Issue: Termination due to Below Contributor rating on re-evaluation; Hearing Date: 08/11/11; Decision Issued: 08/16/11; Agency: TAX; AHO: William S. Davidson, Esq.; Case No. 9642; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 08/30/11; Reconsideration Decision issued 09/14/11; Outcome: Original decision affirmed; Administrative Review: DHRM Ruling Request received 08/30/11; DHRM Ruling issued 12/12/11; Outcome: Remanded to AHO; Remand Decision issued 01/11/12; Outcome: Original decision affirmed.**

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS
DECISION OF HEARING OFFICER
In Re: Case No: 9642

Hearing Date: August 11, 2011
Decision Issued: August 16, 2011

PROCEDURAL HISTORY

The Grievant was issued a Memorandum dated March 24, 2011 for:

> On October 22, 2010, you received your annual performance evaluation with a rating of "Below Contributor". DHRM Policy #1.40, Performance Planning and Evaluation requires a three month re-evaluation plan. You were placed on this plan on November 23, 2010. This plan reiterated the expectations and standards for your job as an Error Resolver. Your plan was extended 30 days due to the absences of your supervisor during the re-evaluation period, making your scheduled end date March 24, 2011.
>
> During the re-evaluation period, a review of your work reveals you have failed to consistently meet the production standards as an Individual Error Resolver and you have made an unacceptable number of mistakes with the errors you worked. This information was provided to you during our meeting on March 22, and you were provided an opportunity to respond. In your response on March 23, you have not offered any substantive information relative to your performance issues.
>
> We have determined there are no alternatives to demote, reassign or reduce your duties. Therefore, we have decided to terminate your employment as an Individual Error Resolver effective immediately, per Policy #1.40. [1]

Pursuant to the Memorandum, the Grievant was terminated. [2] On April 25, 2011, the Grievant timely filed a grievance to challenge the Agency's actions. [3] On June 23, 2011, the Department of Employment Dispute Resolution ("EDR") assigned this Appeal to a Hearing Officer. However, due to conflicts with the Agency's calendar and the Grievant's calendar, a hearing was unable to be scheduled in this matter until August 11, 2011. Accordingly, on August 11, 2011, a hearing was held at the Agency's location.

APPEARANCES

[1] Agency Exhibit 1, Tab 5, Page 1
[2] Agency Exhibit 1, Tab 5, Page 1
[3] Agency Exhibit 1, Tab 1, Page 1

Advocate for the Agency
Grievant
Witnesses

ISSUE

Did the Grievant violate the terms of the Department of Human Resource Management ("DHRM") Policy 1.40, thereby justifying his termination?

AUTHORITY OF HEARING OFFICER

Code Section 2.2-3005 sets forth the powers and duties of a Hearing Officer who presides over a grievance hearing pursuant to the State Grievance Procedure. Code Section 2.2-3005.1 provides that the Hearing Officer may order appropriate remedies including alteration of the Agency's disciplinary action. Implicit in the Hearing Officer's statutory authority is the ability to independently determine whether the employee's alleged conduct, if otherwise properly before the Hearing Officer, justified termination. The Court of Appeals of Virginia in *Tatum v. VA Dept of Agriculture & Consumer Servs,* 41VA. App. 110, 123, 582 S.E. 2d 452, 458 (2003) held in part as follows:

> While the Hearing Officer is not a "super personnel officer" and shall give appropriate deference to actions in Agency management that are consistent with law and policy...the Hearing Officer reviews the facts de novo...as if no determinations had been made yet, to determine whether the cited actions occurred, whether they constituted misconduct, and whether there were mitigating circumstances to justify reduction or removal of the disciplinary action or aggravated circumstances to justify the disciplinary action. Thus the Hearing Officer may make a decision as to the appropriate sanction, independent of the Agency's decision.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8. A preponderance of the evidence is sometimes characterized as requiring that facts to be established more probably than not occurred, or that they were more likely than not to have happened. [4] However, proof must go beyond conjecture. [5] In other words, there must be more than a possibility or a mere speculation. [6]

FINDINGS OF FACT

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

[4] *Ross Laboratories v. Barbour*, 13 Va. App. 373, 377, 412 S.E. 2d 205, 208 1991
[5] *Southall, Adm'r v. Reams, Inc.*, 198 Va. 545, 95 S.E. 2d 145 (1956)
[6] *Humphries v. N.N.S.B., Etc., Co.*, 183 Va. 466, 32 S.E. 2d 689 (1945)

The Agency provided the Hearing Officer with a notebook containing six (6) tabbed sections and that notebook was accepted as Agency Exhibit 1.

