluation and apparently did so at the expense of his claim for retaliation. Following the hearing, the Hearing Officer sent Grievant a letter asking him to proffer the additional evidence he wished to present. He offered no details regarding the additional facts he wished to present. It appears that Grievant simply wishes to talk more about the issue. Such a discussion appears to be cumulative as the thrust of Grievant's claim of retaliation has already been presented.

The Hearing Officer addressed the final evaluations with respect to determining which evaluation was supposedly arbitrary and capricious. The number of evaluations issued by the Agency could be evidence of retaliation, but in this case the number of draft evaluations made reflects Grievant's desire and the Agency's desire to establish the appropriate opinion regarding Grievant's work performance. The number of drafts does not show the Agency retaliated in this case.

Grievant restates his argument that Agency employees falsified documents. No credible evidence was presented to show that any Agency employee falsified any documents. Sometimes mistakes and omission of signatures were made, but none were made with intent to falsify documents. Grievant argued that a supervisor wrote "refused to sign" on several of his draft evaluations when in fact he had not been presented with the documents. If the Hearing Officer assumes for the sake of argument that this assertion is true, it does not establish an arbitrary or capricious evaluation or retaliation. It most likely reflects lethargy and a desire by the supervisor to avoid additional confrontation with Grievant.

Grievant argues he attempted to make up missed canine handler meetings but Sergeant C indicted it was unnecessary to do so. In hindsight, it may have been a mistake for the Agency to deny Grievant the opportunity to make up the canine handler meeting dates, but it does not show that his evaluation was arbitrary or capricious.⁴²

⁴¹ Grievant contends he was denied his "one day" for the hearing. The Grievance Procedure Manual does not give one day to the Grievant to present his case. It authorized one day for the grievance hearing which would include the Agency's response. The Hearing Officer allowed Grievant substantially more time than was allowed to the Agency. The theory of Grievant's case is not complex, yet Grievant dwelled on every "sin" of the Agency regardless of whether that alleged facts related to the theory of his case. Grievant inefficiently used the ample time afforded to him to present his case.

⁴² There is no reason to believe Grievant was denied the opportunity to retake missed classes in order to retaliate against Grievant or to single out Grievant based on some improper reason.

The Sergeant who evaluated Grievant took into consideration that Grievant did not attend the necessary training. He did not disregard material facts as part of his evaluation of Grievant's work performance.

Grievant contends the Hearing Officer was biased against him. The Hearing Officer's docket is set solely by the EDR Director. The standard by which the Hearing Officer must determine whether recusal is appropriate is governed by several EDR policies.

Section II of the Rules for Conducting Grievance Hearings states that a Hearing Officer is responsible for:

Voluntarily disqualifying himself or herself and withdrawing from any case (i) in which he or she cannot guarantee a fair and impartial hearing or decision, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.

EDR Policy 2.10 provides:

A hearing officer must voluntarily disqualify himself or herself and withdraw from any case in which he or she cannot guarantee a fair and impartial hearing or decision or when required by the applicable rules governing the practice of law in Virginia. Upon notification that a hearing officer has withdrawn, EDR will notify the parties and reinstate the process to select a new hearing officer. A request from either party to a grievance for the disqualification of a hearing officer must be in writing and will be addressed as a compliance ruling.

In EDR Director Ruling 2004-934, the EDR Director stated:

This standard for the disqualification of a judge is an objective one; there must be evidence that would convince a reasonable man that bias exists. In addition, it is well settled that while a judge has duty to recuse himself if his "impartiality might reasonably be questioned," he has a concomitant obligation not to recuse himself absent a valid reason for recusal. The mere fact that a judge has ruled against a party is, by itself, generally insufficient to warrant recusal. (Citations omitted).

This Hearing Officer viewed Grievant's case independently and based upon the facts presented in that hearing. Grievant offers no evidence of bias. Merely because Grievant was dissatisfied with prior rulings by the Hearing Officer is not a basis to establish bias. Grievant's complaint about the delay in issuing the decision does not form a basis to grant him relief.

The request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. For this reason, the request for reconsideration is **denied**.

APPEAL RIGHTS

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

1. The 15 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 DHRM, 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.

Carl Wilson Schmidt, Esq.
Hearing Officer



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8604-R2

Reconsideration Decision Issued: December 23, 2009

RECONSIDERATION DECISION

The EDR Director issued Ruling 2009-2335 remanding this case to the Hearing Officer for further consideration.

