

Issue: Separation from State (poor performance); Hearing Date: 06/16/09; Decision Issued: 07/16/09; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 9103; Outcome: Partial Relief; **Administrative Review: AHO Reconsideration Request received 07/31/09; Reconsideration Decision issued 08/27/09; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 09/11/09; EDR Ruling #2010-2428 issued 01/11/10; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/31/09; DHRM Ruling issued 03/05/10; Outcome: AHO's decision affirmed.**



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 9103

Hearing Date: June 16, 2009
Decision Issued: July 16, 2009

PROCEDURAL HISTORY

Grievant was removed from employment based on a 90 day performance re-evaluation with a rating of Below Contributor. On February 24, 2009, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On May 21, 2009, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On June 16, 2009, a hearing was held at the Agency's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether the Agency's evaluation of Grievant was arbitrary or capricious?
2. Whether the Agency complied with State policy?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its removal of Grievant was in accordance with State policy. 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 Transportation employed Grievant as a Transportation Contract Administrator. The purpose of his position was:

Support Residency Maintenance and Construction Programs by developing contracts and monitoring preliminary engineering activities. Utilize copied notes, iPM, FMS II, RUMS, Trans*Port, ISYP and formulate the Secondary Improvement Six Year Plan Budget.

Grievant worked for the Agency for over 16 years. He reported to the Assistant Resident Administrator who had been Grievant's supervisor for approximately four years.

On February 1, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance regarding the issues of:

Timeliness in meeting scheduled deadlines.
Ensuring work is complete and accurate.

On October 28, 2008, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

On November 12, 2008, the Supervisor presented Grievant with a memorandum and a Performance Improvement Plan. The memorandum stated, in part:

During your performance evaluation conducted October 28, 2008, you were informed that your performance was not acceptable and needed improvement. We discussed techniques to assist you with improving your work performance. I also discussed that I would be evaluating you on your work performance after a three-month period and for the next year as a result of your overall rating of "Below Contributor".

The current issues of concern are:

Timeliness in meeting scheduled deadlines.
Ensuring work is complete and accurate.

These are the same issues that resulted in your previous verbal warning and your subsequent counseling during the performance cycle for 2006 -- 2007. Even though I have continued to coach you and seek your input and agreement on deadlines set for contracts of mission, you have continued to miss deadlines for contracts submittals. These missed deadlines are unacceptable and in the attached re-evaluation plan, I am setting out specific timeliness and meeting dates for us to work on your performance.

One example of your missing deadlines is the round of contracts submitted during the month of October. You only submitted two out of six contracts due that month on time. In addition, I continue to find errors in the contracts that you submit. For example, on the District Wide Crack Sealing Contract, I asked you if you had put the correct contract and estimate on the P drive per our normal procedures. You said you had but when I checked the P drive, the wrong estimate was attached to the contract. Similarly in all six contract reviews, I found numerous areas that had been identified in the first review of the contract but were not corrected in the subsequent contracts submittal. In some cases, it took three "In house" reviews per contract to get the initial review changes made correctly.

These actions are very typical of your work performance and have resulted in late contract advertisements. As a result of your failure to improve your work product, I am issuing you this written warning and I will work with you and a re-evaluation plan over the next three months.

The Performance Improvement Plan stated, in part:

This is to advise [Grievant] that a re-evaluation will be conducted beginning immediately and will last through February 2009. The first bi-weekly meeting will take place starting November 24, 2008 at 8:30 a.m. and my office to discuss and review assigned tasks and general work performance. The following meetings will be put on the Outlook Calendar as a reminder to you. [Grievant] needs to understand that my door is always open, it is better to ask questions than to assume. He also needs to know that failure to make the following significant improvements in his work performance will likely lead to termination. Should improvements be made over this three-month period, then the review will extend at three-month intervals over the next year.

During the next three months, and all of the next year (2009), I expect [Grievant] to provide me work assigned within the set deadlines. Also, I

expect [Grievant] to get the complete scope of the project prior to beginning development of the contract. It will be unacceptable to revise the scope after the contract is submitted for in-house review, unless the scope is changed by the sponsor during the contract development stage. Furthermore, it is expected that the initial submittal for in-house review will be made to provide adequate time for such review and will have only limited errors or revisions. However, after the first in-house review, I will expect the revise contract and estimate to come back with all noted errors and revisions being made and that the TRANSPORT estimate matches the contract and the contract qualifies. Similarly, when comments come back to the Residency from the District Review, it is expected that all the comments will be addressed and that all revisions are made prior to the second in-house review in the required time frame as needed to meet the second in-house review and to meet the proposed Advertisement Schedule. For task assigned, e.g. money transfers, contract notifications, requisitions, etc., they are expected to be made within the time frame given with no errors.

