



# ***COMMONWEALTH of VIRGINIA***

## ***Department of Human Resource Management***

### **OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

#### **DECISION OF HEARING OFFICER**

In re:

**Case Number: 11492 / 11510**

Hearing Date: May 12, 2010  
Decision Issued: June 30, 2020

#### **PROCEDURAL HISTORY**

On October 15, 2019, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory work performance. In addition, the Agency issued a three month re-evaluation and removed Grievant from employment.

Grievant timely filed grievances to challenge the Agency's action. The matter advanced to hearing. On March 30, 2020, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On May 12, 2020, a hearing was held by audio conference due to the COVID19 pandemic.

#### **APPEARANCES**

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

### **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 employee has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

The Virginia Department of Transportation employed Grievant as an Assistant District Engineer at one of its facilities. He began working in the position in December 2016. He is a Professional Engineer. No evidence of prior active disciplinary action was presented during the hearing.<sup>1</sup>

In June 2019, Central Office staff conducted a quality assurance review of the Program at the District where Grievant worked. The review identified several problems with the type of inspections performed, the frequency of those inspections, and the qualifications of staff completing the inspections. Item 3 regarded the failure to perform and/or document mechanical or electrical equipment inspections. Item 4 regarded failure to address comments. Grievant's Unit was given responsibility to develop a corrective action plan to address the items of concern identified in the quality assurance review.

The Supervisor made Grievant responsible for developing corrective actions plans relating to Items 3 and 4. The Supervisor met with Grievant several times to discuss the assignment.

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<sup>1</sup> Grievant was issued a Group II Written Notice on February 24, 2020. That Written Notice is not before the Hearing Officer.

On June 16, 2019, the Supervisor instructed Grievant to complete the action plans by July 8, 2019. Grievant did not comply with that instruction. Since Grievant did not submit the action plans by July 8, 2019, the Supervisor instructed Grievant to complete the action plans by July 16, 2019. Grievant did not submit the action plans by the second deadline. While the Supervisor was on vacation, the Acting District Engineer instructed Grievant to complete the action plans by August 20, 2019. Grievant did not meet that deadline. He submitted unsatisfactory actions plans on August 26, 2019. Grievant was asked to complete updated action plans but did not do so.

Grievant received an annual performance evaluation for the period October 25, 2018 to October 24, 2019. Grievant received an overall rating of Below Contributor. He acknowledged receipt of the annual evaluation on November 26, 2019.

On July 25, 2019, the Agency offered to have Grievant accept a demotion to an Engineer Senior position and report to an Assistant District Engineer. Grievant would have remained in the same payband. Grievant declined the demotion. That position was later filled and was not available to Grievant at the time of his removal.

On December 10, 2019, Grievant and the Supervisor met to discuss the re-evaluation process. Grievant received the re-evaluation plan and the Supervisor discussed the Agency's performance expectations for Grievant during the re-evaluation period.

During the re-evaluation period, the Supervisor scheduled weekly meetings with Grievant to discuss and review his assigned tasks and overall work performance. The Supervisor provided several written progress notes. In the progress reports, the Supervisor identified several performance issues:

1. Failure to adequately complete most of the re-evaluation plan tasks and the action plans related to the movable bridge program management as well as some of the tasks associated with inspection and budget/business management.
2. Continued issue of late paid invoices due to lack of oversight, which almost impacted the district's prompt payment act requirements in December 2019.
3. Rehired staff argumentation without obtaining necessary approval for alternate bridge sources and hence impacted the bridge section's budget.
4. Missed five mandatory re-evaluation weekly meetings without acceptable excuses. The dates were December 19, 2019, January 10, 2020, January 23, 2020, and February 13, 2020.

Grievant was notified by a letter dated February 25, 2020 that his performance during the re-evaluation period was Below Contributor. Grievant was placed on paid

administrative leave until March 9, 2020 and given until March 2, 2020 to provide his response to the Agency's evaluation.

Agency managers reviewed the Agency's available positions and Grievant's skills and concluded that there were no other suitable positions for Grievant to fill. The Agency decided to separate Grievant from employment.

On January 8, 2020, Grievant filed a complaint with the DHRM Office of Equal Employment Services alleging discrimination based on veteran status.

### **CONCLUSIONS OF POLICY**

The Agency issued Grievant a Group I Written Notice and then removed Grievant from employment based on a performance re-evaluation.

#### Group I Written Notice.

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."<sup>2</sup> 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.<sup>3</sup> 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.

On June 16, 2019, the Supervisor instructed Grievant to complete two action plans by July 8, 2019. He did not do so despite two additional time extensions. The Agency has presented sufficient evidence to support the issuance of a Group I Written Notice.

Grievant argued that the disciplinary action should be reversed. He did not present evidence showing the disciplinary action should be reversed.

*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

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<sup>2</sup> The Department of Human Resource Management ("DHRM") has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

<sup>3</sup> See Attachment A, DHRM Policy 1.60.

Management ....”<sup>4</sup> 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.

### Re-Evaluation

DHRM Policy 1.40 governs Employee Performance and Planning. An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed.

Grievant received a Below Contributor rating on his annual performance evaluation. The Agency was authorized by DHRM Policy 1.40 to initiate a three month re-evaluation.

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.

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<sup>4</sup> Va. Code § 2.2-3005.

- If the employee transfers to another position during the re-evaluation period, the re-evaluation process will be terminated.

Grievant was given a performance re-evaluation plan. He was advised of the Agency's expectations during the re-evaluation period. The Supervisor scheduled weekly meetings to provide Grievant with feedback regarding his performance.

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.

Grievant received a Below Contributor rating for the three month re-evaluation period. The Agency's assessment of Grievant's poor work performance is supported by the record.

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

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 evaluated whether Grievant could be demoted, reassigned, or have a reduction in his duties. The Agency concluded these were not feasible options given the Agency's staffing needs and Grievant's skill set. Accordingly, the Agency's decision to remove Grievant following a three month re-evaluation must be upheld.

Grievant asserted that the Agency discriminated against him based on his status as a veteran. Grievant did not testify. Grievant did not present any credible evidence to prove this argument.

Grievant asserted that he did not complete all of the re-evaluation plans and action tasks because he was excluded from important meetings that would have provided him with the needed information. Grievant did not preset sufficient evidence to show that he was excluded from essential meetings and, even if he had been excluded, that he would have been able to complete his assignments.

Grievant asserted that the invoices he issued in December 2019 did not impact Agency operations. Grievant did not present evidence showing the invoices were timely. Untimely issuing invoices forms a basis for unsatisfactory performance.

Grievant asserted that he had the ability to develop budgets. He did not rebut the Agency's claim that he hired staff without necessary approval thereby affecting the Agency's budget.

Grievant asserted he failed to attend some weekly meetings because the Agency denied him the right to have a witness present during the meetings. Grievant did not identify a policy requiring him to have a witness present during weekly meetings with his supervisor.

Grievant presented evidence consisting of recorded telephone calls he had with Agency employees subsequent to his removal. None of those calls affects the outcome of this case.

## 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 removal based on a Below Contributor rating following a three month re-evaluation is **upheld**.

## APPEAL RIGHTS

You may request an administrative review by EDR within **15 calendar** days from the date the decision was issued. Your request must be in writing and must be **received** by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance

with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.<sup>[1]</sup>

[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*

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>[1]</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.