The Grievant provided the Hearing Officer with a notebook containing five (5) tabbed sections and that notebook was accepted as Grievant Exhibit 1.

The Grievant's position with the Agency was that of an Error Resolver. [7] He had worked for the Agency for approximately 6 ½ years prior to his termination. On or about August 19, 2010, he received a Notice of Improvement Needed/Substandard Performance Form from the Agency. [8] This form indicated that the Grievant continued to struggle with daily production on forms 760 and 763. His immediate supervisor indicated that she would monitor his production for 30 days and that she would provide weekly updates. [9]

The Grievant's immediate supervisor testified before the Hearing Officer. She stated that he did not pass or complete satisfactorily the terms and conditions of the Notice of Improvement Needed/Substandard Performance Form which was issued on or about August 19, 2010. However, the Assistant Tax Commissioner, who was the Grievant's Second Step Resolution Respondent, advised the Grievant, on or about September 23, 2010, that he had shown improvement and passed the plan period. [10]

The Grievant's immediate supervisor further testified that on numerous occasions he had requested that he be transferred to another cubicle. He had stated that there were distractions within the cubicle and that the immediate supervisor was one of the larger distractions. She further testified that she and the Grievant had had serious talks regarding these distractions. She testified that she had notified her supervisor, the Error Resolution Manager ("Manager") that the Grievant wished to be moved to another cubicle. Indeed, the Grievant sent a series of e-mails to the Manager requesting that he be moved to another cubicle. Those e-mails were dated June 25, 2009; July 3, 2009; July 13, 2009; and July 15, 2009. [11] The recipient of these e-mails testified before the Hearing Officer and acknowledged that she failed to respond to any of the four (4) e-mails for several months.

The Grievant's supervisor testified that she and the Manager simply saw no business reason to move the Grievant. The Grievant's supervisor acknowledged in her testimony that another work group complained of the noise coming from her area, that she was told to tone it down and, the Manager indicated that she had had a conversation regarding noise coming from this group.

The Grievant's supervisor seemed to have an extraordinarily selective memory which often times improved dramatically when the Grievant presented her with a fact pattern that only moments before she had testified to having no recollection of the fact pattern.

[7] Agency Exhibit 1, Tab 2, Page 1
[8] Agency Exhibit 1, Tab 2, Page 11
[9] Agency Exhibit 1, Tab 2, Page 11
[10] Agency Exhibit 1, Tab 1, Page 3
[11] Grievant Exhibit 1, Tab 1, Pages 1 through 4

On October 22, 2010, the Grievant received his Employee Work Profile for the time period of November 1, 2009 through October 31, 2010. He was rated Below Contributor. [12] Pursuant thereto, on November 23, 2010, the Grievant received a Re-Evaluation Plan. [13] On February 23, 2011, the Grievant received a Memorandum from the Manager indicating that his Re-Evaluation Plan would be extended for thirty (30) days because of the absences of his current supervisor. [14] This new supervisor monitored the Grievant's Re-Evaluation Plan for thirty (30) days. At the end of that thirty (30) day period, on March 22, 2011, this new supervisor determined that the Grievant's work performance for the prior four (4) months was that of Below Contributor. [15]

This new supervisor testified that, not only was the Grievant not producing sufficient quantities of work, but that his quality was also deficient. Regarding the quantity of work, he testified that the Grievant was not allowed to count time correcting errors that were pointed out to him against the quantity production that was required. In other words, if, during the re-evaluation period the Grievant was shown errors that might require him a minute or an hour to correct, at the end of each day, he was still supposed to have produced the same quantity of work flow of an employee who did not need to spend time making corrections. This new supervisor is the person who sent the Memorandum to the Grievant terminating him. In that Memorandum, this supervisor indicated that there were no alternatives to demotion, re-assignment, or reduction in duties. [16] The relevant performance cycle is November 1, 2009 through October 31, 2010. [17] The Grievant received a Notice of Improvement Needed/Substandard Performance Form within this performance cycle on August 19, 2010. [18]

DHRM Policy 1.40 provides that an employee who receives a rating of Below Contributor must be re-evaluated and have a Performance Evaluation Plan developed. This Re-Evaluation Plan must be developed within ten (10) work days of the evaluation meeting during which the employee received the annual rating. Inasmuch as the Below Contributor evaluation was received by the Grievant on October 22, 2010, [19] it would appear that the Re-Evaluation Plan should have been developed on or about November 8, 2010. Instead, it appears that the Re-Evaluation Plan was developed and delivered to the Grievant on November 23, 2010. [20] This would appear to be fifteen (15) days late.

