

Issues: Group I Written Notice (unsatisfactory performance), Arbitrary/Capricious Performance Evaluation, Termination (due to poor performance), Retaliation (grievance activity), Discrimination (race, age, disability); Hearing Date: 03/22/13; Decision Issued: 05/31/13; Agency: VDOT; AHO: Carl Wilson Schmidt, Esq.; Case No. 10028, 10029, 10030, 10031; Outcome: Partial Relief; **Addendum issued 06/25/13: Attorney's Fees awarded in the amount of \$1,506.50.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10028 / 10029 / 10030 / 10031

Hearing Date: March 22, 2013

Decision Issued: May 31, 2013

PROCEDURAL HISTORY

On June 26, 2012, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance. On July 26, 2012, Grievant timely filed a grievance to challenge the Agency's action. The grievance was partially qualified for hearing, and the Grievant request a qualification ruling from the Office of Employment Dispute Resolution (EDR).

On November 1, 2012, Grievant filed a grievance to challenge the Agency's issuance to her of an Annual Evaluation with an overall rating of Below Contributor. Grievant sought transfer to another supervisor, bonus pay recovery, and all adverse VDOT personnel documents removed from her personnel file.

On November 8, 2012, Grievant filed a Grievance seeking transfer to another unit within the Department and seeking a DHRM retaliation investigation.

On December 4, 2012, Grievant filed a grievance challenging her removal from employment based on the misapplication of state policies and procedures. She also alleged retaliation and discrimination.

On January 8, 2013, EDR issued Ruling No. 2013-3480, 2013-3495 fully qualifying Grievant's July 26, 2012 grievance and consolidating it with Grievant's December 4, 2012 dismissal grievance for a single hearing. Grievant's November 1, 2012 and November 8, 2012 grievances were consolidated with her other grievances by EDR Ruling No. 2013-3513, 2013-3514 issued on January 28, 2013. On February 19,

2013, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 2013, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?
3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?
5. Whether the Agency complied with DHRM policies governing evaluation and removal of an employee for unsatisfactory work performance.
6. Whether Grievant was discriminated and retaliated against by the Agency?

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. The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency's evaluation and removal of her from employment was contrary to 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 Department of Transportation employed Grievant as a Contract Officer II. She began working for the Agency on July 25, 2011.¹ The purpose of her position was to, “establish and administer ‘Best Value’ contracts for goods and services that meet customer expectations regarding quality, quantity, and price in accordance with applicable laws and policies.”² Her position was Exempt under the Fair Labor Standards Act.

Grievant was supervised by various employees over her tenure with the Agency because she complained about each supervisor. In March 2012, the Agency changed Grievant’s supervisor from Supervisor B to Supervisor P. At various times Grievant was supervised by the Team Leader.

In September 2011, Grievant received an annual performance evaluation with an overall rating of Contributor.

In August 2011, Grievant was assigned a procurement project for ABS services. It consisted of multiple service areas which required completion by February 3, 2012 to ensure the new contract would be affected by February 22, 2012. On September 8, 2011, Grievant attained approval from the Acting Procurement Manager to dispense with competitive sealed bidding for the purchase of nonprofessional services in the ABS assignment. On September 9, 2011, the Acting Procurement Manager gave Grievant authority to use “Competitive Negotiation (RFP)” for the ABS assignment.³ On November 7, 2011, the Agency had a “Solicitation Approval” for the assignment.⁴ Sealed proposals were to be received until December 15, 2011.⁵

The LC Director was the “customer” with respect to the ABS project.

On January 27, 2012, the Team Leader sent Grievant an email stating:

Just want to thank you for the frank discussion yesterday about improving communications and the scoring meetings that you conducted on Monday and Tuesday for the [ABS] for service areas. You stated that you are experienced at handling complex procurements including delegating

¹ She had been employed by another State agency for approximately ten years and worked on procurement issues.

² Agency Exhibit 2.

³ Grievant Exhibit 4.

⁴ Grievant Exhibit 8.

⁵ Grievant Exhibit 8.

responsibilities at previous jobs and you are capable to handle this procurement.

