

Issue: Separation from State (unable to meet work conditions [certification]); Hearing Date: 05/27/15; Decision Issued: 06/09/15; Agency: DFS; AHO: John R. Hooe, III, Esq.; Case No.10480; Outcome: No Relief – Agency Upheld.

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

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

**In the matter of : Case No. 10480**

Hearing Date: May 27, 2015  
Decision Issued: June 9, 2015

**PRELIMINARY MATTERS**

Upon being appointed as the Hearing Officer in this matter, effective October 14, 2014, the Hearing Officer arranged a pre-hearing telephone conference which was conducted on October 23, 2014. The telephone pre-hearing conference was conducted with the Grievant and Agency representative. During the telephone pre-hearing conference, it was agreed that due to issues regarding the production and review of documents, a hearing date could not be scheduled. It was agreed that the Grievant would provide a written request for production of documents by October 27, 2014.

By email on October 24, 2014, the Grievant provided a written request for production of documents. On October 27, 2014, the agency representative responded that an estimate of how long it would take to produce the documents would be provided by the end of the week. By email dated November 1, 2014, the agency representative provided a response of the agency regarding the Grievant's request for records with her letter containing nine numbered responses. The Grievant then provided his responses by his email dated November 13, 2014.

During a telephone conference with the Grievant and the agency representative conducted on November 13, 2014, the Hearing Officer advised that he would provide a written decision on the Grievant's request after considering all of the emails referenced in this letter. By letter dated November 13, 2014 the Hearing Officer ruled on the nine items, including the Hearing Officer's decision that once the Grievant had paid the amounts required for the cost of production of certain documents, the agency would have forty-five days to produce the documents.

By email dated November 19, 2014, the Grievant requested that [the Director] of the

Office of Employment Dispute Resolution make a compliance ruling regarding the Hearing Officer's November 13, 2014 rulings.

Following resolution of the document production issues, another pre-hearing telephone conference was conducted on April 15, 2015 between the Hearing Officer, the Grievant and the agency representative at which time it was agreed that the hearing would be conducted on Wednesday, May 27, 2015 beginning at 9:00 a.m. at [the agency's facility]. It was further agreed that a copy of all exhibits a party intends to introduce at the hearing and a list of witnesses to be called would be provided to the Hearing Officer and to the other party no later than Wednesday, May 20, 2015 at 5:00 p.m.

By email on May 20, 2015 at 8:15 p.m., the agency representative advised the Hearing Officer that the Grievant had not provided her with an exhibit book but instead had emailed hundreds, if not thousands of pages of electronic documents. The agency representative objected and requested that the Hearing Officer order the Grievant to provide the required exhibit book no later than 3:00 p.m. on Friday, May 22, 2015. The agency representative sent an additional email to the Hearing Officer on May 22, 2015 at 11:09 a.m. advising that she had not had a response from the Hearing Officer and again objecting.

The Hearing Officer became aware of the issue regarding the exhibit book only upon returning from vacation on Tuesday, May 26, 2015 at which time a pre-hearing telephone conference was conducted between the Hearing Officer, the Grievant and the agency representative. During the telephone conference, the Hearing Officer sustained the agency representative's objection to the Grievant producing any exhibits at the hearing due to his failure to provide the required exhibit book.

## **APPEARANCES**

Grievant  
Representative for Agency  
Agency Counsel  
Seven witnesses for the Agency  
Two witnesses for the Grievant

## **ISSUES**

1. Did the Grievant fail to meet the required competencies to perform as a qualified examiner?
2. If so, did such failure constitute a "Failure to obtain license or certification required

for the job” as set out in the Standards of Conduct (Policy: 1.60) Article H.?

3. If the Grievant was unable to meet the employment conditions as set out in the Standards of Conduct, did the Agency have the authority to terminate the Grievant’s employment?

### **EXHIBITS**

The Agency Exhibits admitted into evidence are contained in two notebooks with the following contents:

1. - Grievance Form A with attachments
2. - Termination letter dated September 4, 2014
3. - Standards of Conduct, Policy: 1.60
4. - Agency organizational charts
5. - Employee work profile
6. - Performance evaluation, October 2013
7. - Quality Manual
8. - Memo dated March 29, 2012
9. - Job qualification information and advancement letter dated June 4, 2013 directed to Grievant
- 10.- Training Manual (contained in Notebook 2)
- 11.- Training Manual, 30 pages
- 12.- Training Matrix, beginning June 10, 2013
- 13.- Memo dated July 12, 2013 and email dated July 15, 2013
- 14.- Training overview from March 29, 2012 through July, 2014
- 15.- Memo dated August 15, 2013
- 16.- Email dated September 18, 2013
- 17.- Memo dated November 10, 2013
- 18.- Comparison results, 9 pages
- 19.- Memo dated February 26, 2014
- 20.- Assessment of Grievant dated March 10-14, 2014
- 21.- Assessment of Grievant dated March 19, 2014
- 22.- Email dated April 21, 2014
- 23.- Memo dated May 14, 2014
- 24.- Emails dated May 16, 2014
- 25.- Emails from May 20, 2014 through June 30, 2014
- 26.- Training report memorandum dated June 4, 2014
- 27.- Memo dated June 18, 2014
- 28.- Email dated June 20, 2014

- 29.- Grievant practice mock case review with emails
- 30.- Emails from June 27, 2014 and June 30, 2014
- 31.- Technical interview review from July 1, 2014
- 32.- Technical interview review from July 1, 2014
- 33.- Technical interview review from July 1, 2014
- 34.- Technical interview review from July 1, 2014
- 35.- CD of practice mock trial with notations
- 36.- Mock trial review and feedback dated July 7, 2014
- 37.- Emails dated July 8, 2014 and July 9, 2014
- 38.- Memorandum dated July 10, 2014 and notice of improvement needed
- 39.- Training syllabus July 13-16, 2014
- 40.- Memo dated July 18, 2014
- 41.- Training syllabus July 21-24, 2014
- 42.- Memorandum dated July 28, 2014
- 43.- Training syllabus dated July 28-31, 2014
- 44.- Memo dated August 21, 2014
- 45.- Memo dated August 6, 2014
- 46.- Grievant's weekly descriptions of training activities from June 10, 2013 through August 2, 2014 (79 pages)

The Grievant exhibits admitted into evidence are contained in two notebooks with the following contents: (only the listed Tab contents)

- Tab 1.- Memo dated March 24, 2014
- Tab 4.- Emails dated May 16, 2014
- Tab 7.- Memo regarding June 18, 2014
- Tab 10.- Emails from June 27, 2014 and June 30, 2014
- Tab 13.- Email dated July 2, 2014 with June 28, 2014 review
- Tab 14.- Emails from July 1, 2014 and July 2, 2014
- Tab 15.- Review dated July 2, 2014
- Tab 17.- Emails from July 8, 2014
- Tab 25.- Memo dated August 6, 2014
- Tab 30.- Grievant's mock case (also included in separate notebook)
- Tab 31.- Certificates of training regarding D.E.R.
- Tab 32.- Training description
- Tab 34.- Examination sheets
- Tab 35.- Grievant description of weekly training from June 10, 2013 through August 2, 2014
- Tab 36.- Article by R.D.O., Senior
- Tab 45.- Agency objected, Hearing Officer sustained. Not admitted into evidence.
- Tab 46.- Photograph
- Tab 47.- Photograph
- Tab 48.- Training Manual
- Tab 49.- Qualifying questions

- Tab 50.- Agency objected, Hearing Officer sustained. Not admitted into evidence.
- Tab 51.- Agency objected, Hearing Officer sustained. Not admitted into evidence.
- Tab 52.- Photo of print
- Tab 53.- Prints, 3 pages
- Tab 54.- 13 questions with notations
- Tab 56.- Application history

The Agency prior to the hearing objected to the introduction of any exhibits by the Grievant. The Agency withdrew its objections with the exception of the above noted objections which were sustained.

### **FINDINGS OF FACT**

The Grievant filed a timely grievance regarding his termination of employment. The termination letter dated September 4, 2014 indicated that the Grievant was to be terminated from employment because the Grievant was unable to meet the required competencies to perform his job. The Grievant was not terminated as a matter of discipline.

Agency witness, [Program Manager], testified that the Grievant was hired as a Trainee on June 4, 2013 to potentially fill a position if the Grievant successfully completed a documented training program (Exhibit 9). [Program Manager] testified that the Grievant was hired as a trainee primarily because [the Director] wanted to give the Grievant the opportunity to qualify for the position. [Program Manager] reviewed in detail Agency's exhibits documenting the Grievant's participation in the training program from June 10, 2013 until the termination letter dated August 26, 2014 (Exhibit 1).