The following assignments are provided below with assigned dates:

1. Concrete Repair [P and S] Residency Contract ***
2. Pipes Contract ***
3. Bridge Deck Replacement and Steel Painting Contract ***
4. District Wide Crack Sealing Contract ***
5. Intersection Improvement Contract ***
6. Bridge Deck Replacement and Steel FY10 Contract ***
7. Contact FY10 Contract ***

Grievant was responsible for drafting the contracts and sending them to the Assistant Resident Administrator for review. The Assistant Resident Administrator worked with the Resident Administrator to complete an "in-house" review. Following the in-house review, the contract is sent to the District office for a constructability review. A constructability review committee looks at the contract from the perspective of the contractor who will have to comply with the terms of the contract once it is executed. Following a review by the District office, the contract is sent to the Central office so that VDOT Central office employees can consider the Transport estimate of the cost of the contract and any contingencies.

On January 30, 2009, Grievant received a re-evaluation with an overall rating of Below Contributor. He was removed from employment effective January 30, 2009.

CONCLUSIONS OF POLICY

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.

DHRM Policy 1.40, Performance Planning and Evaluation sets forth the procedures for re-evaluating employees who receive a Below Contributor rating on their annual evaluations.

“Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee’s supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.”

The Agency’s re-evaluation plan is consistent with State policy. Grievant was consulted regarding the duties and deadlines expected during the re-evaluation period. He expressed no objection to the plan or its terms. The Agency’s expectations of Grievant’s work performance during the re-evaluation period were not unreasonable. At least four of the contracts for which Grievant was responsible were template contracts. A template contract is one that is used repeatedly for similar contracts. It requires editing by the Contract Administrator as opposed to the drafting of a unique contract. Some of Grievant’s job duties were removed so that he could focus on the work set forth in the re-evaluation plan. The Assistant Resident Administrator estimated 60 percent of Grievant’s duties were removed during the re-evaluation period.

“The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period. If an employee is absent for more than 14 consecutive days during the three (3)-month re-evaluation period, the period will be extended by the total number of days of absence, including the first 14 days.”

The Agency’s evaluation of Grievant was not arbitrary or capricious. Grievant was re-evaluated in accordance with State policy. Although the Agency has not established that every error it alleged Grievant made was actually made, it has presented sufficient evidence to support its assertion that Grievant’s work contained a sufficient number of errors to justify a below contributor rating. Some of these errors are as follows:

Contract 1: Concrete Repair [P and S] Residency Contract. During the third in-house review, Agency managers discovered that the quantity for “Patching Cem. Conc. Pave. Ty CRCP-A” did not match the totals of this same item on the “Summary of Estimated Quantities”. Grievant did not use the CEI budget that was provided by the Constructability Review Committee resulting in an error in Grievant’s estimate.

Contract 2: Pipes Contract. Grievant was instructed to include a note about the aggregate material but the note was not included on the contract submitted for in-house review. When the note was added for the second in-house review, the rate per ton was not incorporated in the note and remained that way through the fourth in-house review. The Table of Contents showed the note on Sheet 14 but it was actually on Sheet 13. For the second in-house review, the General Notes on page 58 were no longer numbered. Notes previously numbered 4, 5, and 6 were missing from the second submittal.

Contract 3: Bridge Deck Replacement and Steel Painting Contract. The title sheet was incomplete. The signature block was not signed and dated. The contract required that all steel services be painted but Grievant's estimate did not include an estimate for painting all surfaces.

Contract 4: District Wide Crack Sealing Contract. Some of the contract sheets had incorrect numbering. The table of contents had incorrect sheet numbering and some items were missing such as Title Sheet, General Notes, and Summary of Estimated Quantities. The title sheet showed the wrong project manager. The signature block was incomplete and the copyright year not filled in. The traffic management plan sheet contained the wrong project number. During the first in-house review, three notes were requested to be added.¹ Grievant did not add these notes when the second in-house review was submitted. Sentence number four was to be changed but Grievant did not make the change.

Contract 5: Intersection Improvements Contract. Page 10 was missing resulting in incorrect page numbering. The summary of quantities did not match the TRANS*PORT estimate or the schedule of items for one of the pavement items. The pavement structure was not included.

Contract 6: Bridge Deck Replacement and Steel Contract for FY 2010. Grievant did not start work on this project. He missed the deadline date for the in-house review of January 5, 2009.