As I've stated before, I will continue to support you and the evaluation committee through to award. I would also like you to except as correction and improvement, the following areas in the scoring process that need to be addressed:

- References (Offeror Data Sheet): the process was delegated to your committee team leader (not what I had advised) and did not instruct all committee members on how scoring would be done. The result was that individual scores were done for the reference criteria which had to be declared invalid at the scoring meeting and replaced by the team leader's scores (or whoever called the references).
- Your instructions were to collect the original score sheets at the beginning of the meeting to avoid changes being made to originals. The results of not collecting the original score sheets was at least one of the original score sheets was changed and it had to be redone. You have stated that this couldn't be done because the reference evaluation scores had to be changed and it was too late for committee members to make a copy of their original (but they should have been instructed to bring a copy).
- Also at the beginning of each meeting, you gave the committee a consensus sheet of all scores. The effect of this, which I observe, was to allow members to begin thinking about the short list before discussion of their scores. Consensus sheet should not be provided until the end of scoring, in the future.
- Clarification Questions:
You instructed the committee to vote whether to ask clarification questions. Clarification should be asked if any member requests it. You stated that clarification questions should only be asked if it affects scoring. Again, clarification questions should be asked (and encouraged) in order to have all the information needed. There is no way to predict if an answer will prompt a member to change their score. Questions should be submitted for your review and edits. If there is a question that you do not think is appropriate, we should discuss it.

I understand that you are coming from a smaller agency where procurement process was not as closely scrutinized. The high value and complexity of VDOT RFP procurements adds to the importance to follow the process and to ask if it is not clear how to proceed.⁶

⁶ Grievant Exhibit 9.

On January 28, 2012, Grievant replied to the Team Leader's email by alleging supervisor harassment and abuse of authority. She asked for mediation.

On February 15, 2012, the LC Director sent an email to Grievant and the Team Leader asking how soon the Notice of Intent to Award would be posted. She added "as you can imagine, we are anxious to move as quickly as possible."⁷

On February 16, 2012, Supervisor B sent Grievant an email stating:

We need to meet today at 11 in the first floor conference room. Come prepared with a timeline that defines project completion dates for each service area. Since January 10, I have requested you to provide project completion dates on multiple occasions (see attached e-mail), and this is the second time [LC Director] has requested this information. (See attached e-mail).

[Team Leader], you, and I have met on multiple occasions and [Team Leader] and I have conveyed to you what steps are required before the Notice of Intent to Award can be posted. On January 31, we met for three hours, and we explained what steps are required in detail so a project completion date would be provided to [LC Director] on February 1. Your inability to provide a project completion date on each service area is unacceptable and our customer is again inquiring for this information.

Grievant replied to Supervisor B's email:

Your request for a new timeline is unreasonable as [Team Leader] you and I have met on multiple occasions. This project has had a timeline from day one in accordance with the procedures but the original expectations that you have given has been altered by the many situational judgment calls that you and [Team Leader] have made since the beginning of this project to accommodate consensus meeting and negotiation meetings.

I will be glad to meet with you and [Team Leader] but I am requesting that [Ms. Pb] meet with us [as] my human resource representative. I have been emotionally abused and coerced to respond to unreasonable demands in this very dynamic and changing environment and I have ... been treated with disrespect and unfairly.⁸

⁷ Grievant Exhibit 10.

⁸ Grievant Exhibit 10.

On February 28, 2012, the Team Leader sent Grievant an email asking for an update will win the Notice of Intent to Award would be posted for each of the four service areas in the RFP. On February 28, 2012, Grievant sent the Team Leader an email stating, in part:

PF0001 – Thursday, March 1, 12:00 noon.
PF0002 – Monday, March 5, 12:00 noon.
PF0003 – Wednesday, March 7, 12:00 noon.
PF0004 – Friday, March 9, 12:00 noon.⁹

Grievant presented a letter dated March 2, 2012 from her mental health provider stating, in part:

This letter is written at the request of [Grievant] to provide documentation of her psychiatric disability. *** therefore based upon her current symptoms presentation and the triggers that exacerbate them, the following are recommended as reasonable work accommodations: 1) One-week leave, which may be extended based upon her level of functioning which will be monitored, 2) provision of written documentation of policies, procedures, and other performance expectations, and 3) advance notification of meetings related to performance.

