



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12092

Hearing Date: May 3, 2024

Decision Issued: June 12, 2024

PROCEDURAL HISTORY

Grievant was removed from employment effective February 5, 2024, following an unsatisfactory three-month re-evaluation period.

On February 7, 2024, Grievant timely filed a grievance to challenge the Agency's action. The Agency requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) issue a ruling as to whether the Grievant's dismissal grievance was in compliance with the grievance procedure. On February 23, 2024, EDR determined that the grievance was in compliance with the grievance procedure and was permitted to proceed.¹ On March 11, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On May 3, 2024, a hearing was held at state agency offices in Richmond, Virginia.

APPEARANCES

Grievant
Agency Counsel
Agency Party Designee
Witnesses

¹ See EDR Compliance Ruling 2024-5673 (Feb. 23, 2024).

ISSUES

1. Whether the Agency's re-evaluation of the Grievant's performance was arbitrary or capricious?
2. Whether the Agency complied with State policy to remove Grievant from employment?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its re-evaluation was not arbitrary or capricious and that it complied with State policy to remove Grievant. The employee has the burden of raising and establishing any affirmative defenses. 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:

Approximately eight years ago, Medical Provider-1 diagnosed Grievant with Attention-Deficit Hyperactivity Disorder (ADHD).² Grievant testified that one of the limitations that he experiences as a result of ADHD is memory loss impacting working memory. As Grievant described it, he has trouble moving information from his short-term memory into his long-term memory.³

Prior to his dismissal, Grievant was a Financial Services Specialist I with the Agency.⁴ Grievant started in that position with the Agency on December 10, 2021.

The Employee Work Profile for Grievant's position described the purpose of the position as follows:

Perform work of varied and considerable difficulty ensuring data accuracy, analyzing and interpreting financial information, reconciling funds and accounts, preparing journal entries, supporting monthly and annual close processes, forecasting, preparing budgets, compiling year-end reports and work papers, maintaining grant fiscal records and databases, developing positive working relationships to foster a collaborative environment for grant reporting and performing other duties as assigned while preserving fiscal

² Agency Ex. 20 at 9.

³ See Agency Ex. 20 at 2.

⁴ During his time with the Agency, Grievant's Employee Work Profiles indicate that the working title for his position appeared to have been Accounting Analyst and then Accountant. See Agency Ex. 5.

integrity. Significantly impacts the success, integrity and financial accountability of [an Agency division].⁵

The KSAs (Knowledge, Skills and Abilities) to successfully perform the work of Grievant's position were identified in the Employee Work Profile as follows:

- Knowledge of and experience with accounting and financial functions with full-scope of daily fiscal operations, federal grant accounting, financial reporting practices, fiscal month-end and year end close.
- Experience managing federal grants.
- Considerable knowledge and ability to apply the principles of GAAP [Generally Accepted Accounting Principles].
- Knowledge and experience with fund and governmental accounting and budget development.
- Ability to research, analyze and evaluate complex financial data and accounting transactions, and financial reporting in a governmental environment.
- Demonstrated ability to independently establish, maintain, evaluate and improve financial processes, systems and internal controls.
- Strong ability to effectively reason in the abstract, conduct complete and thorough analysis, analyze and interpret data for accuracy, determine the impact of actions or plan and make effective recommendations to resolve complex issues.
- Exceptionally strong working knowledge of automated spreadsheet applications to include manipulating large amounts of data with pivot tables, macros and other functions.
- Extensive documented experience effectively using automated financial accounting/database applications and systems in accomplishing work and developing/improving processes.
- Ability to provide a high level of customer service and establish and maintain effective interdepartmental communications and relationships.
- Ability to interpret policies and procedures, document, and develop work processes and procedures.
- Strong interpersonal skills and the ability to work effectively with agency management, employees, state agencies, auditors and other individuals.
- Ability to work independently as well as part of a team, multitask and pay attention to detail.
- Ability to prioritize, organize work effectively, meet deadlines and be detailed oriented.
- Good oral and written communication skills.

The Employee Work Profile identified the Core Responsibilities for Grievant's position as: General Ledger Accounting, Grant Accounting/Reporting, Financial

⁵ Agency Ex. 5 at 1.

Reporting, Customer Service, Master Equipment Leasing Program (MELP), Auction Reconciliations, and Other Duties.

Manager, Assistant Controller and Controller testified that the Agency considered Grievant's position to be a professional level position that would require little training. The expectation was that someone hired into the position would have sufficient base knowledge and experience to perform the work with limited training to help familiarize the employee with issues and processes that may be unique or specific to the Agency.⁶ When Grievant began his job with the Agency, Manager first trained Grievant on the responsibilities of his job related to General Ledger Accounting, Grant Reporting and some of the responsibilities related to Financial Reporting, including training on the computer systems the Agency utilized. Manager testified that he trained Grievant on those core responsibilities of Grievant's job for approximately two months.⁷

Grievant testified that this job was difficult, but that he believed he could learn the job if he was given enough time to do so. Grievant testified that when he took the job, he believed that he was bringing a lot of base knowledge to the position; however, he found that the functions of other accounting positions he had held had not been as detail-oriented and computer-driven as this job.⁸

Although Grievant asserted that he had advised Manager in February 2022 of his ADHD diagnosis, Manager testified that Grievant made Manager aware of Grievant's memory issues around May 2, 2022 when Manager advised Grievant that he was nearing his six-month review and Manager hoped to see improvement in Grievant's performance. Manager testified that after Grievant told Manager about his issues with memory loss, Manager spoke with staff in the Agency's Human Resources office. Based on their advice, Manager then advised Grievant that if Grievant needed accommodations due to his memory issues, he should contact the Agency's Human Resources Office.⁹

On August 17, 2022, Manager met with Grievant and provided Grievant with a copy of Grievant's Employee Work Profile, which apparently had not been provided prior to that time. Manager also discussed the importance of meeting deadlines, anticipated training with Grievant, and reminded Grievant that he should "initiate when help is needed." Manager also advised Grievant that he was rescinding one of Grievant's telework days because Manager believed that would provide better opportunity for Manager to train Grievant and for Grievant to ask questions of Manager and get assistance when he needed it.¹⁰

Grievant advised Manager at that time that:

. . . What I would like to request from you is a little more specificity.

⁶ Hearing Recording at 22:52-30:42, 4:08:16-4:08:53, 4:18:00-4:18:54, 4:41:19-4:43:30.

⁷ Hearing Recording at 30:38-31:20. Although Profit and Loss statements reporting (P&Ls) was part of the Financial Reporting core responsibility of Grievant's job, Grievant was not trained on P&Ls until late in 2022 and early 2023. Grievant began preparing P&Ls in January 2023.

⁸ Hearing Recording at 6:22:15-6:22:50.

⁹ Agency Ex. 18 and Hearing Recording at 42:12-45:50.

¹⁰ Agency Ex. 18 at 6-7 and Hearing Recording at 49:05-52:54.

In other words, beside each of the lines of responsibilities, I need for you to share with me specifically what each line references and how you will objectively evaluate my success/failure of success in fulfilling that responsibility.

I do not do well with generalities and anything else can lend itself to subjectivity.

I like working at [Agency-Office] as the [Accounting Analyst]. I am totally capable of working this job. Nothing we do is difficult.

For my performance to be anything less than successful is not because “I” do not make a successful effort or cannot do the job successfully.¹¹

On or about August 25, 2022, Grievant received a Notice of Improvement Needed/Substandard Performance form documenting specific performance deficiencies and areas for improvement.¹² The Notice of Improvement/Substandard Performance identified the following areas for improvement:

- Grant Reimbursements
- Applying thorough knowledge to identify, research and resolve reconciling discrepancies. Correct application to understand and identify when correcting journal entries are needed.
- SPCC Allocations
- Length of time required to perform job duties should be consistent as outlined in the EWP.
- Initiating requests for assistance when it is required.
- Responding to emails promptly
- Unprofessional email communications and professional office communications¹³

On February 9, 2023, Grievant received a performance evaluation¹⁴ indicating that Grievant had earned an overall rating of Contributor. With respect to the General Ledger core responsibility, Manager rated Grievant a Contributor but noted that there were areas where Grievant’s performance needed to improve.¹⁵

On June 22, 2023, Grievant received a Group I Written Notice of disciplinary action for unsatisfactory performance. The Written Notice described Grievant’s unsatisfactory performance as follows:

¹¹ Agency Ex. 18 at 5-6.

¹² Agency Ex. 17.

¹³ Agency Ex. 17 at 1.

¹⁴ Agency Ex. 16.

¹⁵ Agency Ex. 16 at 1.