Grievant argues that many of what the Agency considered as errors were in fact preferences subject to the Contract Administrator's discretion. To some extent, Grievant's argument is true. The Hearing Officer, however, excluded from consideration items that may have been arguably preferences. When those items are excluded, the fact remains that Grievant's work contained errors in sufficient number to be inconsistent with the Agency's expectations for his work performance.

Grievant's work remained untimely. Only two of Grievant's contracts were submitted timely. Grievant contends that some of the delay was because of preferences added to the review process. To some extent, Grievant's assertion is true.

¹ These were: a note about the road being open to traffic at the end of each work day, a note about truck mounted attenuators, and a note about which counties were included in the contract.

When the Hearing Officer factors in this consideration, however, the fact remains that some of Grievant's contracts were not timely submitted regardless of the including of preferences. Grievant did not seek deadline extensions during his meetings with the Assistant Resident Administrator.

"If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period."

"An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period."

"As an alternative, the Agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation period to remain in his or her position, and reduce the employee's duties. Such a reduction should occur following and based on the re-evaluation and must be accompanied by a concurrent salary reduction of at least 5%."

"If the Agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period."

The Agency did not present evidence showing that it considered alternatives to discharge such as demotion, reassignment or a reduction in Grievant's duties. Accordingly, this matter must be returned to the Agency for the Agency to determine whether these options were possible as of January 30, 2009. The Agency should provide Grievant with a detailed explanation of its analysis for each alternative to discharge that it chooses not to adopt. If there are no alternatives to removal, then the Agency has presented sufficient evidence to support Grievant's removal based on an unsatisfactory re-evaluation.

DECISION

For the reasons stated herein, the Agency's re-evaluation of Grievant was not arbitrary or capricious. However, the Agency failed to comply with State policy because it failed to consider alternatives to removal effective January 30, 2009. Accordingly, the Agency is ordered to reconsider Grievant's removal by examining alternatives to discharge as provided in State policy as of January 30, 2009. In the event an alternative to discharge exists, the Agency should implement that alternative. If an alternative to removal does not exist, Grievant's removal must be upheld.

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.²

² Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.

[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



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 9103-R

Reconsideration Decision Issued: August 27, 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.

The Original Hearing Decision remanded the appeal to the Agency to evaluate options other than removal. The Agency submitted documents showing that it had complied with the Hearing Officer’s directive. Grievant now seeks to reopen the hearing to present evidence regarding whether the Agency has complied with the Hearing Officer’s order.

The documents submitted by the Agency following the hearing do not relate to the original hearing, they related to the Agency’s compliance with the Hearing Officer’s order. Grievant seeks to present evidence regarding whether the Agency has complied

with the Hearing Officer's order. Whether the Agency has complied with the Hearing Officer's order is not an issue before the Hearing Officer. The Grievance Procedure Manual does not grant the Hearing Officer the authority to determine whether the Agency has complied with the Hearing Officer's order. It would be an issue addressed as part of the appeals process. Accordingly, there is no basis to grant Grievant's request to reopen the hearing. 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.

S/Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

POLICY RULING OF THE DEPARTMENT
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Transportation
March 5, 2010

The grievant, through his representative, has requested an administrative review of the hearing decision in Grievance Case No. 9103. The grievant is challenging the decision because he feels the decision is inconsistent with state and agency policy relating to mitigation. For the reason stated below, the Department of Human Resource Management (DHRM) will not interfere with the hearing decision. The agency head, Ms. Sara R. Wilson, has requested that I respond to this appeal.

FACTS

The grievant was employed, until he was terminated, by the Department of Transportation in one of its districts as a Transportation Contract Administrator. In his **Findings of Fact**, the hearing officer stated, in part, the following:

The Virginia Department of Transportation employed Grievant as a Transportation Contract Administrator. The purpose of his position was:

Support Residency Maintenance and Construction Programs by developing contracts and monitoring preliminary engineering activities. Utilize copied notes, IPM, FMS II, RUMS, Trans*Port, ISYP and formulate the Secondary Improvement Six Year Plan Budget.

Grievant worked for the Agency for over 16 years. He reported to the Assistant Resident Administrator who had been Grievant's supervisor for approximately four years.

On February 1, 2008, Grievant received a Notice of Improvement Needed/Substandard Performance regarding the issues of:

Timeliness in meeting scheduled deadlines.
Ensuring work is complete and accurate.

On October 28, 2008, Grievant received an annual performance evaluation with an overall rating of Below Contributor.