While DHRM Policy 1.40 states that the Re-Evaluation Plan **must** be developed within ten (10) work days of the Below Contributor rating, it is only assumed that means it must be delivered within ten (10) work days. However, to assume otherwise would be to render the ten (10) day period meaningless, as any other interpretation would allow for the plan to be developed within ten (10) days and then delivered over any time frame, thereby rendering the ten (10) day rule a nullity.

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[12] Agency Exhibit 1, Tab 2, Pages 1 through 10
[13] Agency Exhibit 1, Tab 3, Pages 1 through 6
[14] Agency Exhibit 1, Tab 3, Page 7
[15] Agency Exhibit 1, Tab 3, Pages 8 and 9
[16] Agency Exhibit 1, Tab 5, Page 1
[17] Agency Exhibit 1, Tab 2, Pages 1 through 9
[18] Agency Exhibit 1, Tab 2, Page 11
[19] Agency Exhibit 1, Tab 2, Page 10
[20] Agency Exhibit 1, Tab 3, Page 6

The Re-Evaluation Plan is to set forth performance measures for a subsequent three (3) month period. DHRM Policy 1.40 states that the employee **must** be re-evaluated within approximately two (2) weeks prior to the end of the three (3) month period. [21] The Agency introduced no evidence to indicate that the Grievant was re-evaluated within approximately two (2) weeks prior to the end of the three (3) month period. Indeed, the Agency unilaterally extended the re-evaluation period for thirty (30) days. This extension was presented to the Grievant on February 23, 2011. [22] The extension provided for a new supervisor for this thirty (30) day extension.

DHRM Policy 1.40 provides for an extension of the re-evaluation period if an employee is absent for more than fourteen (14) consecutive days during the three (3) month evaluation period. However, it does not seem to provide for an extension merely because a supervisor of the employee was absent. [23]

Finally DHRM Policy 1.40 provides that the employee's supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the Re-Evaluation Plan during the re-evaluation period. [24] From the documentary evidence presented to the Hearing Officer and the testimony of the witnesses for the Agency, it appeared that the only recommendations that were made to the Grievant were that his production numbers needed to increase. Indeed, the Re-Evaluation Plan set forth fourteen (14) measures for core responsibilities. [25] The Agency witnesses testified that the first of those, *Interpret 50 or more different error messages to post return accurately and by the production standards set forth for the tax form type*, was essentially the only measure that was being regarded. The Agency's testimony would seem to be that, if the Grievant had improved dramatically the other thirteen (13) measures of core responsibilities but had failed to meet the first quantitative measure, he would be still deemed Below Contributor.

The Agency, in its Memorandum of March 24, 2011, terminated the Grievant pursuant to the terms and conditions of DHRM Policy 1.40. The Agency made this termination based on the fact that the employee received a re-evaluation rating of Below Contributor. The Hearing Officer finds, from the evidence presented, that the Grievant was in fact a Below Contributor performer at the end of his re-evaluation rating. The Grievant alleged that the Agency did not comply with the terms and conditions of DHRM Policy 1.40 when it chose to terminate him. Clearly, the Agency did not develop a Performance Re-Evaluation Plan within ten (10) days of the Grievant receiving his Below Contributor annual rating. The Grievant's supervisor did not discuss with him specific recommendations for meeting the minimum performance measures contained in the Re-Evaluation Plan. The Agency did not re-evaluate the Grievant within approximately two (2) weeks prior to the end of the three (3) month period of his Re-Evaluation Plan. Finally, the Hearing Officer can find no authority within DHRM Policy 1.40 that allows the Agency to unilaterally extend the evaluation period because of the sickness of the Grievant's supervisor.

[21] Agency Exhibit 1, Tab 6, Page 12
[22] Agency Exhibit 1, Tab 3, Page 7
[23] Agency Exhibit 1, Tab 6, Page 12
[24] Agency Exhibit 1, Tab 6, Page 12
[25] Agency Exhibit 1, Tab 3, Page 3

Accordingly, the Hearing Officer finds that, while the Agency has established that the Grievant received a re-evaluation rating of Below Contributor and such re-evaluation would normally justify demotion, re-assignment or termination, the Hearing Officer further finds that the Agency did not comply with the terms of DHRM Policy 1.40 in reaching this re-evaluation finding.