You were hired on 12/10/21, and have made slow progress. In particular, you can explain instructions but your work product does not demonstrate that you know how to apply the required financial knowledge. In response to my questions, you have told me at different times that 1. You know how, 2. Then that you weren't able to because it wasn't what you thought it was, 3. You have never done it all, etc. You have indicated having a CPA but your work product does not reflect that required knowledge and application of that knowledge. You have cited information systems issues; however, you have been in your position for a sufficient amount of time to use your accounting knowledge and system knowledge to ensure error-free work. On 2/15/23, I reminded you to monitor cash and appropriations. On 2/23/23, I discovered that [Fund] was lacking in cash. On 2/24/23, you stated that you saw where the fund could be coming up short the following week but it happened quicker than you expected. You had not taken steps to avoid this from occurring. Cash and appropriations must be frequently monitored to avoid these situations. You additionally have still submitted incorrect journal entries despite training in January 2023, an overview of the journal entry process in February 2023 and additional training on journal entries on 2/6/23. While you have shown some improvement while being on a Notice of Improvement Needed plan, your performance has not demonstrated the necessary decision-making skills for a professional accounting staff member.¹⁶

In the Circumstances Considered for the Written Notice, Manager noted that Grievant additionally "noted a disability yet despite my communication with [Grievant] to contact Human Resources regarding any needed accommodations, [Grievant] failed to do so. [Grievant] indicated [Grievant was] reluctant to go to HR but offered no plausible rationale for not following through."¹⁷ There was no evidence to suggest that Grievant grieved the Group I Written Notice.

It does not appear that Grievant requested an accommodation for a disability until June 30, 2023. Grievant completed an Employee Request for Accommodation Form identifying his disability as: "Diabetic & Attention-Deficit/Hyperactivity Disorder (ADHD) in Adults." Grievant identified the accommodations for ADHD that might enable him to perform the essential functions of his job as:

Time & freedom to ask questions without fear of reprisal as has been expressed on occasions. If I know something, I know that thing. I may not need to ask questions and I won't. However, since I may not be fully comfortable with my own knowledge base, sometimes I need either reassurance that I understand what has been previously taught[] OR I may only need to sharpen up on a small additional point without fear. Sometimes, a process is so infrequent, I may not remember all the details of a process. Again, I shouldn't fear having to ask for reminders, which is often, the only guidance I may need. With all this said, once my brain has

¹⁶ Agency Ex. 6 at 1.

¹⁷ Agency Ex. 6 at 1.

moved information to my long term memory, I have rarely, in the past needed extra accommodation.¹⁸

On the portion of the Employee Request for Accommodation Form that asked whether the request for accommodation was time-sensitive, Grievant stated:

In recent months, I have already endured informal notices, a Notice of Due Process (NDP), and even, a Level One employment punishment (Level 1). The NDP was issued in April, 2 days before leaving on medical short-term disability (STD). . . .

So yes, this is time sensitive as now I'm under the "gun" to correct issues that were included in both the NDP and Level 1. Since I have mentioned on more than at least 1/2 dozen occasions about my ADHD disability, it doesn't seem to have mattered? Even in the Level 1, it was acknowledged that I had mentioned this fact. So yes, I am fearful and afraid to have come back to work as a direct result of such techniques, even when management was aware, and by default, DHRM/DGS, they still deemed it fit and necessary to issue such DHRM documents. Makes me angry & sad because it didn't have to be this way.¹⁹

Grievant also completed a Medical Release for Information form dated June 30, 2023. Grievant completed the form to allow the Agency to contact Primary Care Physician to obtain information relating to his "Diabetic & Attention-Deficit/Hyperactivity Disorder in Adults" and its functional limitations for the purpose of evaluating Grievant's request for accommodation.²⁰

On July 17, 2023, HR Generalist sent Grievant an email advising him that she was "still waiting on the signed form allowing [the Agency] to contact [Medical Provider-1]."²¹ HR Generalist also advised Grievant that:

I also wanted to follow up on the unsolicited email that you sent to me that contained confidential medical information attached. We did not request, nor would we ever request such information as it is inappropriate. The entire email and related attachment have been deleted and will not be retained by the Human Resource Office. In the future, we ask that you not send such information or related information unless requested. Thank you for understanding.²²

Grievant replied to HR Generalist on July 18, 2023. In his emailed reply, Grievant indicated that, when he returned to the office on July 19, 2023, he would send her a copy of the form authorizing the Agency to contact Medical Provider-1. Grievant also acknowledged that he may not totally understand the process and further stated "[a]t

¹⁸ Agency Ex. 20 at 2-4.

¹⁹ Agency Ex. 20 at 3.

²⁰ Agency Ex. 20 at 4.

²¹ Grievant Ex. at 114.

²² Grievant Ex. at 114.

least, I have a copy of the report, which is a document I've wanted for personal reference. Also, I have at least contacted him; know that he had my record; & has such a document to reference."²³

On July 19, 2023, Grievant met with HR Generalist to discuss concerns related to alleged bullying and abusive actions by Manager. Based on the emailed summary of the meeting prepared by HR Generalist, Grievant stated that he "felt that [Manager] shouldn't be such a bully when providing instructions or instruction to find other resources for questions and that sometimes [Manager] can talk in a short and aggressive tone that [Grievant] felt was abusive." But, according to HR Generalist's emailed summary, Grievant was unable to provide more detailed information of the specific instances he referenced.

Grievant also mentioned to HR Generalist at that time that he was "told that maybe [Grievant] should find another job and that [Grievant] was sometimes scared to go to [Manager] because he could be short with [Grievant]." But, again, Grievant was unable to provide more detailed information of specific examples to HR Generalist at that time.²⁴

The Agency granted Grievant's request for accommodations related to his diabetes on September 18, 2023. The Agency also advised Grievant at that time that it had not received information it had requested from his medical provider regarding Grievant's request for accommodation related to the ADHD diagnosis. HR Generalist advised Grievant that: "we have not received the information that I requested from the doctor to be submitted to me. You may want to follow up with him to check on the status and let the office know we are awaiting correspondence from their office."²⁵ On September 18, 2023, Grievant completed a signed Medical Release for Information to allow Agency to contact Medical Provider-1 to obtain information relating to Grievant's ADHD and its functional limitations in order to evaluate Grievant's request for reasonable accommodations.²⁶

On October 11, 2023, the Agency notified Grievant that it was provisionally approving Grievant's request for accommodation related to ADHD.²⁷ The accommodation that the Agency provisionally approved was: "Detailed training and one-on-one training for new and sometimes older task that aren't done frequently and an allotted amount of time to learn the task."²⁸ The Agency noted that:

[Medical Provider-1] did confirm your diagnosis of Attention-Deficit/Hyperactivity Disorder (AD/HD) from an evaluation that was diagnosed more than eight years ago and did feel that his 'best guess' would be that they would continue to be present. He also stated that the requested accommodations of detailed training and one-on-one training for new and sometimes older task that aren't done frequently and an allotted

²³ Grievant Ex. at 114.

²⁴ Agency Ex. 1 at 45.

²⁵ Agency Ex. 20 at 5.

²⁶ Agency Ex. 1 at 46.

²⁷ Agency Ex. 20 at 8-9.

²⁸ Agency Ex. 20 at 9.

amount of time to learn the task appear to be reasonable. These accommodations are currently being provided to you by your supervisor as needed.

In order for your request to be an ongoing accommodation, we will need updated form from your physician that provide a current diagnosis and complete the physician form that we provide for them to answer questions regarding your physical or mental impairment and reasonable accommodations.²⁹

When the Agency provisionally approved Grievant's request for accommodation, the Agency noted that "[t]hese accommodations are currently being provided to you by your supervisor as needed."³⁰

On November 2, 2023, Grievant received his Annual Performance Evaluation for the 2022-2023 performance year. Grievant received an overall rating of Below Contributor.³¹ Grievant did not grieve the Annual Performance Evaluation.

90-Day Re-Evaluation Plan

The Agency created a 90-Day Re-Evaluation Plan for Grievant for the period November 15, 2023, through February 13, 2024. The Re-Evaluation Plan was provided as a memo from Manager to Grievant dated November 15, 2023. The Re-Evaluation Plan set forth the following instructions and expectations for Grievant:

The purpose of this document is to establish a 90-day re-evaluation plan, including timeline and performance expectations following receipt of your below contributor rating for the 2022/2023 performance cycle. You are expected to meet all expectations outlined below:

- Reconciliations are to be accurately processed by the 25th of each month.
- Any reconciliation variance should be thoroughly analyzed, properly identified, and accurately recorded.
- All correcting journals are to be based on sound decision making and should be accurately recorded by the 25th of each month.
- All GL data should be adequately analyzed bi-weekly and provided to Manager by noon on Wednesdays.
- Monthly depreciation entry is to be properly completed by noon, the day after Cardinal's final close.
- Monthly P&L statements are to be correctly prepared and reviewed by the 20th of each month.