[Program Manager] testified that the Quality Manual regarding personnel and training sets out at Section 19.1.5 that "the goal of training is to qualify all employees to meet the responsibilities outlined in their Employee Work Profile (E.W.P.)." (Exhibit 7). In support of the decision to terminate Grievant, [Program Manager] testified that she did not certify the Grievant because the Grievant failed all of the bullets set out in the Quality Manual at Section 19.4.3 (Exhibit 7).

As a demonstration of the Agency's efforts to assist the Grievant in gaining the skills necessary during his training program, [Program Manager] testified that not only was he trained at the location where he was employed, but was also given the opportunity to travel to each of the other three agency locations for training and evaluation (Exhibits 38, 39, 40, 41, 42, 43 and 44). At each location the Grievant's performance was deemed not acceptable.

Finally [Program Manager] testified that no other trainee received as much help as the Grievant.

Agency witness [Supervisor] testified that he was Grievant's supervisor during training and that he had coordinated training for eight or nine other trainees. He testified that he had known the Grievant for approximately thirteen years and supervised the Grievant for six years in the Grievant's former agency position as a photographer. Supervisor testified that the Grievant had applied for the trainee position in the past but more qualified applicants had been hired. Supervisor testified that he had no reservation in hiring the Grievant as a trainee on June 10, 2013. He also testified that prior to Grievant being hired as a trainee, the Grievant was given the opportunity in 2012 to participate in an unofficial training program with the encouragement of [the Director] (Exhibit 8).

[Supervisor] testified that at the beginning of Grievant's training program in June 2013, [Supervisor] believed that it would take Grievant approximately seven months to gain the skills necessary to be certified (due to Grievant's unofficial training before being hired as a Trainee) and established a loose goal for completion of training as January, 2014. He testified that he has never spent more time with any trainee and denied any claim by the Grievant that he tried to undermine Grievant's progress in the training program.

[Supervisor] indicated that as of November 10, 2013 it appeared the Grievant was making good progress (Exhibit 17) and even as late as February 26, 2014 it was indicated that "...[the Grievant] is making progress" (Exhibit 19). However, the period that followed indicated that evaluations of the Grievant's progress were not good from that time forward (Exhibit 20, 21, 22, 23, 24 and 26). [Supervisor] testified that he offered to sit down and work with the Grievant but the Grievant declined. In closing, [Supervisor] testified that he had no doubt that "we did all we could." [Supervisor] testified that by letter dated August 26, 2014 (Exhibit 1) he advised Grievant of his intentions to terminate Grievant's employment and gave Grievant the opportunity to respond.

[Witness 4] testified that she went through the training program and was certified after eleven months of training. She also testified that she helped with Grievant's training but that he had a lack of focus and refused to take notes to assist him in remembering essential information. [Witness 4] testified that she asked to be removed from Grievant's training program due to his lack of cooperation.

Agency witness [Witness 5] testified that she began as a trainee in September 2013 and was certified in October, 2014. She testified that [Supervisor] was also her trainer and that she observed [Supervisor] working with the Grievant during the Grievant's training. She further testified that she never got the impression of any bias or favoritism shown by [Supervisor] and that the Grievant actually received more one-on-one time with [Supervisor] than she did.

Agency witness [Witness 6] testified that he was trained by [Witness 4] and worked with the Grievant during Grievant's training. [Witness 6] stated his opinion that he did not think that the Grievant could be trained due to his issues with "visualizing."

Agency witness [Section Supervisor] testified that after working with the Grievant from

March 10 through March 14, 2014, she reached the opinion that the Grievant's knowledge and skill level is that of an examiner just beginning training (Exhibit 20).

Agency witness, [the Director], testified that at his urging the Grievant was given first the opportunity for unofficial training and then hired to the trainee position. He testified that the Agency went to considerable expense in its efforts to train the Grievant so that he could qualify to take on the important work of the Agency. He reviewed in detail his memorandum dated August 6, 2014 (Exhibit 45) where he responded to the Grievant's complaints that he had been "shortchanged" in his training and sets out a detailed rebuttal of the Grievant's claim.

The Grievant testified by introducing his exhibits and commenting on the items which he believes support his claim that he received inadequate training. He pointed out examples of being told that he had made a mistake when he had not and receiving different training than other trainees. Grievant also testified that the Training Manual (Grievant Exhibit 48) states that the training program would take a "minimum of ten to twelve months."

Grievant's witness [GW-1] testified that he was a close friend of the Grievant. However, [GW-1] stated in his opinion [Supervisor] is a good supervisor. He also stated that the Grievant told him that he was struggling in the training program after six months, that he wasn't going to spend "after hours" training and that he didn't believe he was going to make it through the program.