The Ruling states, in part:

Here, while the hearing officer concludes that the Sergeant did not disregard material facts when evaluating the grievant, as discussed below, the hearing officer does not explain why apparent evidence that the grievant was purportedly not permitted to make up training time and was allegedly told that it was not necessary to do so, are not material facts.

The statement that “[t]here is no reason to believe Grievant was denied the opportunity to retake missed classes in order to retaliate against Grievant or to single out Grievant based on some improper reason,” addresses retaliation but does not fully address the grievant’s arbitrary or capricious claim because it does not necessarily follow that because a decision is not retaliatory, it cannot be arbitrary. Although the Sergeant who evaluated Grievant may have taken into consideration that the grievant did not attend the necessary training, testimony and evidence that the grievant was not allowed to make up missed training and was told that he did not have to, seems to be, at least on its face, potentially both relevant and material. [Footnote omitted]. Thus, the hearing officer is asked to clarify why they are not.

The original hearing decision only contained material and relevant facts which is why the Hearing Officer mentioned Grievant's interaction with Agency staff regarding his training.⁴³ Simply because a fact is material and relevant does not mean it supports a particular parties' position. Although the Hearing Officer might have evaluated Grievant differently knowing that Grievant had sought to make up training but was not permitted to do so, this does not make the Agency's evaluation of Grievant arbitrary or capricious. Grievant brought to the Agency's attention that he sought to make up the training and was not permitted to do so. It might not have been "fair" to Grievant to deny him the opportunity to make up the training; however, the Agency is entitled to make decisions regarding its operations needs such as that it needed Grievant to perform duties more pressing than making up training. There is no reason to believe that Grievant was denied training for any malevolent reason such as attempting to reduce Grievant's performance evaluation or to retaliate against him for his union affiliation. Part of the definition of arbitrary and capricious includes disregarding facts. In this case, the Agency did not disregard that (1) Grievant did not attend certain training, (2) Grievant sought to make up the training and (3) the Agency denied Grievant's request to make up the training.⁴⁴ Grievant's evaluation takes into consideration all of these facts. The Agency did not disregard material and relevant facts. Its evaluation is not without a reasoned basis. The Agency's evaluation of Grievant was not arbitrary or capricious.

APPEAL RIGHTS

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

3. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, 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.

⁴³ An assertion that the Hearing Officer found these facts not to be material or relevant is incorrect.

⁴⁴ The Agency's expectation of its employees including Grievant is that they perform at a level sufficient for them to be contributors. It may be the case that the Agency's manager decided that Grievant could perform his job sufficiently (at a contributor level) without making up the training and that Grievant's time would be better spent on other more significant duties to the Agency. Such a decision would be appropriate for Agency managers to make and would not render Grievant's evaluation arbitrary or capricious even if it served to deny Grievant a higher rating regarding training.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Virginia State Police

January 20, 2010

The grievant has requested an administrative review of the hearing officer's decision in Case No. 8604. The grievant requested a reconsideration of the decision by the hearing officer and an administrative review from the Department of Employment Dispute Resolution (EDR). The hearing officer did not revise his decision based on the grievant's request. The EDR remanded the decision to the hearing officer for reconsideration of several issues. Upon a second reconsideration, the hearing officer did not revise his decision. The agency head of the Department of Human Resource Management has asked that I respond to this request for an administrative review.

FACTS

The hearing officer decision stated, in part, the following:

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of State Police employs Grievant as a Trooper. He has been employed by the Agency since 1998. The Agency rates employee's performance using five ratings as follows:

| | |
|---------------------------|---|
| Extraordinary Contributor | Work that is characterized by sustained exemplary accomplishments throughout the rating period; performance that is considerably and consistently well above the criteria of the job function. |
| Major Contributor | Work that is characterized by strong performance of basic job duties, accented by numerous extra efforts which exceed basic job performance. |
| Contributor | Work that is characterized by successfully performing job responsibilities; independently demonstrating appropriate knowledge, skills and abilities; and demonstrating required work and behavior competencies. |
| | |
| Marginal Contributor | Work not quite at the Contributor level, but demonstrating the capability to improve with additional training. |
| Below Contributor | Work that fails to meet the criteria of the job function. |