²⁹ Agency Ex. 20 at 9.

³⁰ Agency Ex. 20 at 8-9.

³¹ Agency Ex. 7.

- Accrual cash reconciliation should be properly planned and analyzed to make a sound decision as to what steps are required to accurately correct each month prior to completing the P&L statement.
- SPCC allocations are to be completed each month with marginal errors by the 15th of each month.
- Grant Reimbursements are to be accurately prepared, reviewed, and submitted by the 20th of each month.
- MELP packages are to be accurately prepared and submitted within 3 workdays of receipt.
- MELP master file is to be updated no later than 3 workdays after receipt of payment schedule.
- Must maintain a high level of customer service by responding promptly to email and telephone messages.
- Must be able to adapt to changes without a delay in workflow or performance.

During the re-evaluation period, you must take steps to improve your performance. We will meet every two weeks with a final review approximately two weeks prior to the end of your re-evaluation period (February 13, 2024). If you are unable to perform at a contributor level during the re-evaluation period, the agency will consider options available under the Department of Human Resources Management (DHRM) Policy 1.40, Performance Planning and Evaluation for non-contributors, including termination of employment or demotion/transfer if there are any available positions at that time for which you are qualified. Under demotion/transfer, this includes a reduction in pay. I have attached a copy of the DHRM Policy 1.40, Performance Planning and Evaluation for your review.

To ensure you remain on track and meeting criteria, we will continue to meet and will provide you a review of your progress. Please feel free to see me to discuss further if you have any questions.³²

Grievant signed the 90-Day Re-Evaluation Plan on November 15, 2023. Manager signed the 90-Day Re-Evaluation Plan on November 14, 2023, and Assistant Controller, the Reviewer, signed the Re-Evaluation Plan on November 13, 2023.³³

Throughout the re-evaluation period, Manager met approximately bi-weekly with Grievant to discuss Grievant's work performance, including reviewing Employee Review Reports that Manager completed. In these meetings, Manager noted, with explanatory comments and recommendations, whether Grievant had met expectations for each of the review areas set forth in the Re-Evaluation Plan.³⁴ Based on the Employee Review Reports, Grievant's performance appeared to be inconsistent during the re-evaluation period. Additionally, with respect to Grievant's performance in certain review areas,

³² Agency Ex. 8 at 1.

³³ Agency Ex. 8 at 1.

³⁴ Agency Ex. 8 at 2-12.

Manager's comments or observations were repeated multiple times during the review period.

Employee Review Report – November 15 - 29, 2023

The Employee Review Report for the review period November 15-29, 2023, noted that Grievant met expectations in one review area, and did not meet expectations with respect to the following review areas: "Analysis of General Ledger Data" and "Accrual Cash Recon." The report noted that there was no basis for review of six of the nine review areas during the review period.

Manager noted that Grievant met expectations with respect to "Reconciliations and Variances," but commented that "Reconciliations were complete with a few minor concerns with layout of data, legible support, and presentation," and recommended that Grievant "review work for accuracy and neatness before giving to Management."³⁵

With respect to the review area of "Analysis of General Ledger Data," Manager assessed Grievant's performance as not meeting expectations and provided the following comment:

Employee did not perform a complete analysis. [Grievant] is responsible for Program [###] which includes multiple funds other than grant funds. The analysis provided was only for grant fund and was limited within its scope of an adequate analysis.

Recommendation: Reminded [Grievant] he was responsible for all of the Program [###] and recommended that he uses the Data Analysis spreadsheet that was provided to him over a year ago.³⁶

The document noted Grievant's response to Manager's assessment of "Analysis of General Ledger Data" as: "performed analysis based on what I thought was due because of past experience."

With respect to Grievant's performance not meeting expectations for the review area of "Accrual Cash Recon," Manager commented that:

Employee did not perform any accrual cash reconciliations during this review period.

Recommendation: Informed [Grievant] this was an on-going process and to inform me if help is needed.³⁷

The document noted Grievant's comment on this review area as: "forgot to do accrual cash recon but will make sure it's done going forward."³⁸

³⁵ Agency Ex. 8 at 2.

³⁶ Agency Ex. 8 at 2.

³⁷ Agency Ex. 8 at 3.

³⁸ Agency Ex. 8 at 2-3.

Employee Review Report – November 30 – December 13, 2023

The Employee Review Report for the review period November 30-December 13, 2023, noted that Grievant met expectations in one review area ("SPCC Allocations"), that there was no basis for review of two review areas, and that Grievant failed to meet expectations in the remaining six of the nine listed review areas, including "Reconciliations and Variances," "Correcting Journal Entries," "Analysis of General Ledger Data," "Depreciation Entry," "P&L Statements," and "Accrual Cash Recon."

For the "Reconciliations and Variances" review area, Manager assessed Grievant's performance as not meeting expectations and commented that:

Reconciliations were complete with continued concerns particularly with identifying proper handling of vouchers.

Recommendation: Recommended to use T accounts to set up the flow of transactions and to review voucher status and GL data entries within the AP module. Create a 3-way review process, and analyze data in order to make proper corrections.³⁹

Grievant's comment on this review area was noted as:

Hadn't time to prepare journal entries for Vpay returns which was the first time ever working with them. Made efforts by reaching out to AP for assistance, and didn't know what to do with the V-pay returns until I received your instructions. Not a fair assessment.⁴⁰

In rating Grievant's performance as not meeting expectations for "Correcting Journal Entries," Manager provided the following comment:

Numerous journal entries were returned to [Grievant] for corrections. Issues involved were use of wrong account, wrong sign on the amounts, wrong trans code, and wrong amount.

Recommendation: Work must be thoroughly analyzed in order to make a sound decision on what corrective action to take.⁴¹

Grievant's comment on this review area was: "Don't ever see the cash transfer out for federal and it was a learning opportunity on which accounts to use for cash transfers. I used what I was told to use."⁴²

³⁹ Agency Ex. 8 at 4.

⁴⁰ Agency Ex. 8 at 4-5.

⁴¹ Agency Ex. 8 at 4.

⁴² Agency Ex. 8 at 4-5.

With respect to the review area of “Analysis of General Ledger Data,” Manager again assessed Grievant’s performance as not meeting expectations and provided the following comment:

[Grievant] did not provide me any analysis for this review period. [Grievant] is responsible for Program [###] which includes multiple funds.

Recommendation: Reminded [Grievant] he was responsible for all of Program [###] and recommended that he uses the Data Analysis spreadsheet that was provided to him over a year ago.⁴³

The document noted Grievant’s comment on this review area as: “Haven’t had time to look at these and just found the spreadsheet this morning.”⁴⁴

With respect to “Depreciation Entry,” Manager assessed Grievant’s performance as not meeting expectations and provided the following comment:

I had to assist [Grievant] with determining the correct amount for 1 fund and the journal prepared had all signs incorrect.

Recommendation: I walked [Grievant] through the process of downloading FAACS data, and how to determine which amounts are to be used in the preparation of the depreciation entry.⁴⁵

Grievant’s comment on this area of review was noted as: “bookkeeping error, my mistake.”⁴⁶

With respect to “P&L Statements,” Manager assessed Grievant’s performance as not meeting expectations and commented that:

[Grievant] provided me with 1 P&L statement as of this morning. Fiscal is 4 months behind and [Grievant] has 3 funds per month. After review, some of the data was incorrect and some data had been omitted all together.

Recommendation: I outlined the errors and explained how these amounts were to be determined. I also informed [Grievant] that I had provided a spreadsheet for the missing data that needed to be recorded.⁴⁷

The document noted Grievant’s comment on this review area as:

Have only been introduced to the P&L’s – only did 2 or 3 before short term disability. Fiscal office is behind and we just received these and other encompassing work omitted as for unknown to me. [Co-worker] showed me.

⁴³ Agency Ex. 8 at 4.

⁴⁴ Agency Ex. 8 at 4-5.

⁴⁵ Agency Ex. 8 at 4.

⁴⁶ Agency Ex. 8 at 4-5.

⁴⁷ Agency Ex. 8 at 4.

Starting in July office back up and recently received and had to incorporate and do other thing required. Training courses, charge cards – set aside reimbursements more learning and what you showed me. Unless other things come up no problems going forward.⁴⁸

With respect to “Accrual Cash Recon,” Manager assessed Grievant’s performance as not meeting expectations and provided the following comment:

[Grievant] did not perform any accrual cash reconciliations during this review period. Fiscal is 4 months behind and [Grievant] has 3 funds which it appears to be at least 2 funds needing reconciliations.