Grievant's witness [GW-2] testified that she transferred from the location where the Grievant was training "due to the environment" and that the person who trained her for the position was "forced to retire." She stated that [Witness 4] told her that [Witness 4] "should never have been put in position of being a trainer." [GW-2] also stated that [Supervisor] had problems training other trainees. However, [GW-2] testified that she did not observe the Grievant's close work with [Supervisor], and that all examiners at the location were available to trainees.

### **APPLICABLE LAW AND OPINION**

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et. seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 (A) sets forth the Commonwealth's grievance procedure and provides, in pertinent part:



It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints.....

To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

Standards of Conduct, Policy: 1.60 applies to oppositions covered by the Virginia Personnel Act, including non-probationary full-time and part-time classified and restricted employees. Agency's may use this policy as a guide for evaluating the workplace conduct of employees who are not covered by the Virginia Personnel Act, such as wage employees, probationary employees and employees expressly excluded from the Act's coverage. The Standards of Conduct state as follows:

An employee unable to meet the working conditions of his or her employment due to circumstances such as those listed below may be removed under this section. Reasons include:

- failure to obtain license or certification required for the job;

Prior to such removal, the appointing authority and/or Human Resource Office shall gather full documentation supporting such action and notify the employee, verbally or in writing, of the reasons for such a removal, giving the employee a reasonable opportunity to respond to the charges. Final notification of removal should be via memorandum or letter, not by a Written Notice form. (Standards of Conduct.H.1.)

## **DECISION**

The Agency decision to terminate the Grievant from employment is upheld.

The Agency proved by a preponderance of the evidence that the Grievant had failed to gain certification required for the job despite extensive training opportunities. Grievant's failure constituted a "Failure to obtain a license or certification" as set out in the Standards of Conduct.

The Agency gave Grievant a letter expressing the intent to terminate his employment and gave Grievant the opportunity to respond. After considering the Grievant's response, the Agency exercised its right to terminate his employment.

## **APPEAL RIGHTS**

A hearing decision must be consistent with law, policy, and the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**Administrative Review:** This decision is subject to administrative review by both EDR and the DHRM Director based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or email. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and received by the reviewer within fifteen calendar days of the date of the original hearing decision. "Received by" means delivered to, not merely post-marked or placed in the hands of a delivery service.

#### **Requesting Administrative Review:**

1. **A challenge that the hearing decision is inconsistent** with state or agency policy is made to the Director of the Department of Human Resources Management. This request must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. The director's authority is limited to ordering the Hearing Officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-371-7401 or emailed.
2. **A challenge that the hearing decision is not in compliance with the grievance procedure (including the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings)**, as well as a request to present newly discovered evidence, is made to EDR. This request must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance. EDR's authority is limited to ordering the Hearing Officer to revise the decision so that it complies with the grievance procedure. Requests must be sent to the office of Employment Dispute Resolution, 101 North Fourteenth Street, 12<sup>th</sup> Floor, Richmond, Virginia 23219 or fax to 804-786-0111 or emailed.

In response to any requests for administrative review, the opposing party may submit a written challenge (rebuttal) to the appropriate reviewer. If the opposing party chooses to submit a rebuttal, it must be received by the reviewer within ten calendar days of the conclusion of the original fifteen day appeal period. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the Hearing Officer.

Administrative review decisions issued by the Director of DHRM and EDR are final and not appealable. If the DHRM Director or EDR orders the Hearing Officer to reconsider the hearing decision, the Hearing Officer must do so. If request for administrative review have been made to both the DHRM Director and EDR, the Hearing Officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interest of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within thirty calendar days of the conclusion of any other administrative reviews.

**Final Hearing Decision.** A Hearing Officer's original decision becomes a final hearing decision, with no further possibility of 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:** Once an original hearing decision becomes final, either party may seek review by the Circuit Court on the ground that the final hearing decision is contradictory to law. Neither the Hearing Officer nor the Department of Human Resources Management (or any employee thereof) shall be named as a party in such an appeal.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal. The request for approval to appeal must be received by EDR within 10 calendar days, which means delivered to, not merely postmarked or placed in the hands of a delivery service. The agency may make its request by email or fax. The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency's request.

A notice of appeal must be filed with the Clerk of the Circuit Court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and EDR. The judicial review procedure shall be as more particularly set out in the Grievance Procedure Manual.

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John R. Hooe, III  
Hearing Officer