MITIGATION

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including "mitigation or reduction of the Agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Employment Dispute Resolution..." [26] Under the Rules for Conducting Grievance Hearings, "a Hearing Officer must give deference to the Agency's consideration and assessment of any mitigating and aggravating circumstances. Thus a Hearing Officer may mitigate the Agency's discipline only if, under the record evidence, the Agency's discipline exceeds the limits of reasonableness. If the Hearing Officer mitigates the Agency's discipline, the Hearing Officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the Agency has consistently applied disciplinary action among similarly situated employees, (3) the disciplinary action was free of improper motive, (4) the length of time that the Grievant has been employed by the Agency, and (5) whether or not the Grievant has been a valued employee during the time of his/her employment at the Agency.

DECISION

For reasons stated herein, the Hearing Officer finds that the Agency has not complied with the terms of DHRM Policy 1.40 and, accordingly, orders that the Grievant be reinstated and given a new ninety (90) day Re-Evaluation Plan. Further, the Hearing Officer orders that the Grievant not be re-evaluated by the same supervisor who testified before the Hearing Officer as the Hearing Officer finds that her testimony was less than forthcoming and as the Hearing Officer specifically finds that there is a clear conflict between the Grievant and this immediate supervisor.

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

[26] Va. Code § 2.2-3005

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 Street, 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 Street, Suite 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 your appeal 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 a review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[27] 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.[28]

[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]

_____
William S. Davidson
Hearing Officer

[27] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State *Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[28] 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: 9642

Hearing Date:	August 11, 2011
Decision Issued:	August 16, 2011
Grievant's Reconsideration Request Received:	August 17, 2011
Agency's Reconsideration Request Received:	August 30, 2011
Response to Reconsideration:	September 14, 2011

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. A request to the Hearing Officer to Reconsider his Decision must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [29]

OPINION

The Grievant seeks reconsideration of the Hearing Officer's Decision based on the Grievant's belief that the Hearing Officer failed to properly consider mitigation in reaching his Decision, even though the Hearing Officer ruled in favor of the Grievant.

The Agency seeks reconsideration of the Hearing Officer's Decision based on the Agency's belief that the Hearing Officer incorrectly interpreted DHRM Policy 1.40 Performance Planning and Evaluation.

Normally, as set forth in Section 7.2(a)(1) of the Grievance Procedure Manual, a request for reconsideration deals with newly discovered evidence or evidence of incorrect legal conclusions. Because of the need for finality, documents not presented at the hearing cannot be considered upon administrative review unless they are "newly discovered evidence." 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 trial ended. However, the fact that a

[29] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

party discovered the evidence after the trial does not necessarily make it "newly discovered." Rather, the party must show that:

1. The evidence is newly discovered since the judgment was entered;
2. Due diligence on the part of the movant 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 judgment to be amended. [30]

Here, neither the Grievant nor the Agency have provided the Hearing Officer with any newly discovered evidence. The Agency has presented a former Hearing Officer's Finding in a distinctly separate case and uses that to suggest that the Hearing Officer in this matter reached an incorrect legal conclusion. Essentially, the Agency invites the Hearing Officer to determine that the time frames set forth in DHRM Policy 1.40 are merely advisory and not mandatory. By extension, the Agency is inviting the Hearing Officer to rule that all time frames set forth in all DHRM policies are merely advisory and not mandatory. The Hearing Officer does not accept this invitation.

Should DHRM decide to determine that the time frames that it has set forth in Policy 1.40 and other policies are merely advisory and are discretionary in their application, then that will be a ruling that must come from DHRM. The Hearing Officer notes that all of these policies were written and produced by the Agency and the language contained therein shall be strictly construed against the drafter of the Policy. The Hearing Officer can find no language in Policy 1.40 that would indicate an intent on the Agency that the time frames delineated therein are merely advisory time frames to be changed at the whim of either the Agency or the Grievant.

Finally, Policy 1.40 prescribes that there be a ninety (90) day period of evaluation prior to a termination. In this matter, the evaluator was sick and/or out of work for a significant part of the ninety (90) day time frame. The Agency, in an admitted attempt to properly evaluate the Grievant, unilaterally extended the evaluation time frame by an additional thirty (30) days. The purpose was to have an evaluator that was actually available to assist and evaluate the Grievant. A proper thirty (30) day evaluation is in no way comparable to a proper ninety (90) day evaluation.

DHRM does not state that a proper evaluation can be performed in thirty (30) days. Instead, it states that a proper evaluation must be performed in ninety (90) days and the clear intent is for that to be ninety (90) consecutive days. Here, there appears to be an off-and-on evaluation for ninety (90) days and then an attempt to correct this by a continuous thirty (30) day evaluation. The Hearing Officer does not find that the latter thirty (30) day evaluation corrects the flaws in the original ninety (90) day evaluation.