Recommendation: Review data and start on the reconciliation process as soon as possible.⁴⁹

The document noted Grievant’s comment on this review area as: “I only had one to do.”⁵⁰

Manager assessed Grievant’s performance as meeting expectations for “SPCC Allocations” and provided the following comment:

Prepared 6 SPCC allocations with no errors. All transmitted to Cardinal, I had to ask for 1 of the 6 because it hadn’t been done.

Recommendation: Make sure that you have received all allocations for the month. If not, reach out to cardholder.⁵¹

Employee Review Report – December 14, 2023 – January 3, 2024

The Employee Review Report for the review period December 14, 2023 – January 3, 2024, noted that Grievant was meeting expectations during that review period in five of the nine review areas, but continued to have trouble meeting expectations in the areas of “Analysis of General Ledger Data” and “P&L Statements.”

Manager assessed Grievant’s performance with respect to “Reconciliations and Variances” as meeting expectations and provided the following comments:

Reconciliations were complete with a few minor issues.

Recommendation: Create a 3-way review process in efforts to resolve minor issues.⁵²

Manager also assessed Grievant’s performance with respect to “Correction Journal Entries” as meeting expectations and provided the following comments:

⁴⁸ Agency Ex. 8 at 4-6.

⁴⁹ Agency Ex. 8 at 5.

⁵⁰ Agency Ex. 8 at 5.

⁵¹ Agency Ex. 8 at 5.

⁵² Agency Ex. 8 at 7.

Three journal entries were completed by [Grievant] with only 1 oversight on the signage.

Recommendation: Work must be thoroughly analyzed and reviewed prior to giving to management.⁵³

With respect to "Analysis of General Ledger Data," Manager again assessed Grievant's performance as not meeting expectations and again commented that:

[Grievant] did not provide me any analysis for this review period. [Grievant] is responsible for Program [###] which includes multiple funds.

Recommendation: Reminded [Grievant] that he was responsible for all of Program [###] and recommended that he uses the Data Analysis spreadsheet that was provided to him over a year ago.⁵⁴

Grievant's comment on this review area was noted as: "Still haven't had time to look at these and been going through the GL data finding errors."⁵⁵

With respect to "P&L Statements," Manager assessed Grievant's performance as not meeting expectations and commented that:

[Grievant] was able to prepare P&L Statements with assistance; however, he failed to complete all that were assigned.

Recommendation: [Grievant] put forth a good effort to accomplish and hopefully going forward he will be able to complete all within given time frame.⁵⁶

Grievant's comment on this review area was noted as: "I've made progress and things are beginning to come together."⁵⁷

Manager assessed Grievant's performance as meeting expectations in the review area of "Accrual Cash Recon" and provided the following comments:

[Grievant] performed accrual cash reconciliations with some assistance on 2 funds and included the correcting entry within his monthly accrual entry.

Recommendation: Review desk top procedures and check for any misplaced information.⁵⁸

⁵³ Agency Ex. 8 at 7.

⁵⁴ Agency Ex. 8 at 7.

⁵⁵ Agency Ex. 8 at 7-8.

⁵⁶ Agency Ex. 8 at 7.

⁵⁷ Agency Ex. 8 at 7-8.

⁵⁸ Agency Ex. 8 at 8.

Grievant's comment on this review area and assessment was: "Walking me through the process with a concrete example really helps."⁵⁹

Manager assessed Grievant's performance as meeting expectations in the review area of "Grant Reimbursements" and provided the following comment: "Grant reimbursements were accurately completed prior to deadline."⁶⁰

Manager also assessed Grievant's performance as meeting expectations in the review area of "MELP packages and spreadsheet" and provided the following comment: "One MELP package was submitted to TRS within timeline."⁶¹

Employee Review Report – January 4 – 10, 2024

The Employee Review Report for the review period January 4 – 10, 2024, noted that Grievant was meeting expectations during that review period in four of the nine areas of review, but continued to have trouble meeting expectations in the areas of "Analysis of General Ledger Data" and "P&L Statements."

Manager assessed Grievant's performance in the review area of "Reconciliations and Variances" as meeting expectations and provided the following comment:

Reconciliations were complete with but with few issues.

Recommendation: Make sure reminders are created.⁶²

Manager also assessed Grievant's performance as meeting expectations in the review area of "Correcting Journal Entries" and made the following comments:

Four journal entries were completed by [Grievant] with only one recording the incorrect amount.

Recommendation: Work must be thoroughly analyzed and reviewed prior to giving to management. Set up a check and balance process to review data.⁶³

With respect to "Analysis of General Ledger Data," Manager again assessed Grievant's performance as not meeting expectations and again provided the following comments:

[Grievant] did not provide me any analysis for this review period. [Grievant] is responsible for Program [###] which includes multiple funds.

⁵⁹ Agency Ex. 8 at 8.

⁶⁰ Agency Ex. 8 at 8.

⁶¹ Agency Ex. 8 at 8.

⁶² Agency Ex. 8 at 9.

⁶³ Agency Ex. 8 at 9.

Recommendation: Reminded [Grievant] that he was responsible for all of Program [###] and recommended that he uses the Data Analysis spreadsheet that was provided to him over a year ago.⁶⁴

Grievant's comment on this review area was noted as: "Still haven't had time to look at these. I've been focused on completing P&L's."⁶⁵

Manager assessed Grievant's performance in the review area of "Depreciation Entry" as meeting expectations and provided the following comments:

Depreciation entry was accurately prepared before due date.

Recommendation: Just be mindful not to prepare too early in case there's a change in the DOA amounts.⁶⁶

With respect to the review area of "P&L Statements," Manager again assessed Grievant's performance as not meeting expectations and provided the following comments:

[Grievant] is still working on P&L's that were outstanding from last week.

Recommendation: [Grievant] is struggling with applying P&L theoretical knowledge into practical knowledge.⁶⁷

Grievant's comment on this review area was noted as: "I've made progress and things are beginning to come together. Learning process and learning unique things to funds. I don't agree with practical knowledge."⁶⁸

Manager assessed Grievant's performance as meeting expectations in the review area of "MELP packages and spreadsheets" and provided the following comment: "All MELP data and spreadsheets have been completed."⁶⁹

Employee Review Report – January 11 – 24, 2024

The Employee Review Report for the review period January 11-24, 2024, noted that Grievant met expectations in four areas of review, but did not meet expectations in four of the nine listed review areas during that period, including the following: "Reconciliations and Variances," "Analysis of General Ledger Data," "P&L Statements," and "Accrual Cash Recon."

Manager assessed Grievant's performance as meeting expectations in the area of "Correcting Journal Entries" and provided the following comments:

⁶⁴ Agency Ex. 8 at 9.

⁶⁵ Agency Ex. 8 at 9-10.

⁶⁶ Agency Ex. 8 at 9.

⁶⁷ Agency Ex. 8 at 9.

⁶⁸ Agency Ex. 8 at 9-10.

⁶⁹ Agency Ex. 8 at 10.

Six journal entries were completed by [Grievant] with one recording an incorrect entry.

Recommendation: Work must be thoroughly analyzed and reviewed prior to giving to management.⁷⁰

With respect to "Analysis of General Ledger Data," Manager again assessed Grievant's performance as not meeting expectations and again commented that:

[Grievant] did not provide me any analysis for this review period. [Grievant] is responsible for Program [###] which includes multiple funds.

Recommendation: Reminded [Grievant] that he was responsible for all of Program [###] and recommended that he uses the Data Analysis spreadsheet that was provided to him over a year ago.⁷¹

Grievant's comment on this review area was noted as:

Started working on these yesterday, need budget, not difficult, have been working on this. Learning to construct – next step to interpret and understand the use and impact. Need to know the value of the process. Feel okay. Not [as nebulous] as 2 weeks ago.⁷²

With respect to "P&L Statements," Manager again assessed Grievant's performance as not meeting expectations and provided the following comments:

[Grievant] has not completed P&L's that were outstanding from last week and haven't begun on those that are presently due.

Recommendation: [Grievant] stated that he's able to complete the P&L's without issues but when asked if I could get them by Friday he wasn't sure if it was doable.⁷³

The document noted Grievant's comment on this review area as:

Kind of finished with October and don't see any complications of completing. Think I finally got the hang of P&L's. Feeling good about the P&L's. Getting things down good. Still learning how thing work. Introduced last year, not a brag. Not a mountain to climb but getting over it. Identify all cash variances. Get to know better try to⁷⁴

⁷⁰ Agency Ex. 8 at 11.