On September 29, 2005, Grievant signed an Employee Work Profile effective November 1, 2005. The EWP listed Grievant's Core Responsibilities as:

- A. Perform Bomb/Explosives Canine Specialty
- B. Promote Highway Safety
- C. Complete and File Reports
- D. Investigate Crashes
- E. Investigate Criminal Activity
- F. Public Liaison and Other Agency Cooperation

G. Maintain Equipment and Professional Standards¹

Grievant had been working as part of the canine program for approximately three years. In the fall of 2005, Grievant was issued a particular vehicle to use for his duties with a canine. He altered the vehicle without obtaining the Agency's permission. He altered the vehicle in a manner to improve the conditions for the dog and to enable Grievant to safely operate the vehicle, according to Grievant. When Grievant returned the vehicle after approximately one month to the State Police garage, an Agency employee observed the alteration and notified Agency managers who began an investigation. On January 23, 2006, Sergeant D notified Grievant of a complaint that he had altered an Agency vehicle and that the complaint had been referred to Sergeant D for investigation. Grievant and Sergeant D met on February 3, 2006. During that meeting, Grievant admitted he altered the Agency's vehicle. Sergeant D told Grievant to remove the items he had installed in his vehicle and return the vehicle to its original configuration. Grievant provided written justification for his actions to Sergeant D by memorandum dated February 5, 2006.

On March 16, 2006, Sergeant D made a routine vehicle inspection of Grievant's vehicle. Sergeant D noticed that Grievant had not removed the divider as instructed.

Captain M wrote Grievant a memorandum dated March 17, 2006 which stated, in part, "Effective immediately you are relieved from the Explosives Detection Canine Program."

¹ Grievant Exhibit 11.

² Grievant Exhibit 1.

³ Grievant Exhibit 2.

⁴ Grievant Exhibit 22.

On March 18, 2006, Grievant wrote a letter to Sergeant C regarding safety concerns in the canine program.

Grievant wrote a memorandum dated March 18, 2006 to Captain M asking "to meet with the head of the Bureau of Field Operations of the Virginia Department of State Police, relating to matters of public safety and my involuntary removal from the Virginia State Police's canine program."

Captain M wrote Grievant a memorandum dated March 20, 2006 stating, in part, "You are being removed from the Explosive Detection Canine Program due to the fact you continue to demonstrate you are not suitable for such a trusted position. ***"

There is nothing more important in specialty work than close adherence to policy and you have demonstrated you are either unwilling or unable to comply with the Standards of Conduct.

Grievant was assigned a new vehicle on March 16, 2006. Grievant wrote a memorandum to Sergeant D dated March 24, 2006 in which he listed items needing repair and indicating that he would have those repairs made.

On April 5, 2006, Grievant and Sergeant D met in Sergeant D's office.⁷ They discussed several matters including Grievant's new EWP which was signed by Grievant and Sergeant D at that time. The EWP had been signed by the Reviewer on March 20, 2006. Sergeant D also mentioned to Grievant that there appeared to be a down turn in Grievant's enforcement

activities. Grievant was advised of the lack of enforcement efforts on his part. They decided to review Grievant efforts again in 30 days. Sergeant D drafted a memorandum to Grievant outlining the discussion they had during the meeting. Grievant drafted a memorandum dated April 7, 2006 outlining what he and Sergeant D discussed and expressing his belief that he was being harassed and intimidated. In addition, Grievant wrote, "I request an interim Performance Evaluation for my first three quarters of this fiscal year."

⁵ Grievant Exhibit 22.

⁶ Grievant Exhibit 22.

⁷ Sergeant D first approached Sergeant T to discuss his concerns about Grievant's performance. Sergeant T told Sergeant D to have a meeting with Grievant and to document the meeting.

⁸ Grievant Exhibit 5.

⁹ Agency Exhibit E.

¹⁰ Grievant Exhibit 6.

Sergeant D and Grievant were scheduled to meet on May 30, 2006 regarding Grievant's work performance. That meeting was not held. On June 14, 2006, Grievant wrote a memorandum to Sergeant T expressing his frustration with Sergeant D. He also mentioned that he asked for an interim performance evaluation from Sergeant D but had not yet received it.