Accordingly, the Hearing Officer ruled that the Grievant be reinstated and be given a proper ninety (90) day evaluation.

[30] Administrative Review Ruling of Director, Dated December 12, 2009, Ruling No. 2010-2467, Page 3

The Grievant has asked that the Hearing Officer reconsider mitigating circumstances. As stated in the original Decision, the Hearing Officer found no mitigating circumstances that would warrant a change in the Agency's Finding, based solely on mitigation.

DECISION

The Hearing Officer concludes that none of the reasons given by either the Agency or the Grievant rise to the level that would require him to set aside his original Decision in this matter. The Hearing Officer has carefully considered the Agency's arguments and the Grievant's arguments and has concluded that there is no basis to change the Decision issued on August 16, 2011.

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. [31]

_____

William S. Davidson
Hearing Officer

[31] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).

POLICY RULING OF THE DEPARTMENT OF
HUMAN RESOURCE MANAGEMENT

In the Matter of the
Department of Taxation

December 12, 2011

The Department of Taxation has requested an administrative review of the hearing officer's decision in Case No. 9642. For the reasons stated below, we are remanding the decision to the hearing officer to revise it to be in conformance with the Department of Human Resource Management's interpretation and application of policy. The agency head of the Department of Human Resource Management (DHRM), Ms. Sara R. Wilson, has directed that I conduct this administrative review.

In his PROCEDURAL HISTORY, the hearing officer wrote the following:

> The Grievant was issued a Memorandum dated March 14, 2011 for:
>
> > On October 22, 2010, you received your annual performance evaluation with a rating of "Below Contributor". DHRM Policy #1.40, Performance Planning and Evaluation, requires a three month re-evaluation plan. You were placed on this plan on November 23, 2010. This plan reiterated the expectations and standards for your job as an Error Resolver. Your plan was extended 30 days due to the absences of your supervisor during the re-evaluation period, making your scheduled end date March 24, 2011.
> >
> > During the re-evaluation period, a review of your work reveals you have failed to consistently meet the production standards as an Individual Error Resolver and you have an unacceptable number of mistakes with the errors you worked. This information was provided to you during our meeting on March 22, and you were provided an opportunity to respond. In your response on March 23, you have not offered any substantive information relative to your performance issues.
> >
> > We have determined there are no alternatives to demote, reassign, or reduce your duties. Therefore, we have decided to terminate your employment as an Individual Error Resolver, effective, per Policy #1.40.
>
> Pursuant to the Memorandum, the Grievant was terminated. On April 25,

2011, the Grievant timely filed a grievance to challenge the Agency's actions. On June 23, 2011, the Department of Employment Dispute Resolution ("'EDR") assigned this Appeal to a Hearing Officer. However, due to conflicts with the Agency's calendar and the Grievant's calendar, a hearing was unable to be scheduled in this matter until August 11, 2011. Accordingly, on August 11, 2011, a hearing was held at the Agency's location.

In his FINDINGS OF FACT, the hearing officer wrote, in relevant 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 Grievant's position with the Agency was that of an Error Resolver. He had worked for the Agency for approximately six and one-half years prior to his termination. On or about August 19, 2010, he received a Notice of Improvement Needed/Substandard Performance Form from the Agency. This form indicated that the Grievant continued to struggle with daily production on forms 760 and 763. His immediate supervisor indicated that she would monitor his production for 30 days and that she would provide weekly updates.

The Grievant's immediate supervisor testified before the Hearing Officer. She stated that he did not pass or complete satisfactorily the terms and conditions of the Notice of Improvement Needed/Substandard Performance Form which was issued on or about August 19, 2010. However, the Assistant Tax Commissioner, who was the Grievant's Second Step Resolution Respondent, advised the Grievant, on or about September 23, 2010, that he had shown improvement and passed the plan period.

The Grievant's immediate supervisor testified that on numerous occasions he had requested that he be transferred to another cubicle. He had stated that there were distractions within the cubicle and that the immediate supervisor was one of the larger distractions. She further testified that she and the Grievant had had serious talks regarding these distractions. She testified that she had notified her supervisor, the Error Resolution Manager ("Manager") that the Grievant wished to be moved to another cubicle. Indeed, the Grievant sent a series of e-mails to the Manager requesting that he be moved to another cubicle. Those e-mails were dated June 25, 2009; July 3. 2009; July 13, 2009; and July 15, 2009. The recipient of these e-mails testified before the Hearing Officer and acknowledged that she failed to respond to any of the four (4) emails for several months.