⁷¹ Agency Ex. 8 at 11.

⁷² Agency Ex. 8 at 11-12.

⁷³ Agency Ex. 8 at 11.

⁷⁴ Agency Ex. 8 at 11-12. This remainder of this comment appeared to be cut off in the exhibit that was provided.

With respect to “Accrual Cash Recon,” Manager assessed Grievant’s performance as not meeting expectations and commented that:

[Grievant] was able to identify outstanding accrual entries but his attempt to correct was by reversing the AR component of accrual cash entry. I explained to [Grievant] that he was missing the Cashiering side of the equation.

Recommendation: I went over the process with [Grievant] and explained to him that he was missing the Cashier component and that he needed to follow up with [Agency employee].⁷⁵

The document noted Grievant’s comment on this review area as: “Working on it and almost done.”⁷⁶

Manager assessed Grievant’s performance as meeting expectations in the review area of “SPCC Allocations” and commented that: “SPCC Allocations were done prior to review period. Manager also assessed Grievant’s performance as meeting expectations in the area of “Grant Reimbursements” and commented that: “Grant reimbursements were accurately completed prior to deadline.” Manager assessed Grievant’s performance as meeting expectations in the review area of “MELP packages and spreadsheets” and commented that: “One MELP package was submitted to TRS within timeline.”⁷⁷

Assessment by Medical Provider-2

On January 22, 2024, Medical Provider-2 provided Grievant with a letter that stated:

[Grievant] recently completed psychological testing with the undersigned. Previous psychological testing concluded that he was diagnosed with F.90 Attention Deficit Hyperactive Disorder. Results of the most recent assessment did not show the same impairment. However, he appears to have difficulty with working memory and processing speed that likely impact his work process. It is suggested that he be given 1.5 the amount of time to complete tasks and be allowed to have short breaks between tasks. He also would benefit from having 1:1 meetings with his supervisor to review problems and details.⁷⁸

On January 23, 2024, Grievant emailed HR Generalist to provide her with the letter from Medical Provider-2. In his email, Grievant stated:

Regarding the letter you sent to me, 10.11.2023, you requested an up-to-date psychological evaluation. It took a while to get the appointment; go through the testing; and having the report meeting on the testing. Please

⁷⁵ Agency Ex. 8 at 12.

⁷⁶ Agency Ex. 8 at 12.

⁷⁷ Agency Ex. 8 at 12.

⁷⁸ Agency Ex. 19 at 3.

see the attached from [Medical Provider-2]. If you choose to obtain additional information directly, I'd encourage you to contact [Medical Provider-2] at [Medical Practice-2]. . . .

I believe the results are consistent with the prior report of qualities that impair my memory's ability to function at a preferred level.

Accommodation is still requested.

I am learning my job and have gone through the most difficult parts of learning the job and attention to the detail the manager desires. Yes, it's been a challenge but I believe that I am slowly but surely working through the 90-Day Evaluation the Manager has established.⁷⁹

HR Generalist replied to Grievant the next morning, first to confirm that the date on the letter from Medical Provider-2 was incorrect and should have been dated January 22, 2024, rather than January 22, 2023. HR Generalist replied to Grievant a second time on January 24, 2024, to clarify her understanding of Grievant's request for accommodation. She wrote:

Per the attached letter, dated October 10, 2023, your request for an accommodation was provisionally approved for detailed trainings, one-on-one training for new and sometimes older task that aren't done frequently and an allotted amount of time to learn the task. From my understanding your supervisor has been providing you the training as needed and provided you time to learn the necessary task as needed.

I am not aware of any additional accommodation request. If I have missed something, please let me know.⁸⁰

Re-Evaluation Performance Evaluation

On January 31, 2024, Manager re-evaluated Grievant and provided Grievant the Re-evaluation Performance Evaluation⁸¹ with an overall rating of Below Contributor as follows:

Core Responsibilities - Rating Earned	Core Responsibilities - Comments on Results Achieved
C. [General Ledger Accounting] Rating Earned: Below Contributor	Due to receiving a below contributor rating during the 2022/2023 performance cycle, [Grievant] was issued a three-month re-evaluation performance plan in order to assist him to meet the minimum expectations of his position. While [Grievant] has made a few limited improvements in the areas of

⁷⁹ Agency Ex. 19 at 5.

⁸⁰ Agency Ex. 19 at 4.

⁸¹ Agency Ex. 2 at 9-13.

	<p>reconciliations, researching, and preparing correcting journal entries, his improvement has remained inconsistent over the last 90 days despite discussing these issues during biweekly performance meetings. Grievant fails to apply practical knowledge related to accounting and he fails to meet established expectations for a professional level senior accountant. In his position, he is expected to have the ability to research, analyze, and evaluate complex financial data and accounting transactions. There have been an unacceptable number of reoccurring issues to include: having to correct journal entries coded with the wrong account, incorrect amounts being entered, signage issues, and/or using the inappropriate batch type. While [Grievant] can analyze basic General Ledger (GL) data, he fails to apply financial knowledge when analyzing GL data that is more complex in nature. Since beginning his reevaluation plan on November 15th, in several of our biweekly meeting as well as on occasions, I have explained and instructed him on the correct process and procedures. Often, I have had to return the journal entry for him to review and correct after my instruction. On many occasions, when I received the journal entry back from him it would still have the same erroneous data. At other times the data may have been corrected but often when it was returned for my review, a new error would be found to have occurred. On numerous occasions I have advised [Grievant] to create a check and balance process and to review his work prior to presenting it to me for review, but to date he has failed to implement my recommendation. While [Grievant] is able to identify reconciling variances, he often does not exercise the required level of decision-making skill to determine the appropriate correction required. [Grievant] has made improvements when doing research but his ability to perform adequate research is limited due to a lack of computer/accounting system knowledge required for a professional level senior accountant. I have gone over various processes with [Grievant] and have encouraged him to take notes on how to navigate and utilize our accounting system. I have provided him the opportunity to ask questions after the review process, but generally he does not have any questions. [Grievant] normally states that he now understands the process after discussing it with him, but his final work product does not demonstrate an understanding. Despite being employed as a Senior Accountant since December 10, 2021 and being provided more than a reasonable period of time to acclimate and to learn his job, [Grievant] continues to struggle and to not meet his job expectations. He has been unable to meet the</p>
--	--

	<p>established expectations for his job. While advised on several occasions during his three-month re-evaluation period to review his procedures and update his notes in order that his notes could be used as a resource for him to assist him in performing his duties, he has indicated he did not even understand his own notes. [Grievant] had issues with the process for preparing the monthly depreciation entry which was reviewed with him which included the process for identifying the data needed. When reviewing and accounting or monthly depreciation, [Grievant] continues to become confused and has demonstrated considerable difficulty with his inability to isolate and separate equipment related data from the relative depreciation expense. This results in erroneous depreciation entries and does negatively impact the monthly reconciliations. He is currently preparing the monthly depreciation entry with little to no supervision. Due to the fact [Grievant] has demonstrated a significant lack of understanding of basic accounting principles, he has been offered the opportunity to take a refresher accounting class. [Grievant] indicated that he did not need to take a class and declined the offer to take the class.</p>
<p>D. [Grant Accounting] Rating Earned: Contributor</p>	<p>[Grievant] does a sufficient job with preparing the grant reimbursement packages with little supervision. He currently has been working on making the grant reimbursement process more efficient. It is critical that [Grievant] works toward improving his consistency related to the monitoring of transactional data within his assigned funds for anomalies as well as analyzing/projecting cash and appropriation availability. [Grievant] has received training and has documented the processes for these tasks; however, improvement is still needed in monitoring grant expenditures, grant receipts, federal cash balances, and federal appropriations. [Grievant] has been asked to review his procedures and update his notes accordingly to better perform in this area. His documented notes should be able to be used as a resource for him to accurately perform his duties. It is critical that he review grant transactions, cash, and appropriations in order to assure that requirements and standards are being met. There must be sufficient reserves to pay grant related bills, and even more important is making sure there is an appropriation available for use. Reviewing grant financial transactions to make sure they don't include any restrictive cost which are not allowed by the Federal Grantors is required to avoid denied or delayed reimbursement packages which would impact the flow of available cash.</p>