On March 6, 2012, the LC Director sent Grievant, the Team Leader, and Supervisor B an email stating, "I am getting anxious that the Notice of Intent to Award has not yet gone out." She asked, "[c]an you please tell me when we can expect the Notice of Intent to Award to be posted, and is it necessary that all service areas be done at the same time? Additionally, if there is anything we can do to expedite this effort, please know that we are here to help."¹⁰

On March 6, 2012, Supervisor B removed the project and files from Grievant because she believed that Grievant was not moving as quickly as possible to complete the assignment. The assignment was given to another employee. The Notice of Intent to Award for the ABS project was published on March 12, 2012.

On March 9, 2012, the Acting Division Administrator informed the Team Leader of Grievant's request for accommodation under the Americans with Disabilities Act.

Grievant took leave after March 9, 2012. On March 29, 2012, Grievant's mental health provider released Grievant to return to work on April 2, 2012 with the following accommodations:

⁹ Grievant Exhibit 10.

¹⁰ Grievant Exhibit 13.

- Provision of written documentation of policies, procedures, and other performance expectations.
- Advance notification of meetings related to performance.¹¹

On April 4, 2012, the Team Leader sent Grievant an email stating:

To begin, your refresher training¹² is to complete the following assignments, in order:

- 1) Read the Professional Services manual,
- 2) Read the Code of Virginia, VPPA,
- 3) Read the APSPM Chapters 1-4, 7, 10
- 4) Read the Vendors Manual.¹³

On May 1, 2012, Grievant was assigned the Café procurement project. She was given a work plan¹⁴ as follows, in part:

Core Responsibilities	Detail/Steps to take	Timeframe
B. Contracts and manages procurement for goods and nonprofessional services, using the competitive negotiation process (RFP) and competitive sealed bidding (IFB/RFQ) in compliance with the Virginia Public Procurement Act (VPPA) and VDOT policies and procedures without the disruption of the department's business operations. Provides oversight of district procurements. Assists with Professional Services Contracts.	<p>Beginning Tuesday May 1, 2012:</p> <ol style="list-style-type: none"> 1. Complete RFP's assigned; as follows: (Café RFP assigned on April 30, 2012) <p>Meet with Supervisor to establish timeframe to complete steps stated in the VDOT Procurement Checklist- RFP, Guideline for Evaluation of RFPs, Provide direction and deadlines to all members (end user/evaluation team) related to each procurement.</p> <ol style="list-style-type: none"> 2. Procurement file with all 	<ol style="list-style-type: none"> 1. Meet with end-user within 1 week of RFP assignment to cover scope/specifications and project timeline; Create a plan to complete the RFP within 2 days of meeting with end-user; 2. Provide for Supervisor approval at least 2 days prior to posting solicitation and prior to NOIA. 3. Provide a weekly report to Supervisor detailing daily tasks worked on and/or completed.

¹¹ Grievant Exhibit 12.

¹² Grievant was given a work plan beginning April 4, 2012 including these requirements. See, Grievant Exhibit 42.

¹³ Grievant Exhibit 19.

¹⁴ Grievant Exhibit 42.

	<p>documentation completed and in-place as prescribed tabs and format without any missing information or out of place documents in file.</p> <p>3. Follow written policies and procedures and oral instructions/directions, received training from Supervisor as needed.</p> <p>4. Ensure draft documents are reviewed by Supervisor and corrections are completed accurately and without errors more than one time.</p> <p>Complete Professional Services as follows: (Construction Engineering Inspection Services for [location] Project Specific Contract I – being assigned Wednesday May 2, 2012.</p> <p>5. Once assigned project is received – Make folder and provide necessary documents to appropriate personnel within 2 business days.</p> <p>Contact Division Project Manager or Committee Chair for any missing information or documents needed for the file within 2 business days.</p> <p>6. Upon receipt of Expression of Interests – pickup list of recorded firms from appropriate personnel</p>	
--	--	--

	<p>or create list of Expression of Interest received and notify the Division Project Manager or Committee Chair within 2 business days.</p> <p>7. Once Expression of Interest has been picked up by Division Project Manager or Committee Chair, coordinate meeting dates with Division Project Manager or Committee Chair within 2 business days.</p> <p>8. Attend all necessary short list an interview meetings ensuring proper forms and documentation are in file as outlined in the Professional Services Manual.</p> <p>9. Proofread, edit as appropriate, and approve written narrative provided by the Division Project Manager or Committee Chair within 5 business days of receipt.</p>	
--	--	--

Grievant did not sign the May 1, 2012 development plan. Agency managers did not sign the May 1, 2012 development plan because Grievant did not sign the plan.