The Grievant's supervisor testified that she and the Manager simply saw no business reason to move the Grievant. The Grievant's supervisor acknowledged in her testimony that another work group complained of the noise coming from her area, that she was told to tone it down and the Manager indicated that she had had a conversation regarding noise coming from this group.

The Grievant's supervisor seemed to have an extraordinarily selective

memory which often times improved dramatically when the Grievant presented her with a fact pattern that only moments before she had testified to having no recollection of the fact pattern.

On October 22, 1010, the Grievant received his Employee Work Profile for the time period of November 1, 2009 through October 31, 2010. He was rated Below Contributor. Pursuant thereto, on November 23, 2010, the Grievant received a Re- Evaluation Plan. On February 23, 2011, the Grievant received a Memorandum from the Manager indicating that his Re-Evaluation Plan would be extended for thirty (30) days because of the absences of his current supervisor. This new supervisor monitored the Grievant's Re-Evaluation Plan for thirty (30) days. At the end of that thirty (30) day period, on March 22, 2011, this new supervisor determined that the Grievant's work performance for the prior four (4) months was that of Below Contributor.

This new supervisor testified that not only was the Grievant not producing sufficient quantities of work, but that his quality was also deficient. Regarding the quantity of work, he testified that the Grievant was not allowed to count time correcting errors that were pointed out to him against the quantity production that was required. In other words, if, during the reevaluation period the Grievant was shown errors that might require him a minute or an hour to correct, at the end of each day, he was still supposed to have produced the same quantity of work flow of an employee who did not need to spend time making corrections. This new supervisor is the person who sent the Memorandum to the Grievant terminating him. In that Memorandum, this supervisor indicated that there were no alternatives to demotion, re-assignment, or reduction in duties. The relevant performance cycle is November 1, 2009 through October 31, 2010. The Grievant received a Notice of Improvement Needed/Substandard Performance Form within this performance cycle on August 19, 2010.

DHRM Policy 1.40 provides that an employee who receives a rating of Below Contributor must be re-evaluated and have a Performance Evaluation Plan developed. This Re-Evaluation Plan must be developed within ten (10) work days of the evaluation meeting during which the employee received the annual rating. Inasmuch as the Below Contributor evaluation was received by the Grievant on October 22, 2010, it would appear that the Re-Evaluation Plan should have been developed on or about November 8, 2010. Instead, it appears that the Re-Evaluation Plan was developed and delivered to the Grievant on November 23, 2010. This would appear to be fifteen (15) days late.

While DHRM Policy 1.40 states that the Re-Evaluation Plan must be developed within ten (10) work days of the Below Contributor rating, it is only assumed that means it must be delivered within ten (10) work days. However, to assume otherwise would be to render the ten (10) day period meaningless, as any other interpretation would allow for the plan to be developed within ten (10) days and then delivered over any time frame, thereby rendering the ten (10) day rule a nullity.

The Re-Evaluation Plan is to set forth performance measures for a subsequent three (3) month period. DHRM Policy 1.40 states that the employee must be re-evaluated within approximately two (2) weeks prior to the end of the three (3) month period. The Agency introduced no evidence to indicate that the Grievant was re-evaluated within approximately two (2) weeks prior to the end

of the three (3) month period. Indeed, the Agency unilaterally extended the re-evaluation period for thirty (30) days. This extension was presented to the Grievant on February 23, 2011. The extension provided for a new supervisor for this thirty (30) day extension.

DHRM Policy 1.40 provides for an extension of the re-evaluation period if an employee is absent for more than fourteen (14) consecutive days during the three (3) month evaluation period. However, it does not seem to provide for an extension merely because a supervisor of the employee was absent.

Finally DHRM Policy 1.40 provides that the employee's supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the Re-Evaluation Plan during the re-evaluation period. From the documentary evidence presented to the Hearing Officer and the testimony of the witnesses for the Agency, it appeared that the only recommendations that were made to the Grievant were that his production numbers needed to increase. Indeed, the Re-Evaluation Plan set forth fourteen (14) measures for core responsibilities. The Agency witnesses testified that the first of those, *Interpret 50 or more different error messages to post return accurately and by the production standards set forth for the tax form type*, was essentially the only measure that was being regarded. The Agency's testimony would seem to be that if the Grievant had improved dramatically the other thirteen (13) measures of core responsibilities but had failed to meet the first quantitative measure, he would be still deemed Below Contributor.