In June 2006, Grievant and the Virginia Troopers Union, by counsel, filed a complaint in the local Circuit Court seeking injunctive relief. The Defendants were the Commonwealth of Virginia, the Colonel, and Captain M. Grievant sought an injunction to prevent his removal and further damage to the Virginia Troopers Union. Grievant alleged the defendants violated his rights under the Constitution of Virginia and the Virginia Right to Work Law.

On July 6, 2006, Grievant was issued a Group III Written Notice of disciplinary action with suspension and transfer for insubordination or serious breach of discipline in violation of General Order 19, paragraph 14(B)(4). The Written Notice arose from Grievant's failure to follow Sergeant D's instruction given on February 3, 2006 to return his vehicle to its original condition. As part of its disciplinary determination, the Agency seeks "endorsements" from various supervisors and managers in the Agency. Sergeant D wrote an endorsement stating, in part:

I am unable to find any mitigating circumstances which justify [Grievant's] retention as a member of this Department. [Grievant's] continued disruptive behavior indicates that he is unwilling and incapable of following procedures outlined by this Department or orders given to him by supervision. This makes [Grievant's] continued employment with the Virginia Department of State Police a liability. Given the totality of [Grievant's] employment record with the Department, it is my opinion the retention of [Grievant] would have grave negative consequences. I recommend the immediate termination of his employment. Anything else would be malfeasant.

Grievant appealed the discipline and alleged retaliation because he had achieved prominence as the President of the Virginia Trooper's Alliance. On October 3, 2006, the Hearing Officer reduced the Group III to a Group II Written Notice. The suspension was upheld but the transfer was reversed. Grievant's request for relief due to alleged retaliation was denied.

On July 6, 2006, Grievant filed a discrimination complaint with the DHRM Office of Equal Employment Services. His claim was later denied.

¹¹ Grievant Exhibit 31.

¹² Grievant Exhibit 19.

¹³ Grievant's claim for discrimination and workplace harassment was also denied by the Hearing Officer.

¹⁴ Grievant Exhibit 32.

On July 19, 2006, Sergeant D gave Grievant an interim performance evaluation. It was reviewed and signed by Sergeant W on July 19, 2006. Grievant did not sign the evaluation because it was placed in his mailbox. The interim evaluation showed Grievant's work performance in all categories but one to be "Contributor" with an overall rating of "Contributor. With respect to the Core Responsibility of "Maintain Equipment and Professional Standards", Grievant received a rating of "Marginal Contributor." In the Comments section, Sergeant D wrote, "[Grievant] during this period was disciplined for altering his assigned patrol vehicles." On July 21, 2006, Grievant sent a memorandum to Sergeant T asking for reconsideration of that interim evaluation.

Sergeant D remained Grievant's supervisor until July 25, 2006 when Sergeant S assumed those duties.

On August 20, 2006, Grievant submitted a self evaluation for his 2006 evaluation. He listed his supervisor as Sergeant S. He rated himself as "Extraordinary Contributor" for all of his core responsibilities. He rated is overall performance as "Extraordinary Contributor."

On October 7, 2006, Grievant was given an evaluation by Sergeant D describing his overall rating as "Contributor".¹⁶ In particular, his evaluation read, in part:

| Core Responsibilities | Rating | Comments |
|---|---------------------------|---|
| Promote Highway Safety | Contributor | |
| Investigate Crashes | Contributor | |
| Investigate Criminal Activity | Extraordinary Contributor | [Grievant] had 22 felonies, seven narcotic and 33 misdemeanor arrests during this reporting period. |
| Complete and File Reports | Major Contributor | [Grievant] submits complete reports in a neat and timely fashion. |
| Public Liaison and Other Agency Cooperation | Contributor | |
| Maintain Equipment and Professional Standards | Marginal Contributor | [Grievant] has twice been disciplined for altering his patrol vehicle. |

On October 10, 2006, Grievant sent a memorandum to Sergeant T asking for reconsideration of the October 7, 2006 evaluation.

On October 10, 2006, Grievant returned to the Area and resumed being supervised by Sergeant D.

¹⁵ Grievant Exhibit 9.

¹⁶ Grievant Exhibit 10.

¹⁷ This evaluation showed the effective date of November 1, 2005.