During a pre-proposal meeting with vendors, Grievant provided incomplete information about the location of the Café project that might have affected the amount of the vendors' bids.

In May 2012, Grievant asked the Regional Procurement Manager if she would review Grievant's RFP draft. The Regional Procurement Manager met with Grievant and provided Grievant with her feedback. Grievant was "taken aback" by the number of comments made by the Regional Procurement Manager. They discussed the Café procurement for approximately three hours. The Regional Procurement Manager

observed that Grievant was confused and seemed to have difficulty determining what information was supposed to be placed in various sections of the RFP.

On July 6, 2012, Grievant began meeting on a weekly basis with the Team Leader to discuss her work duties and performance. The Regional Procurement Manager also participated in the meeting. Grievant knew that she would be meeting with the Team Leader on a weekly basis well before each meeting.

After observing Grievant's work performance, the Regional Procurement Manager concluded that Grievant did not have adequate experience in working with requests for proposal and developing those proposals. Grievant seemed to need a lot of supervision and was not able to handle assignments independently. The Regional Procurement Manager also concluded that Grievant was often resistant to feedback from the Team Leader. In one meeting in May 2012, the Regional Procurement Manager observed the Team Leader talk to Grievant about coordinating selection meetings with the Team Leader but Grievant did not respond to the Team Leader.

On August 14, 2012, Grievant was given a performance plan as follows:

Core Responsibilities	Detail/Steps to take	Timeframe
<p>B. Contracts and manages procurement for goods and nonprofessional services, using the competitive negotiation process and competitive sealed bidding in compliance with the Virginia Public Procurement Act and VDOT policies and procedures without the disruption of the department's business operations. Provides oversight of district procurements. Assist with professional services contracts.</p>	<p>Beginning August 14, 2012:</p> <ol style="list-style-type: none"> 1. Complete IFB/RFP's assigned; as follows: <ol style="list-style-type: none"> a. RFP [numbers] Cafeteria RST assigned April 30, 2012; meet with supervisor to established timeframe to complete steps stated in the "VDOT Procurement Checklist/RFP", ("Guidelines for evaluation of RFPs"). b. Other assigned projects. <p>Provide direction and deadlines to end users/evaluation team) related to each IFB/RFP procurement.</p> <ol style="list-style-type: none"> 2. Procurement file with all documentation completed and in-place as prescribed 	<ol style="list-style-type: none"> 1. Meet with end-user within 1 week of RFP assignment to cover scope/specifications and project timeline; Create a plan to complete the RFP within 2 days of meeting with end-user; 2. Provide for Supervisor approval at least 2 days prior to posting solicitation and prior to NOIA. 3. Provide a weekly report to Supervisor detailing daily tasks worked on and/or completed.

	<p>tabs and format without any missing information or out of place documents in file.</p> <p>3. Follow written policies and procedures and oral instructions/directions, received training from Supervisor as needed.</p> <p>4. Ensure draft documents are reviewed by Supervisor and corrections are completed accurately and without errors after first review. (No repeat of the error corrections).</p> <p>5. Ensure contract administration by following up with Contract and end-user. Consult with Supervisor for directions, if needed.</p> <p>Right-of-way construction Plans for the [projects] assigned Wednesday, July 18, 2012.</p> <p>6. Once assigned project is received – Make folder and provide necessary documents to appropriate personnel within 2 business days. Contact Division Project Manager or Committee Chair for any missing information or documents needed for the file within 2 business days.</p> <p>7. Upon receipt of Expression of Interests – pickup list of recorded firms from appropriate personnel</p>	
--	---	--