<p>E. [Financial Reporting] Rating Earned: Below Contributor</p>	<p>[Grievant] does a good job in preparing the SPCC allocations but has issues when the data does not upload properly. Even though [Grievant] has received training on the Accrual Cash Reconciliation process, he fails to meet the expectations of a Senior Accountant who is expected to have a strong ability to effectively reason in the abstract, conduct complete and thorough analysis, interpret data for accuracy, determine the impact of actions, and make effective recommendations to resolve complex issues. While training has been provided to [Grievant] on this process on several separate occasions, he still demonstrates significant issues in navigating and utilizing the systems to perform adequate research. Also, he has erroneously indicated that he's never seen these modules before despite receiving training on each step of the process on several occasions. [Grievant] has failed to perform at the level of research required in his position. [Grievant] has identified items and has attempted to correct these items but his inability to thoroughly research data in order to formulate a sound decision is impeded by his lack of understanding how to properly analyze financial data. Several training sessions have been provided to him on the financial Profit and Loss (P&L) statements which have been unsuccessful. [Grievant] missed the January 3, 2024 deadline established and they are currently still outstanding assignments. Subsequently, there were additional P&L's that were due by January 31, 2024 and they too remain outstanding assignments he is responsible for completing. I frequently ask [Grievant] if he needs help but he indicates that he does not need any assistance. Additionally, [Grievant] continues to provide me with different explanations and reasons as to why he has not completed his assigned work and meet established deadlines. Often when late assignments are received, there are usually errors. I then walk him through the process and what is needed, but when he attempts to make corrections, most of the time the errors continue to remain inaccurate.</p>
<p>F. [Customer Service] Rating Earned: Contributor</p>	<p>[Grievant] can perform this task at a satisfactory level. At times when something is outside his normal routine, he will need supervision to walk him through the process. It is strongly encouraged that [Grievant] consistently review the year end process throughout the fiscal year since it's only performed once per year.</p>
<p>G. [Master Equipment Leasing Program (MELP)]</p>	<p>[Grievant] will be serving as back up to the auction reconciliations function for which he has received limited training. [Grievant's] inconsistent work performance consumes more time than needed which doesn't provide him the ability to take on the additional training of new task while maintaining</p>

	and performing all required functions of this position. Although he has not performed this assignment, he is being rated as a contributor.
--	--

Performance Evaluation Factors - Rating Earned	Performance Evaluation Factors - Comments on Results Achieved
K. Attendance and Punctuality Rating Earned: Contributor	No issues in this area.
L. Customer Service and Interpersonal Relations Rating Earned: Contributor	No issues in this area.
M. Communications Rating Earned: Contributor	[Grievant] is timely responding to emails in a courteous professional manner.
N. Adapting to Change Rating Earned: Below Contributor	It takes [Grievant] longer to adapt to changes and even longer to understand the changes. Only after he has performed a duty several times does he seem to begin grasping the concept but does not demonstrate a full understanding of the processes.
O. Agency policy compliance Rating Earned: Contributor	No issues in this area.
P. Planning/Analytical Skills/Decision Making Rating Earned: Below Contributor	[Grievant] needs to improve his analytical and decision-making skills in order to become proficient in his job. [Grievant] has over two years of work experience in PeopleSoft and Cardinal accounting software but does not demonstrate the required systems knowledge despite having desk top procedures. This lack of knowledge impedes his ability to analyze accounting data and to make sound decisions. Over this reevaluation process, [Grievant] has continuously been provided training on the fundamentals of accounting and has been provided tools to aid in analyzing data. I continue to have a lack of confidence in [Grievant's] work. When assignments are given and I ask him whether he needs any assistance and/or if he understands the process and how to perform various accounting assignments and activities, despite assuring me that he understands the necessary means, methods, related accounting concepts, and processes, his final work product is often unacceptable and demonstrates a profound lack of understanding of what is needed and how to get the assignment done. Consequently, he cannot work independently, and all his work has to be reviewed and often redone which is not acceptable.
Q. Safety Rating Earned: Contributor	No issues in this area.

R. Telework Rating Earned: Contributor	No issues in this area.
---	-------------------------

Manager provided Grievant with a Notice of Contemplated Termination from Employment dated January 31, 2024.⁸² In the Notice of Contemplated Termination memorandum, Manager advised Grievant that: "Following careful[] consideration of your performance during the re-evaluation period, I have determined that you have not made significant progress to achieve an overall contributor rating, where your performance remains at the below contributor level of performance as detailed on the re-evaluation provided to you today."⁸³ Manager also advised Grievant that:

By policy, an employee whose performance is not improving and remains at the overall below contributor level may be demoted or reassigned, may have duties reduced, or terminated if no alternatives are identified. I have worked with and discussed these possible options with the Human Resources Office and with Division Management, and no alternatives to termination were identified. As a result, I am contemplating terminating you from employment unless you provide a satisfactory or sufficient reason to mitigate this action.

Because the consequences of your overall below contributor re-evaluation could result in the termination of your employment, you are being afforded an opportunity to respond before a final decision is made. I ask that you provide me with a written statement responding to this notice no later than 3:00 PM on February 2, 2024 providing mitigating circumstances, and any and all other factors you would like to be considered, and a discussion of how you could become successful in your position before a final determination is made. If you elect not to provide me with a written statement, I will make my decision based on the information available to me at that time.

You are being granted and are being placed on Administrative Leave with pay to allow you time to focus on and prepare your response to this notice. You should return to the office on Monday, February 5, 2024.⁸⁴

Grievant provided his written response to the Notice of Contemplated Termination from Employment by the February 3, 2024, deadline. Grievant asserted in his response that:

I am only requesting, by definition in the law and policies, reasonable accommodation, which is not an unreasonable request given my mental condition. I was conditionally approved for accommodation upon receiving [Medical Provider-1's] report and subsequently, permanently accepted upon receiving [Medical Provider-2's] report.

⁸² See Agency Ex. 2 at 3-4.

⁸³ Agency Ex. 2 at 3.

⁸⁴ Agency Ex. 2 at 3.

Nothing has changed except the pressure put upon me by management during this period after I had made you aware of my condition.

...

I'd like to continue the once/twice a month one-on-one meeting with the manager. It has been specifically very helpful. I showed gradual if not continual improvement during this time of the 90-day Evaluations. It's what I needed and as [Medical Provider-2] suggested, need to do.

As time has passed, I may not meet 100% of the manager's expectations, but I've made good progress and am becoming more comfortable in performing my job responsibilities.⁸⁵

The Agency terminated Grievant from employment effective February 5, 2024. In the "Notice of Termination of Employment,"⁸⁶ Manager stated:

You provided your response on Friday, February 2, 2024, and your response has been carefully reviewed by management. In consideration of your response, as well as your years of service, your ongoing performance issues, and other identified mitigating factors and considerations, a decision has been made that in accordance with Department of Human Resource Management policy 1.40 Performance Planning and Evaluation, you are being terminated effective February 5, 2024. At your option you may immediately resign in lieu of termination.⁸⁷

CONCLUSIONS OF POLICY

The Agency may remove Grievant from employment only if its re-evaluation was not arbitrary or capricious and it followed State policy.

Whether the Agency's re-evaluation of Grievant was arbitrary or capricious

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.

During the 90-Day Re-Evaluation Period, Grievant continued to fail to meet the Agency's expectations for his performance. The Agency presented credible evidence,

⁸⁵ Agency Ex. 2 at 7-8.

⁸⁶ See Agency Ex. 2 at 1-2.

⁸⁷ Agency Ex. 2 at 2.

including the Employee Work Review reports and Supervisor's testimony, showing that Grievant continued to have performance issues throughout the re-evaluation period. Supervisor credibly testified regarding Grievant's continued performance issues. Supervisor met approximately bi-weekly with Grievant to discuss Grievant's progress, including identifying areas where Grievant's performance was or was not meeting expectations, and provided recommendations to Grievant to help improve his performance.⁸⁸

Grievant appeared to suggest that Manager was a "perfectionist" and "nit-picky" in his evaluation of Grievant, but Grievant did not present evidence that would suggest that the Agency's re-evaluation of his performance was arbitrary or capricious. Indeed, Manager's assessment of Grievant appeared to fairly note where Grievant was meeting expectations and succeeding and where he was not.

The Agency's re-evaluation of Grievant was neither arbitrary nor capricious. The Agency considered Grievant's Core Responsibilities and performance expectations for the three-month re-evaluation period. The Agency monitored Grievant's work performance during the three-month re-evaluation period and then compared that work performance to Grievant's Core Responsibilities and performance expectations.

Whether the Agency complied with State policy

DHRM Policy 1.40⁸⁹ provides that an employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed as follows:

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.

⁸⁸ See Agency Ex. 8 and see Hearing Recording at 1:17:51-2:02:24.

⁸⁹ DHRM Policy 1.40, Performance Planning and Evaluation.

- 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.

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.

When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the re-evaluation period, the action is considered a Performance Demotion and the agency must reduce the employee's salary at least 5%.