On October 11, 2006, Grievant filed an SP-103 Complaint/Request/Incident Report alleging Sergeant D "selectively [misapplied] policy and procedure by returning reports to me for reasons only applied to myself. These actions are retaliation for participating in the grievance process and requesting reconsideration on my annual performance evaluation. This harassment

and retaliation impedes my ability (and in turn the ability of the Department) to perform stated^{18,} duty.

On November 8, 2006, Lieutenant Colonel S responded to a letter dated October 29, 2006 from Grievant seeking reinstatement into the explosives/weapons detection canine program as a handler. The response stated, in part:

The Department reserves the right to manage all specialty operations to include the canine program in a way that benefits the Department and the citizens of the Commonwealth. This management includes appointments, operations, and deployments of specialty programs. Your removal from this program did not adversely impact your seniority or opportunity for career progression and you suffered no loss of compensation. Your failure to follow established¹⁹ policy and written instructions precludes me from returning you to the canine program.

Grievant sent the Colonel a memorandum dated November 28, 2006 stating:

In accordance with Grievance Procedure rules and applicable law, I respectfully request to be promoted to Senior Trooper with the effective date in June of

2006 or earlier, when I was first eligible and not properly promoted.²⁰

On December 7, 2006, the Colonel denied Grievant's request for promotion because, "you do not meet the requirements of General Order 74, paragraph 3.a.(2)."²²

On December 7, 2006, Grievant received through inter-agency mail another evaluation.²² The evaluation was effective March 20, 2006. This evaluation stated, in part:

¹⁸ Grievant Exhibit 50.

¹⁹ Grievant Exhibit 22.

²⁰ Grievant Exhibit 22.

²¹ Grievant Exhibit 22.

²² Grievant Exhibit 13.

| Core Responsibilities | Rating | Comments |
|---|---------------------------|---|
| Promote Highway Safety | Contributor | |
| Investigate Crashes | Contributor | |
| Investigate Criminal Activity | Extraordinary Contributor | [Grievant] had 22 felonies, seven narcotic and 33 misdemeanor arrests during this reporting period. |
| Complete and File Reports | Major Contributor | [Grievant] submits complete reports in a neat and timely fashion. |
| Public Liaison and Other Agency Cooperation | Contributor | |
| Maintain Equipment and Professional Standards | Marginal Contributor | [Grievant] has been disciplined for Alteration of Vehicle and Failure to Obey a Director Order during this rating period. |

In section 36 of the evaluation, Sergeant D wrote:

During the approximately first six months of this performance evaluation period, [Grievant] was assigned as an explosives canine handler. This evaluation takes the performance of this

specialty into consideration including input from the Virginia State Police Academy Canine Coordinator for matters addressed in item F of Section 33.

While Grievant was a canine handler, he missed a sufficient amount of canine training time such that the Canine Training Coordinator believed the best rating Grievant could receive regarding training/maintenance that occurred at the State Police Academy was Contributor.

As part of the Step Process, the Third Step Respondent changed the comment in the Maintain Equipment and Professional Standards part of Grievant's evaluation to read:

[Grievant] has twice been disciplined for altering his patrol vehicle.

The rating for that Core Responsibility did not change. The Third Step Respondent also determined that the, "statement should include a brief assessment of performance and rating

for canine related job duties as described on the work profile dated September 29, 2005."²³

On January 1, 2006, Grievant formed the Virginia Troopers Union. In August 2006, the organization was renamed the Virginia Troopers Alliance. The mission of the organization is "to be a highly ethical, nonprofit, sworn employee's labor organization, sponsoring Departmental change in order to better the professional and personal lives of Virginia Troopers and to voice and promote positive change regarding job related issues that affect employee welfare and Departmental mission accomplishments.

²³ Agency Exhibit A.

The mission is also to "work with and support the International Union of Police Association and their affiliates."²⁴ Grievant served as the President of the Virginia Troopers Alliance. The union was featured in a local newspaper article. In the article, the Colonel said he met with the three founding members of the union to discuss their plans. The Colonel said:

'It was cordial,' he said of the meeting. 'It doesn't offend me at this point as long as it doesn't breed any divisiveness.

The article also quoted a spokesman for the Governor who said, "the governor is opposed to unionizing public safety employees."²⁵ The Virginia Troopers Alliance issues a quarterly newsletter and has a website.