On November 12, 2008, the Supervisor presented Grievant with a memorandum and a Performance Improvement Plan. The memorandum stated, in part:

During your performance evaluation conducted October 28, 2008, you were informed that your performance was not acceptable and needed improvement. We discussed techniques to assist you with improving your work performance. I also discussed that I would be evaluating you on your work performance after a three-

month period and for the next year as a result of your overall rating of "Below Contributor".

The current issues of concern are:

Timeliness in meeting scheduled deadlines.

Ensuring work is complete and accurate.

These are the same issues that resulted in your previous verbal warning and your subsequent counseling during the performance cycle for 2006 -- 2007. Even though I have continued to coach you and seek your input and agreement on deadlines set for contracts of mission, you have continued to miss deadlines for contracts submittals. These missed deadlines are unacceptable and in the attached re-evaluation plan, I am setting out specific timeliness and meeting dates for us to work on your performance.

One example of your missing deadlines is the round of contracts submitted during the month of October. You only submitted two out of six contracts due that month on time. In addition, I continue to find errors in the contracts that you submit. For example, on the District Wide Crack Sealing Contract, I asked you if you had put the correct contract and estimate on the P drive per our normal procedures. You said you had but when I checked the P drive, the wrong estimate was attached to the contract. Similarly in all six contract reviews, I found numerous areas that had been identified in the first review of the contract but were not corrected in the subsequent contracts submittal. In some cases, it took three "In house" reviews per contract to get the initial review changes made correctly.

These actions are very typical of your work performance and have resulted in late contract advertisements. As a result of your failure to improve your work product, I am issuing you this written warning and I will work with you and a re-evaluation plan over the next three months.

The Performance Improvement Plan stated, in part:

This is to advise [Grievant] that a re-evaluation will be conducted beginning immediately and will last through February 2009. The first bi-weekly meeting will take place starting November 24, 2008 at 8:30 a.m. and my office to discuss and review assigned tasks and general work performance. The following meetings will be put on the Outlook Calendar as a reminder to you. [Grievant] needs to understand that my door is always open, it is better to ask questions than to assume. He also needs to know that failure to make the following significant improvements in his work performance will likely lead to termination. Should improvements be made over this three-month period, then the review will extend at three-month intervals over the next year.

During the next three months, and all of the next year (2009), I expect [Grievant] to provide me work assigned within the set deadlines. Also, I expect [Grievant] to get the complete scope of the project prior to beginning development of the

contract. It will be unacceptable to revise the scope after the contract is submitted for in-house review, unless the scope is changed by the sponsor during the contract development stage. Furthermore, it is expected that the initial submittal for in-house review will be made to provide adequate time for such review and will have only limited errors or revisions. However, after the first in-house review, I will expect the revised contract and estimate to come back with all noted errors and revisions being made and that the Transport estimate matches the contract and the contract qualifies. Similarly, when comments come back to the Residency from the District Review, it is expected that all the comments will be addressed and that all revisions are made prior to the second in-house review in the required time frame as needed to meet the second in-house review and to meet the proposed Advertisement Schedule. For task assigned, e.g. money transfers, contract notifications, requisitions, etc., they are expected to be made within the time frame given with no errors.

The hearing officer continued in his **Findings of Fact** the following:

Grievant was responsible for drafting the contracts and sending them to the Assistant Resident Administrator for review. The Assistant Resident Administrator worked with the Resident Administrator to complete an “in-house” review. Following the in-house review, the contract is sent to the District office for a constructability review. A constructability review committee looks at the contract from the perspective of the contractor who will have to comply with the terms of the contract once it is executed. Following a review by the District office, the contract is sent to the Central office so that VDOT Central office employees can consider the Transport estimate of the cost of the contract and any contingencies.

On January 30, 2009, Grievant received a re-evaluation with an overall rating of Below Contributor. He was removed from employment effective January 30, 2009.

In his **CONCLUSIONS OF POLICY**, the hearing officer states, in part:

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.

DHRM Policy 1.40, Performance Planning and Evaluation sets forth the procedures for re-evaluating employees who receive a Below Contributor rating on their annual evaluations.

“Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.”

The Agency's re-evaluation plan is consistent with State policy. Grievant was consulted regarding the duties and deadlines expected during the re-evaluation period. He expressed no obligation to the plan or its terms. The Agency's expectations of Grievant's work performance during the re-evaluation period were not unreasonable. At least four of the contracts for which Grievant was responsible were template contracts. A template contract is one that is used repeatedly for similar contracts. It requires editing by the Contract Administrator as opposed to the drafting of a unique contract. Some of Grievant's job duties were removed so that he could focus on the work set forth in the re-evaluation plan. The Assistant Resident Administrator estimated 60 percent of Grievant's duties were removed during the re-evaluation period.

“The employee must be re-evaluated within approximately two weeks prior to the end of the three (3)-month period. If an employee is absent for more than 14 consecutive days during the three (3)-month re-evaluation period, the period will be extended by the total number of days of absence, including the first 14 days.”

The Agency's evaluation of Grievant was not arbitrary or capricious. Grievant was re-evaluated in accordance with State policy. Although the Agency has not established that every error it alleged Grievant made was actually made, it has presented sufficient evidence to support its assertion that Grievant's work contained a sufficient number of errors to justify a below contributor rating.

The hearing decision states further:

Grievant argues that many of what the Agency considered as errors were in fact preferences subject to the Contract Administrator's discretion. To some extent, Grievant's argument is true. The Hearing Officer, however, excluded from consideration items that may have been arguably preferences. When those items are excluded, the fact remains that Grievant's work contained errors in sufficient number to be inconsistent with the Agency's expectations for his work performance.

Grievant's work remained untimely. Only two of Grievant's contracts were submitted timely. Grievant contends that some of the delay was because of preferences added to the review process. To some extent, Grievant's assertion is true.

When the Hearing Officer factors in this consideration, however, the fact remains that some of Grievant's contracts were not timely submitted regardless of the including of preferences. Grievant did not seek deadline extensions during his meetings with the Assistant Resident Administrator.

"If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period."

"An employee whose performance during the re-evaluation period is documented as not improving, may be demoted within the three (3)-month period to a position in a lower Pay Band or reassigned to another position in the same Pay Band that has lower level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period."

"As an alternative, the Agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation period to remain in his or her position, and reduce the employee's duties. Such a reduction should occur following and based on the re-evaluation and must be accompanied by a concurrent salary reduction of at least 5%."

"If the Agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period."

The Agency did not present evidence showing that it considered alternatives to discharge such as demotion, reassignment or a reduction in Grievant's duties. Accordingly, this matter must be returned to the Agency for the Agency to determine whether these options were possible as of January 30, 2009. The Agency should provide Grievant with a detailed explanation of its analysis for each alternative to discharge that it chooses not to adopt. If there are no alternatives to removal, then the Agency has presented sufficient evidence to support Grievant's removal based on an unsatisfactory re-evaluation

Based on the return of the matter to the agency by the hearing officer, management officials provided data to the hearing officer that they had considered alternatives to terminating the grievant. The hearing officer deemed the agency's response as adequately meeting his directive and thus retained his original decision.

DISCUSSION

The Department of Human Resource Management offers the following in response to the grievant's request for an administrative review. 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 beyond the limit of reasonableness, 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.

The relevant policy, the Department of Human Resource Management's Policy No. 1.40, Performance Planning and Evaluation, "provides for the establishment and communication of employees' performance plans and procedures for evaluating employees' performance." That policy also sets forth the procedures for re-evaluating employees who receive a Below Contributor rating on their annual evaluations. In addition, the Department of Transportation has established a policy of its own that comports with DHRM Policy No. 1.40.

Concerning mitigating circumstances as related to disciplinary action, DHRM Policy No. 1.60, Standards of Conduct, provides the following:

- a. Agencies may reduce the level of a corrective action if there are mitigating circumstances, such as conditions that compel a reduction to the interests of fairness and objectivity, or based on an employee's otherwise satisfactory work performance.
- b. Mitigating circumstances for a Group III offense may support, as an alternative to termination, an employee's demotion or transfer to a position with reduced responsibilities and a disciplinary salary action with a minimum 5% reduction in salary; transfer to an equivalent position in a different work area; and/or suspension of up to 30 workdays.
- c. An employee who is issued a Written Notice that would normally warrant termination but who is not terminated due to mitigating circumstance should be notified that any subsequent Written Notice for any level offense during the life of the Written Notice may result in termination.

This Department has long held that agencies are not mandated to but *may* consider mitigating circumstances when deciding on disciplinary action. Likewise, agencies are not mandated to but *may* examine alternatives to termination (such as demotion, transfer, etc.) in cases of unsatisfactory performance.

Based on the evidence, the hearing officer determined that the grievant's performance did not meet the performance standards that were established for his position and that VDOT officials properly applied the provisions of DHRM Policy No. 1.40. A review by this Agency has determined that the hearing officer properly interpreted the provisions of the relevant policy. Therefore, this Agency will not disturb that decision.

Ernest G. Spratley