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

If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.⁹⁰

The Agency developed a 90-Day Re-Evaluation Plan for Grievant. The Re-Evaluation Plan was signed by Grievant on November 15, 2023. The Re-Evaluation Plan was sufficient in detail to properly inform Grievant of the Agency's expectations for his work performance during the three-month period.

Although an employee whose performance during the re-evaluation period is documented as not improving may be demoted, reassigned or have reduced duties, in this case, the Agency determined that there were no alternatives to demote, reassign, or

⁹⁰ DHRM Policy 1.40, Performance Planning and Evaluation.

reduce Grievant's duties and that termination based on unsatisfactory re-evaluation was the proper action. Grievant argued that he could have been demoted into what he described as a "lower level" accounts payable or cashier position within the Agency. Grievant, however, did not provide any information to support his assertion or to refute Controller's testimony that based on the high volume of work required of those positions and Grievant's performance, the Agency determined that he would not be a good fit for those positions.⁹¹ Indeed, although Grievant argued that he was qualified for such positions, he also testified that he had no experience in those types of positions and that he believed the Agency just did not want to teach him those positions.⁹²

Grievant argued that the Agency violated DHRM Policy 1.40 because it terminated his employment before the end of the re-evaluation period. DHRM Policy 1.40 provides, "[t]he employee who receives an unsatisfactory reevaluation will be terminated at the end of the three (3)-month re-evaluation period." Based on the information the Agency provided to Grievant in the 90 Day Re-Evaluation Plan, the re-evaluation period ended February 13, 2024,⁹³ but Manager provided Grievant with a memorandum dated February 5, 2024, notifying Grievant that he was being terminated "effective February 5, 2024."⁹⁴ Thus, the Agency erred by terminating Grievant's employment prior to the end of the re-evaluation period.

The Agency argued that it terminated Grievant's employment prior to the end of the re-evaluation period based on a discussion Assistant HR Director had with policy staff at the Department of Human Resource Management. This Hearing Officer does not know, and cannot speculate as to, the full context of that discussion and whether the discussion included a review of the information that had been provided to Grievant, including the establishment of a 90-Day Re-Evaluation period with a specific end date identified. The Agency argued that although there is language that states that "[t]he employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3) month re-evaluation period," such language must be read in the context of the requirement to re-evaluate within two weeks prior to the end of the re-evaluation period and the Agency's assertion that the Agency should not be required to continue to employ someone to the end of the re-evaluation period after the Agency has determined they did not meet performance expectations. This Hearing Officer does not agree. The language of DHRM Policy 1.40 regarding termination is not ambiguous. The policy clearly states that "The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3) month re-evaluation period." In this case, the Agency advised Grievant that the re-evaluation period would end on February 13, 2024, and neither the Agency nor any policy provision put Grievant on notice that the Agency may terminate his employment based on his performance during the re-evaluation period at some time before that date. Grievant is entitled to back pay and benefits to the extent the Agency prematurely removed him from employment.

⁹¹ Hearing Recording at 4:44:13-4:48:44, see also Hearing Recording at 5:06:23-5:07:12.

⁹² Hearing Recording at 6:38:26-6:39:26.

⁹³ Agency Ex. 8 at 1.

⁹⁴ Agency Ex. 2 at 1-2

Americans with Disabilities Act

Grievant argued that the issues with his performance that were identified by Manager were directly related to Grievant's ADHD. Grievant argued that he should not have to "hide" his disability. Grievant offered no evidence, however, to support any assertion that the Agency's dismissal was intended to punish him for having a disability or was otherwise discriminatory or retaliatory in nature. The Agency should be able to expect an employee to meet performance expectations for the position for which he was hired. The Agency had business reasons for its evaluation and dismissal of Grievant based on performance and Grievant offered no evidence that would suggest that those reasons were mere pretext for discrimination or retaliation.

Grievant also argued that the Agency failed to provide him with reasonable accommodations for ADHD that would allow him to perform the essential functions of his job. Grievant asserted during the hearing that he had informed Manager of his ADHD on multiple occasions before he first received notice from Manager that his work performance was unsatisfactory. It does appear that by May 2022, Manager was aware of Grievant's assertions that he had memory issues. Manager testified that he advised Grievant that if he needed an accommodation, he should speak to the Agency's Human Resources Office.⁹⁵ Although Grievant asserted that he mentioned his memory issues and ADHD to Manager on multiple occasions, Grievant did not provide any evidence to suggest that he had requested any accommodation from the Agency prior to the request that Grievant submitted to HR Generalist on June 30, 2023. Although Grievant was correct when he asserted that he could make a request for accommodation verbally and did not need to use legal verbiage or reference the ADA, there is no evidence to suggest that he made a request for accommodation prior to June 30, 2023. Merely stating that he had an impairment without notifying the Agency that he needed accommodation because of that impairment did not, as Grievant suggested, shift the burden to the Agency to assume that Grievant needed accommodation. Further, the Agency was allowed to have internal procedures for submitting and reviewing reasonable accommodation requests, including a process that required employees to direct requests for accommodation to the Agency's Human Resources Office.⁹⁶

As noted above, on June 30, 2023, Grievant described the accommodation that he was requesting as:

Time & freedom to ask questions without fear of reprisal as has been expressed on occasions. If I know something, I know that thing. I may not need to ask questions and I won't. However, since I may not be fully comfortable with my own knowledge base, sometimes I need either reassurance that I understand what has been previously taught; OR I may only need to sharpen up on a small additional point without fear. Sometimes, a process is so infrequent, I may not remember all the details of a process. Again, I shouldn't fear having to ask for reminders, which is

⁹⁵ Hearing Recording at 42:12-45:50 and Exs. 18 and 6.

⁹⁶ See DHRM, APA Policy Guide Series - #2, Procedures for Requesting and Identifying Reasonable Accommodation.

often, the only guidance I may need. With all this said, once my brain has moved information to my long term memory, I have rarely, in the past needed extra accommodation.⁹⁷

Once Grievant made his request for accommodation on June 30, 2023, it appeared that the Agency took reasonable steps to respond to the request, including asking Grievant to provide supporting information from Medical Provider-1. Once that information was provided, on October 11, 2023, the Agency provisionally approved the following accommodation for Grievant: "Detailed training and one-on-one training for new and sometimes older task that aren't done frequently and an allotted amount of time to learn the task."

Manager credibly testified that he trained Grievant on various aspects of his job throughout Grievant's time with the Agency, including providing one-on-one training and repeated or refresher training on some tasks and processes.⁹⁸ Grievant did not dispute that he had received the training. Grievant appeared to argue that to the extent he was not performing some of the requirements of his job to the Agency's satisfaction, it was because the training that had been provided was insufficient (or not sufficiently specific) for Grievant to learn those aspects of the job.

The core responsibilities for which Grievant was rated Below Contributor on the Re-Evaluation Performance Evaluation were related to the Core Responsibilities of General Ledger Accounting and Financial Reporting. The evidence showed that Grievant was trained on General Ledger Accounting, including training related to the accounting software systems utilized by the Agency during the first two months of his employment with the Agency. The evidence showed that Grievant was provided training related to some aspects of the Financial Reporting Core Responsibility within the first two months of his employment with the Agency and was trained on the remaining portions of that Core Responsibility by early 2023.⁹⁹

Manager credibly testified, and supporting evidence showed, that Manager provided additional and continual training to Grievant when needed or requested; Manager would ask Grievant if he understood or had questions about processes or about tasks he was given.¹⁰⁰ Manager testified that, in accounting roles such as Grievant's, "no two days are the same," such that it was impossible for Manager to train Grievant on every potential scenario that may arise in his position.¹⁰¹ Manager also testified that throughout the Re-Evaluation Period, Manager would ask Grievant if he needed help and Grievant often would say he did not need help or that he understood what he was doing. Manager testified that even when Grievant told Manager he did not need help during the Re-Evaluation Period, Grievant would then miss work deadlines or produce work product

⁹⁷ Agency Ex. 20 at 2-3.

⁹⁸ Agency Exs. 15 and 18, and Hearing Recording at 30:38-31:20, 38:19-42:00, 51:45-52:54, 2:02:34-2:05:41, 2:37:31-2:38:27.

⁹⁹ Hearing Recording at 1:15:36-1:16:40, Agency Ex. 15 at 2-3 and 9-13.

¹⁰⁰ Agency Ex. 15 and Hearing Recording at 30:38-31:20, 38:19-42:00, 51:45-52:54, 2:02:34-2:05:41, 2:37:31-2:38:27.