The Agency, in its Memorandum of March 24, 2011, terminated the Grievant pursuant to the terms and conditions of DHRM Policy 1.40. The Agency made this termination based on the fact that the employee received a re-evaluation rating of Below Contributor. The Hearing Officer finds from the evidence presented, that the Grievant was in fact a Below Contributor performer at the end of his re-evaluation rating. The Grievant alleged that the Agency did not comply with the terms and conditions of DHRM Policy 1.40 when it chose to terminate him. Clearly, the Agency did not develop a Performance Re-Evaluation Plan within ten (10) days of the Grievant receiving his Below Contributor annual rating. The Grievant's supervisor did not discuss with him specific recommendations for meeting the minimum performance measures contained in the Re-Evaluation Plan. The Agency did not re-evaluate the Grievant within approximately two (2) weeks prior to the end of the three (3) month period of his Re-Evaluation Plan. Finally, the Hearing Officer can find no authority within DHRM Policy 1.40 that allows the Agency to unilaterally extend the evaluation period because of the sickness of the Grievant's supervisor.

Accordingly, the Hearing Officer finds that, while the Agency has established that the Grievant received a re-evaluation rating of Below Contributor and such re-evaluation would normally justify demotion, re-assignment or termination, the Hearing Officer further finds that the Agency did not comply with the terms of DHRM Policy 1.40 in reaching this re-evaluation finding.

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In his DECISION, the hearing officer stated the following:

For reasons stated herein, the Hearing Officer finds that the Agency has not complied with the terms of DHRM Policy 1.40 and, accordingly, orders that the Grievant be reinstated and given a new ninety (90) day Re-Evaluation Plan. Further the Hearing Officer orders that the Grievant not be re-evaluated by the same supervisor who testified before the Hearing Officer the Hearing Officer finds that her testimony was less than forthcoming and as the Hearing Officer specifically finds that there is a clear conflict between the Grievant and this immediate supervisor.

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. 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 each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or is misinterpreted. In its request to this Department for an administrative review, the agency contends that the agency's failure to create the Performance Improvement Plan (PIP) within ten (10) days was harmless error. The PIP was actually created within twenty-five (25) days of the date the grievant was given the Below Contributor rating. The DHRM has determined that the 25-day time period it took for the agency to develop a corrective action plan did not have any negative impact on the grievant's employment, especially since the overall time period for the re-evaluation was expanded to include the 15-day delay.

The agency also stated that it should not be penalized for extending the re-evaluation period for an additional thirty (30) days in order to give a new supervisor a chance to evaluate the grievant's performance. The DHRM agrees with the agency for two reasons: (1) that the original supervisor was absent and the new supervisor needed appropriate time to evaluate the grievant's performance represents a legitimate, fair and equitable reason; (2) the extra thirty (30) days prolonged the grievant's time period to improve his performance. Please note that policy cannot list all instances where exceptions may be appropriate. In the present case, an exception to policy was appropriate.

Regarding the hearing decision, DHRM agrees that the agency did not adhere strictly to the letter of the policy. However, this non-adherence to policy was advantageous to the grievant because it extended his employment. Thus, we are returning this decision to the hearing officer in order that he can revise it to be consistent with this Department's interpretation and application of policy.

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Ernest G. Spratley
Assistant Director,
Office of Equal Employment Services

COMMONWEALTH OF VIRGINIA
DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION
DIVISION OF HEARINGS

DECISION OF HEARING OFFICER
In re:

Case No: 9642

Hearing Date:	August 11, 2011
Decision Issued:	August 16, 2011
Grievant's Reconsideration Request Received:	August 17, 2011
Agency's Reconsideration Request Received:	August 30, 2011
Response to Reconsideration:	September 14, 2011
Policy Ruling of DHRM received:	January 3, 2012
Response to Reconsideration:	January 11, 2012

APPLICABLE LAW

A Hearing Officer's original decision is subject to administrative review by both the Department of Human Resource Management ("DHRM") and the Department of Employee Dispute Resolution ("EDR"). A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the Hearing Officer. A copy of all requests must be provided to the other party and to the EDR Director. A request to the Hearing Officer to Reconsider his Decision must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request. [32]

OPINION

The Department of Human Resource Management ("DHRM") issued a Policy Ruling on December 12, 2011, in this matter. DHRM, for reasons unknown to the Hearing Officer, mailed that ruling to an address that the Hearing Officer has not used for the last two (2) years. Pursuant to DHRM's failure to use the correct address, its Policy Ruling was received by the Hearing Officer on January 3, 2012.