	<p>or create list of Expression of Interest received and notify the Division Project Manager or Committee Chair within 2 business days.</p> <p>8. Once Expression of Interest has been picked up by Division Project Manager or Committee Chair, coordinate meeting dates with Division Project Manager or Committee Chair within 2 business days.</p> <p>9. Attend all necessary short list an interview meetings ensuring proper forms and documentation are in file as outlined in the Professional Services Manual.</p> <p>10. Proofread, edit as appropriate, and approve written narrative provided by the Division Project Manager or Committee Chair within 5 business days of receipt.</p>	
--	---	--

Grievant signed the August 2012 performance development plan and wrote that she was receiving the work plan as “a direct result from reporting ethic concerns and represents an unfair application of state policies; however I will continue to perform my duties to the best of my abilities.”¹⁵

On October 17, 2012, Grievant received an Annual Evaluation for the time period of October 25, 2011 through October 24, 2012. She received an overall rating of Below Contributor. The Supervisor wrote:

[Grievant] has significant substandard work performance issues related to following Supervisor instructions. Written Notices were issued related to

¹⁵ Agency Exhibit 1.

following procedures to report work absences and productivity. [Grievant] was assigned one RFP for [ABS] and could not complete this project in a timely manner. She has been given a second RFP for [Cafeteria] which is still in process. She still needs to demonstrate ability to handle complex procurements following management's instructions to be considered a Contributor. Improvement is being addressed with a Performance Development Plan and weekly meetings.

[Grievant] has been assigned to read and understand the Professional Services Procurement Manual in order to assist in Professional Services procurements, under [Ms. W.]

Challenges:

Implementation of Cardinal Procurement Module in December, 2011 (learning curve) to replace outdated FMS system.

Attended:

Cardinal Training – Strategic Sourcing

Public Procurement Forum (November 13 – 16th, 2011)

PIM 29 Class (November 2011)

Ethics (September 26, 2012)

[Grievant] needs to continue to work on improvement in communications and following instructions of VDOT management in order to be entrusted to handle more complex procurements.¹⁶

On November 7, 2012, Grievant met with the Team Leader, Regional Procurement Manager and two other managers to discuss Grievant's re-evaluation. Grievant was told that DHRM Policy 1.40 requires that an employee receiving a Below Contributor rating on an annual performance evaluation must be re-evaluated and have a performance re-evaluation plan developed. Grievant was presented with a re-evaluation plan. The re-evaluation plan was scheduled to begin on November 8, 2012 and was not materially different from the evaluation plan Grievant received on August 14, 2012.¹⁷ She was told she could review the plan for one week and then return on November 14, 2012 with any feedback she may have had regarding the tasks, time frames, and expected deliverables. The Team Leader tried to answer any questions Grievant had regarding the policy or the new plan. Grievant became angry. Her voice became loud and she became confrontational. She stood up before the meeting had concluded and walked out of the room. As she walked out of the room she said "I am not signing it. I am done with the abuse and games you all play." The Team Leader and Ms. S signed the re-evaluation plan. In the place on the form for Grievant's signature, the words "Refused to Sign" were written.

¹⁶ Agency Exhibit 3.

¹⁷ The primary difference between the two plans was that Grievant was responsible for a different assignment given to her on November 6, 2012.

On November 8, 2012, the Team Leader sent Grievant an email stating, in part:

As a result of you indicating that you do not intend to provide feedback on the re-evaluation plan, the re-evaluation plan (attached) will become effective Thursday, November 8, 2012. We will continue to hold our weekly meetings to discuss performance each Thursday at 3 p.m. I am aware that you will be in a meeting [Ms. S] on November 8 at 3 p.m. and as a result, our next scheduled weekly meeting will be November 15, 2012.¹⁸

On November 15, 2012 Grievant met with the Team Leader. Grievant said, "These meetings are mandated and I don't want to be here."

On November 16, 2012, the Team Leader sent Grievant a letter stating, in part:

You have been non-cooperative throughout this process which ultimately resulted in a below contributor rating on your annual performance evaluation. You continue to be non-cooperative therefore; it has been determined that you are not able to successfully complete the re-evaluation. Alternatives to discharge have been considered however; we are unable to identify a suitable alternative. I regretfully inform you that your employment is terminated effective today.¹⁹

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action."²⁰ Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."