¹⁰¹ Hearing Recording at 2:02:34-2:05:41.

that did not meet the Agency's standards.¹⁰² If Grievant was having trouble remembering or understanding a process, the evidence showed that he would be provided additional or repeated training, including one-on-one training to review the process and answer Grievant's questions.¹⁰³ At times during the hearing, Grievant testified that Manager patiently trained him and even described Manager as "one of the better teachers" when Manager provided one-on-one training.¹⁰⁴ Grievant also testified that the 90-Day Re-Evaluation Plan and meetings were helpful because they highlighted for Grievant what Manager expected. Grievant asserted, however, that he was "intimidated" by Manager and reluctant to ask for help because Grievant believed that all of his mistakes were being documented as part of the re-evaluation. The preponderance of the evidence showed that to the extent the Agency did not provide Grievant with the training he was looking for, it was not because of a refusal to accommodate on the Agency's part, but because Grievant either did not notify the Agency that he needed additional help or training or because Grievant was reluctant to ask for training or assistance when he needed it.

Grievant also asserted that one of the conditions of his ADHD affects his working memory and his ability to move information from short-term memory to long-term memory. Grievant argued that the Agency did not provide him with sufficient time to have repetition of tasks so that he could learn his job. At the time of his dismissal, Grievant had been trained in the core responsibilities of his job for at least one year and had been performing the various functions of his job for one to two years. Grievant did not articulate how long would be a sufficient amount of time for Grievant to learn the core responsibilities of his job. It also is important to note that Grievant did not point to particular training or time that would have allowed him to meet the particular performance deficiencies Manager identified during the 90-Day Re-Evaluation Period.

In the Core Responsibilities where Manager rated Grievant as Below Contributor in the Re-Evaluation Performance Evaluation, Manager credibly testified that the assessment was due at least in part to the fact that Grievant simply had not performed the work he was specifically assigned as set forth in the Re-Evaluation Plan.¹⁰⁵ The 90-Day Re-Evaluation Plan specifically set forth the expectation that "[a]ll [General Ledger] data should be adequately analyzed bi-weekly and provided to Manager by noon on Wednesdays."¹⁰⁶ The evidence showed that Grievant provided Manager with an incomplete analysis for the first bi-weekly reporting period and then provided no analyses through the rest of the re-evaluation period even after Manager repeatedly noted in each of the bi-weekly Employee Review Reports that Grievant was failing to meet this expectation.¹⁰⁷ At one point, Grievant suggested that Manager had told him to focus on working on the P&L statements,¹⁰⁸ but there was no evidence to suggest that Manager had directed Grievant to work only on the P&L statements or to explain Grievant's failure to provide the spreadsheet showing his analysis of the General Ledger data during the

¹⁰² Hearing Recording at 1:58:56-2:00:09.

¹⁰³ Agency Ex. 15.

¹⁰⁴ Hearing Recording at 6:29:34-6:31:11.

¹⁰⁵ Hearing Recording at 1:57:34-2:02:24, Agency Ex. 2 at 9-13 and Ex. 8 at 2-14.

¹⁰⁶ Agency Ex. 8 at 1.

¹⁰⁷ Agency Ex. 8 at 2-12.

¹⁰⁸ See Agency Ex. 8 at 9-10.

prior bi-weekly review periods during the Re-Evaluation Period.¹⁰⁹ The 90-Day Re-Evaluation Plan also required that “[m]onthly P&L statements are to be correctly prepared and reviewed by the 20th of each month.”¹¹⁰ Grievant did not complete the P&L statements he was required to submit within the established deadlines, even when, according to Grievant, he was focused on P&L Statements to the detriment of completing other work. The evidence showed that Grievant did not meet the January 3, 2024, deadline that had been established for completing P&L Statements and then did not meet a second extended deadline for getting the P&L Statements completed. Grievant argued that he had not had sufficient time to learn the process for preparing the P&L Statements; however, Grievant had been provided with training on the preparation of P&L Statements by early 2023 and had prepared P&L Statements for different funds for January, February and March 2023.¹¹¹ Although Grievant had not prepared P&L Statements while he was on short-term disability, Manager testified that he had reviewed with Grievant each of the P&L Statements for which Grievant was responsible based on anticipated numbers while they were waiting to receive final numbers prior to the deadlines for the submission of the P&L Statements.¹¹² There was no evidence to suggest that Grievant asked for additional training or review of preparation of P&L Statements during the Performance Re-Evaluation Period or that any requests for additional training were refused.

Grievant also asserted that Manager was being “nit-picky” in his evaluation of Grievant’s work which, Grievant suggested, was not appropriate because a known condition of ADHD is a potential lack of attention to detail. Generally, the Americans with Disabilities Act does not require an employer to lower a performance or production standard for an employee with a disability. Grievant did not ask for an accommodation that would excuse him from any requirements for attention to detail and it is not clear that such a request would be reasonable or could have been provided for a position such as Grievant’s that required research, analysis, and evaluation of complex financial data and interpretation of data for accuracy.¹¹³

Grievant has not met his burden of proving that the Agency failed to provide him with a reasonable accommodation or that his dismissal was due to the Agency’s failure to reasonably accommodate his disability.

The Agency’s re-evaluation and dismissal of Grievant was consistent with law and policy. Accordingly, the Agency’s decision to remove Grievant must be upheld.

DECISION

For the reasons stated herein, the Agency’s decision to remove Grievant is **upheld**. However, the removal upheld is effective February 13, 2024, and Grievant is awarded back pay and benefits to the extent the Agency prematurely terminated his employment.

¹⁰⁹ See Agency Ex. 8 at 2-8.

¹¹⁰ Agency Ex. 8 at 1.

¹¹¹ Hearing Recording at 1:27:57-1:40:05, 3:19:00-3:33:11.

¹¹² Hearing Recording at 1:27:57-1:40:05.

¹¹³ See Agency Ex. 5.

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 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 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.¹¹⁴

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

¹¹⁴ 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.



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12092-R

Reconsideration Decision Issued: August 6, 2024

RECONSIDERATION DECISION

Grievant was removed from employment effective February 5, 2024, following an unsatisfactory three-month re-evaluation period.

On February 7, 2024, Grievant timely filed a grievance to challenge the Agency's action. The Agency requested that the Office of Employment Dispute Resolution (EDR) at the Department of Human Resource Management (DHRM) issue a ruling as to whether the Grievant's dismissal grievance was in compliance with the grievance procedure. On February 23, 2024, EDR determined that the grievance was in compliance with the grievance procedure and was permitted to proceed.¹ On March 11, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On May 3, 2024, a hearing was held at state agency offices in Richmond, Virginia.

A decision was issued on June 12, 2024.

Both the Agency and the Grievant requested administrative review of the Hearing Officer's decision.

On August 2, 2024, the Office of Employment Dispute Resolution (EDR) issued Administrative Ruling 2024-5728, 2024-5730 concluding:

We find no error in the hearing officer's assessment of the evidence in the record or their conclusion that the agency's evidence was sufficient to support the grievant's termination. Accordingly, the grievant's arguments do

¹ See EDR Compliance Ruling 2024-5673 (Feb. 23, 2024).

not present a basis to disturb the hearing officer's findings as to the agency's motive for re-evaluation and subsequent termination.

However, this matter is remanded for reconsideration of DHRM Policy 1.40, Performance Planning and Evaluation, and its interpretation as discussed herein.

The Ruling remanded the matter to the Hearing Officer for further consideration of the following:

Upon review of Policy 1.40, EDR agrees with the agency's contention that the policy is at least ambiguous. While the hearing officer cites a portion that uses the phrase, "at the end of the three (3) month re-evaluation period," the same policy also uses the phrase "by the end of the three (3) month re-evaluation period." EDR has also been informed by DHRM's Policy Administration staff that it interprets DHRM Policy 1.40 to permit the termination of the grievant at the time chosen by the agency in this case. In essence, "at the end" of the three-month re-evaluation period is interpreted to include the, approximate two-week period "prior to the end" of the three-month re-evaluation period when the re-evaluation occurs. Accordingly, EDR remands the matter for reconsideration of the hearing officer's conclusions of policy, in light of the policy interpretation herein, as to the timing of separation under DHRM Policy 1.40 and award of back pay and benefits for the time between the grievant's termination and the end of the re-evaluation period.

Based on this policy interpretation from EDR, the Agency's termination of Grievant on February 5, 2024 was not premature.

DECISION

Based on the foregoing, nothing in this Hearing Officer's reconsideration changes the outcome that the Agency's discipline is **upheld**. However, because the Agency's termination of Grievant was not premature, Grievant is not entitled to an award of back pay and benefits.

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 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 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.²

Angela Jenkins

Angela L. Jenkins, Esq.
Hearing Officer

² 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.