Many Agency employees have a close relationship with the Virginia State Police Association (VSPA). The VSPA was formed in 1974. There are approximately 2000 members in the VSPA. On February 18, 2006, the Board of Directors of the VSPA made a unanimous resolution that:

this organization is adamantly opposed to the formation of any public safety union by public employees in the Commonwealth of Virginia, be they state or locally based. Such organizations inherently oppose the Commonwealth's prohibition of collective bargaining or strikes by public employees.

The Virginia State Police Association, Inc., formed in 1974, is not now, has not been, and will not be a union, and is in no way related to the purported Virginia Troopers Union.²⁶

On February 26, 2007, Colonel F wrote a memorandum to the file regarding sole source procurement. He wrote, in part:

The Department of State Police and the Virginia State Police Association (VSPA) have a mutual desire to establish a retail store within the Department of State Police Academy ... known as room 329. This location is convenience to persons attending or visiting the academy. *** There would be no need or desire to establish a store operated by any other vendor. *** The term of the lease began on September 29, 2006 and terminates on

September 29, 2008. The lease is automatically renewed and continued from year to year, unless otherwise terminated.²⁷

²⁴ Grievant Exhibit 53.

²⁵ Grievant Exhibit 54.

²⁶ Grievant Exhibit 39.

The lease had been approved by the Senior Assistant Attorney General on November 30, 2006.

In April 2007, Grievant went to “Motor School” to become a member of the Motor Program. This program involves four troopers who ride motorcycles. They work during the day time and usually have weekends off. They attend parades and funerals as well as conducting enforcement activities. Sergeant D had become the supervisor of the program prior to Grievant’s transfer there in August 2007. Captain P could have denied Grievant’s request to enter the Motor Program but he spoke with Sergeant D who indicated he did not object to having Grievant as a Trooper in the program.

On April 11, 2008, Grievant initiated a request for an investigation under the Fair Labor Standards Act regarding alleged violations by the Virginia State Police.²⁸

As part of Grievant’s 2008 performance evaluation, Sergeant D rated Grievant overall as an Extraordinary Contributor.

Relevant policies include the Department of Human Resource Management’s Policy No.1.40, Performance Planning and Evaluation, which “provides for the establishment and communication of employees’ performance and procedures for evaluating employees’ performance.” The VSP has developed its own set of guidelines, similar to those as outlined in Policy 1.60, that govern communicating employee’s performance and procedures for evaluating employees’ performance.

DISCUSSION

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. In addition, in cases involving discipline, the hearing officer reviews the facts to determine whether the cited actions constitute misconduct and whether there are mitigating circumstances to justify reduction or removal of the disciplinary action. If misconduct is found, but the hearing officer determines that the disciplinary action is too severe, he may reduce the discipline. By statute, the DHRM has the authority to determine whether the hearing officer’s decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department’s authority, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department 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 results in a decision that is in violation of policy and procedure.

In his appeal to this Agency, the grievant challenges that he was not permitted to make up certain training activities he missed during the 2006 performance cycle before his supervisor completed his performance evaluation. Summarily, he contends that he was ordered to appear in court on days during which he was supposed to be in canine training classes and other job-related training and was not given the opportunity to make up those trainings. He was rated for the year on the tasks he had performed up to the time the performance cycle ended without receiving any credit for those classes he missed. Thus, he contends that the provisions of the performance evaluation policy were not adhered to because he was not given the opportunity to complete his training and thus be rated on his entire performance.

Concerning the grievant not completing all the relevant training during the performance rating, the hearing officer wrote:

During the approximately first six months of this performance evaluation period, [Grievant] was assigned as an explosives canine handler. This evaluation takes the performance of this specialty into consideration.

While the grievant was a canine handler, he missed a sufficient amount of canine training time such that the Canine Training Coordinator believed the best rating the grievant could receive regarding training/maintenance that occurred at the State Police Academy was Contributor.

DHRM Policy No. 1.40 states that to the extent possible, performance evaluations should reflect performance levels for the entire performance cycle. In the instant case, it appears that because the grievant did not complete the training, the supervisor properly consulted with the Canine Training Coordinator and made an assessment of the grievant's performance absent his completing the training. This Agency deems this to have been a proper action, given that the grievant was not penalized for not completing the training.

Therefore, the Department of Human Resource Management will not interfere with the application of the hearing officer's decision.

Ernest G. Spratley
Assistant Director, Office of
Employment Services

Equal