"[U]nsatisfactory work performance" is a Group I offense.²¹ In order to prove unsatisfactory work performance, the Agency must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

¹⁸ Agency Exhibit 3.

¹⁹ Agency Exhibit 4.

²⁰ The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

²¹ See Attachment A, DHRM Policy 1.60.

Grievant was assigned responsibility to complete the procurement for the ABS project. She should have been able to complete the project by February 3, 2012. She was unable to complete the project on a timely basis. The Agency's customer became concerned regarding whether the project would be completed timely. On March 6, 2012, the Agency removed the project from Grievant and gave it to another employee to be completed. Grievant's Café project contained numerous errors that had to be corrected because Grievant was confused and unable to perform the work without extensive supervisory support. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice for unsatisfactory work performance.

Grievant argued that the assignment was removed from her just as she was about to complete it. Even if the Hearing Officer assumes for the sake of argument that Grievant's assertion is true, the Agency presented evidence from its customer who was concerned that the project would not be completed timely because of existing delays. Grievant was responsible for those delays. Her work load was not so excessive that she would have been unable timely complete the ABS assignment.

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 Human Resource Management"²² 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, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

Annual Performance 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.

²² *Va. Code § 2.2-3005.*

The Agency presented sufficient evidence to support its opinion regarding Grievant's annual work performance. She was assigned the ABS project which she failed to timely complete. Grievant demonstrated confusion with respect to completing the Café assignment. She gave incomplete information to a vendor during a pre-procurement meeting.

Grievant's workload was not unreasonable. The Director of Procurement²³ testified that someone in Grievant's position should have been able to handle six or seven solicitations at a time. Grievant was given only two yet she had difficulty completing the assignments.

The Agency took significant measures to ensure that Grievant was aware of her job duties and the Agency's expectations. She was provided with detailed work performance plans. After the Agency identified problems with her work performance, she began weekly meetings with the Team Leader to discuss her performance. When Grievant asked for additional training as part of her accommodation, the Agency gave her an opportunity to review the appropriate resources and policies governing her job duties.

Grievant disputed the accuracy of the Agency's assessment of her work performance. The evidence she presented was not sufficient to establish that the Agency's annual performance evaluation was arbitrary or capricious. Indeed, the Agency presented evidence showing that Grievant was given deadlines for the ABS project but she exceeded those deadlines. The Agency's customer expressed concern about issuing the Notice of Intent to Award on a timely basis. The project had to be removed from Grievant and given to another employee to ensure it was completed as soon as possible. Grievant argued that her work product was adequate. The Regional Procurement Manager observed that Grievant seemed confused and overwhelmed by the work and that she made errors. Grievant failed to completely explain the location for the work in the Café procurement that could have resulted in inaccurate bids.

Grievant repeatedly objected to the employees supervising her. The Agency assigned at least three different employees to supervise her yet problems with her work performance continued. She was consistently resistant to criticism of her work from managers and considered them to be hostile to her. This suggests that the problem was not with the supervisors but with Grievant.

An employee cannot be rated "Below Contributor" on the annual evaluation unless he or she has received:

- At least one Notice of Improvement Needed/Substandard Performance form; OR
- A Written Notice for any reason as defined in Policy 1.60, Standards of Conduct.

²³ The Director of Procurement began working in Grievant's location in November 2011 and left January 29, 2013.

Grievant received a Group I Written Notice in June 2012 and, thus, the Agency had met a condition necessary to issue an annual performance evaluation of Below Contributor.

Re-Evaluation

Under DHRM Policy 1.40, Performance Planning and Evaluation, an employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below.

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.

- Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- The supervisor should develop an entire performance plan including, "Employee Development."
- If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form, which will be used for re-evaluation purposes. The form should clearly indicate that it is a re-evaluation.
- The 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.
- The employee's reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- If the employee transfers to another position during the re-evaluation period, the re-evaluation process will be terminated.

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.

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.

If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's of 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 drafted a re-evaluation work plan that was consistent with Grievant's work duties and the Agency's expectations for her work performance. The Agency met with Grievant to present the re-evaluation work plan to her and obtain her feedback regarding the plan. Drafting the re-evaluation work plan and presenting it to Grievant was consistent with DHRM Policy 1.40.