In its Policy Ruling, DHRM correctly restates the Findings of Fact from the Hearing Officer's original Decision, which was issued on August 16, 2011. The Agency, on August 30, 2011, requested that the Hearing Officer reconsider his Decision. In so doing, the Agency asked the Hearing Officer to rule that all time frames set forth in DHRM policies were merely advisory and not mandatory. The Hearing Officer did not accept this invitation.

[32] §7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

In its Policy Ruling of December 12, 2011, DHRM has ruled that the time frames set forth in its policies are merely advisory and not mandatory. The effect of this Ruling is to eviscerate the time requirements set forth in DHRM policies. DHRM attempts to circumvent this obvious evisceration by stating that the failure to comply with policy time lines in this matter actually benefitted the Grievant. DHRM totally ignores the concept that only the Agency or DHRM is allowed to decide when the Agency's failure to comply should be exempted because the Agency or DHRM decided that the failure actually benefitted a Grievant. Because the Agency or DHRM is the ultimate decision-maker as to what does or does not benefit a Grievant, the result is that at any time an Agency or DHRM so chooses, it may determine that its failure to comply with its own rules was an exception because the failure benefitted the Grievant. This circularity of argument is a slippery slope to ruin. Indeed, in its own Policy Ruling, DHRM stated, in part, as follows:

> Please note that policy cannot list all instances where exceptions may be appropriate. In the present case, an exception to policy was appropriate. [33]

Even DHRM seems to recognize once this Pandora's Box is opened, it will be very difficult to ever close it and to establish the primacy of the time lines, which DHRM wrote, not the Grievant. To use a sport's analogy, DHRM has ruled "no harm, no foul." The Hearing Officer wonders how DHRM will rule when a Grievant fails to comply with a time line set forth in DHRM Regulations and the Grievant argues, "no harm, no foul."

Regardless, the Hearing Officer is bound by DHRM's Policy Ruling that its time lines are of no meaning. However, DHRM quite correctly stated in its Policy Ruling as follows:

> 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...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. [34]

As acknowledged by DHRM in its Policy Ruling, the Hearing Officer stated in his original Decision that

> ...DHRM Policy 1.40 provides that the employee's supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the Re-Evaluation Plan during the re-evaluation period. From the documentary evidence presented to the Hearing Officer and the testimony of the witnesses for the Agency, it appeared that the only recommendations that were made to the Grievant were that his production numbers needed to increase. Indeed, the Re-Evaluation Plan set forth fourteen (14) measures for core

[33] Policy Ruling of DHRM, dated December 12, 2011, Page 5
[34] Policy Ruling of DHRM, dated December 12, 2011, Page 5

> responsibilities. The Agency witnesses testified that the first of those, *Interpret 50 or more different error messages to post return accurately and by the production standards set forth for the tax form type*, was essentially the only measure that was being regarded. The Agency's testimony would seem to be that, if the Grievant had improved dramatically the other thirteen (13) measures of core responsibilities but had failed to meet the first quantitative measure, he would be still deemed Below Contributor. [35]

The Agency cannot set forth fourteen (14) measures for core responsibilities and then judge the Grievant as Below Contributor based only on one (1). The Agency cannot ask an employee to be competent in fourteen (14) areas and then judge them solely on one (1) area, unless the Agency makes it explicitly clear that the other thirteen (13) areas should be considered secondary, if not tertiary, to the one (1) area.

Accordingly, based upon the quality and veracity, or lack thereof, of the evidence presented by Agency witnesses before this Hearing Officer, and taking into account DHRM policy rulings regarding time lines, the Hearing Officer continues to find that DHRM Policy 1.40 was not adequately implemented in this matter in that the Grievant was not adequately made aware that only one (1) of the fourteen (14) areas of core responsibilities was relevant to his being a Contributor or being deemed Below Contributor.

DECISION

The Hearing Officer concludes that the Policy Ruling of DHRM does not require him to set aside his original Decision in this matter. The Hearing Officer has carefully considered the Policy Ruling of DHRM and has concluded that there is no basis to change the Decision issued on August 16, 2011.

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 byEDR 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. [36]

[35] Decision, Case 9642, dated August 16, 2011, Page 5

William S. Davidson
Hearing Officer

[36] An appeal to circuit court may be made only on the basis that the decision was *contradictory to law*, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. Virginia Department of State Police v. Barton, 39 Va. App. 439, 573 S.E. 2d 319 (2002).