The decision to remove an employee must be made at the conclusion of the three month re-evaluation period after the Agency has determined that the employee's work performance is unsatisfactory. The Agency did not provide Grievant with a three month re-evaluation period. The Agency did not determine that Grievant's work performance was unsatisfactory at the conclusion of a three month re-evaluation period. The Agency did not determine that there are no alternatives to demote, reassign, or reduce Grievant's duties at the end of that three month period.²⁴ The issuance of a three month re-evaluation is a condition precedent to removal of an employee. The Agency has not presented a sufficient basis to support Grievant's removal. She must be reinstated so that a re-evaluation can take place.

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because she is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

Retaliation and Discrimination

An Agency may not retaliate against its employees. To establish retaliation, Grievant must show he or she (1) engaged in a protected activity;²⁵ (2) suffered an adverse employment action; and (3) a causal link exists between the adverse employment action and the protected activity; in other words, management took an adverse employment action because the employee had engaged in the protected

²⁴ The Agency asserted that it determined no alternatives were available at the time of removal. The Agency's obligation to determine whether alternatives are possible arises at the end of the re-evaluation period.

²⁵ 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.

activity. If the agency presents a nonretaliatory business reason for the adverse employment 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 causal connection and inferences drawn therefrom may be considered on the issue of whether the Agency's explanation was pretextual.²⁶

Grievant engaged in protective activity because she filed grievances to challenge the Agency's actions against her and she sought investigations against her supervisors for discrimination, unethical behavior, etc. She suffered a materially adverse employment action because she was removed from employment. Grievant has not established a connection between her protective activities and the adverse employment action taken against her. The Agency took action against Grievant because of her poor work performance and not as a pretext for retaliation.

Grievant argued that she was being discriminated against because of her race, age, and disability. No credible evidence was presented to support this allegation.²⁷ The evidence showed that Grievant received disciplinary action, performance plans, and an annual evaluation because of her poor work performance and not because of any protected status or protective activity. Grievant's assertion that she was being harassed related to her objection of the management style displayed by the Team Leader and Supervisor B. The Agency asserted that the management style of its employees reflected their concern regarding Grievant's poor work performance and their desire to improve her performance. Grievant's concerns of harassment related to differing opinions regarding Grievant's work performance and not her protected status. The Agency afforded Grievant reasonable accommodation to her disability by permitting her to take leave, providing her with training regarding procedures, and giving her advance notice of meetings relating to performance. Grievant knew that she would be meeting with the Team Leader on a weekly basis to discuss her work performance. Although Grievant may have believed she was being "harassed" the pressure and criticism she experienced was a result of the Agency's concerns regarding her work performance and not because of her race, age, or disability.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief regarding her annual performance evaluation is **denied**. Grievant's request for relief regarding retaliation and discrimination is **denied**. Grievant's request for relief regarding her removal is **granted**. The Agency is ordered to **reinstate** Grievant to Grievant's same

²⁶ 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).

²⁷ The Director of Procurement testified that the Agency's Civil Rights Division investigated Grievant's claim of discrimination and concluded her claim was unfounded.

position prior to removal, or if the position is filled, to an equivalent position. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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 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

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR 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:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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

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.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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

²⁸ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10028 10029 10030 10031-A

Addendum Issued: June 25, 2013

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.²⁹ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.³⁰

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's attorney devoted 11.50 hours towards representing Grievant in her grievance hearing. She was ordered to be reinstated to her position. The hourly rate allowable by EDR is \$131.³¹ Accordingly, Grievant should be awarded \$1,506.50 (11.5 hours X \$131).

²⁹ Va. Code § 2.2-3005.1(A).

³⁰ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

³¹ Grievant's petition erroneously stated the rate as \$120 per hour.

Grievant's attorney submitted an amended petition on June 25, 2013 seeking fees associated with Grievant's previous attorney. The previous attorney did not submit a separate affidavit. The request for the additional fees was made more than 15 days after the date of the original hearing decision. Accordingly, those fees are denied.

AWARD

Grievant is awarded attorneys' fees in the amount of \$1,506.50.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes "final" as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer