OAH 22-3000-39310

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF ADMINISTRATION

In the Matter of the Appeal of the Determination of the Responsible Authority for the Minnesota Department of Transportation that Certain Data about Mao Yang are Accurate and/or Complete	**SUMMARY DISPOSITION RECOMMENDATION AND ORDER**

This matter came before Administrative Law Judge Christa L. Moseng for a hearing on the Department of Transportation's (Department) Motion for Summary Disposition (Motion) on February 2, 2024.

Joshua T. Root, Deputy Chief Counsel, appeared on behalf of the Department. Lao Sue Yang, Attorney at Law, appeared on behalf of Mao Yang (Appellant).

The Department filed its Motion on December 5, 2023. Appellant filed her response opposing the Motion on December 11, 2023. The Administrative Law Judge heard oral argument on February 2, 2024, and the motion record closed on that date.

Based upon the record, and for the reasons set forth in the accompanying Memorandum, the Judge makes the following:

RECOMMENDATION

The Judge respectfully recommends that the Department's Motion be **GRANTED** and that the appeal be **DISMISSED**.

ORDER

1. Further proceedings at the Office of Administrative Hearings are **CANCELLED**.

2. The record in this matter shall be returned to the Commissioner of the Department of Administration for issuance of a final decision.

Dated: March 5, 2024

CHRISTA L. MOSENG
Administrative Law Judge

NOTICE

This Report is a recommendation, not a final decision. The Commissioner will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2022), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten (10) calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact the Commissioner of the Minnesota Department of Administration, 50 Sherburne Avenue, 200 Administration Building, St. Paul, MN 55155, telephone (651) 201-2555, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2022). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline to be imposed.

Under Minn. Stat. § 14.62, subd. 1 (2022), the Agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

I. Introduction

The Department of Administration initiated this proceeding to determine the accuracy and completeness of certain data that the Department of Transportation maintains about Appellant, a Department employee.[1] Appellant disputes the accuracy and completeness of the position description for her position as a Principal Engineer for the Department, as well her supervisor's appraisal of her performance in the role.[2] The Department argues that there is no material factual dispute and requests a summary disposition recommendation in its favor.

[1] Notice and Order for Prehearing Conference and Hearing (June 14, 2023) (Notice and Order for Hearing), 1; Affidavit of Mark Vizecky (undated) (Vizecky Aff.) at 1–2.
[2] Data Challenge Appeal to the Commissioner of Administration (March 27, 2023) 1–2, *attached to* Notice and Order for Hearing.

II. Applicable Legal Standards

A. Summary Disposition

Summary disposition is the administrative law equivalent to summary judgment.[3] Summary disposition is appropriate where there is no genuine issue of material fact and where the application of law to undisputed fact will resolve the controversy.[4] The Office of Administrative Hearings has generally followed the summary judgment standards developed in the district courts in considering motions for summary disposition of contested case matters.[5]

The Administrative Law Judge's function on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but solely to determine whether genuine factual disputes exist with regard to material issues.[6] The judge does not weigh the evidence on a motion for summary disposition.[7]

In deciding a motion for summary disposition, the judge must view the evidence in the light most favorable to the non-moving party.[8] All doubts and factual inferences must be resolved against the moving party.[9] If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.[10]

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact.[11] If the moving party is successful, the nonmoving party then has the burden of proof to show specific facts that are in dispute that can affect the outcome of the case.[12]

It is not sufficient for the nonmoving party to rest on mere averments or denials; it must present specific facts demonstrating a genuine issue for trial.[13] A genuine issue is one that is not sham or frivolous.[14] A material fact is a fact whose resolution will affect the result or outcome of the case.[15]

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[3] *Pietsch v. Minnesota Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2023).
[4] *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp*., 378 N.W.2d 63, 66 (Minn. Ct. App. 1985); *Gaspord v. Washington County Planning Commission*, 252 N.W.2d 590, 590-591 (Minn. 1977); *See* Minn. R. 1400.5500 K; Minn. R. Civ. P. 56.03.
[5] *See* Minn. R. 1400.6600 (2023).
[6] *See, e.g., DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[7] *Id.*
[8] *Ostendorf v. Kenyon*, 247 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[9] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[10] *DLH*, 566 N.W.2d at 69.
[11] *Thiele*, 425 N.W.2d at 582.
[12] *Highland Chateau, Inc. v. Minnesota Dep't of Public Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 6, 1985).
[13] Minn. R. Civ. P. 56.05.
[14] *Highland Chateau,* 356 N.W.2d at 808.
[15] *Zappa v. Fahey*, 245 N.W.2d 258, 259-260 (Minn. 1976); *see also O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).

While the purpose and useful function of summary disposition is to secure a just, speedy, and inexpensive determination of an action, summary disposition cannot be used as a substitute for a hearing where any genuine issue of material fact exists.[16] Summary disposition is only proper where there is no fact issue to be decided.[17]

B. Accuracy and Completeness

The Minnesota Government Data Practices Act (MGDPA) establishes requirements related to data on individuals stored by government entities. Each government entity must have a designated responsible authority[18] who, among other things, must "establish procedures to assure that all data on individuals is accurate, complete, and current for the purposes for which it was collected."[19]

An individual who is the subject of data held by a government entity may contest the accuracy and completeness of that data by submitting a written challenge to the responsible authority.[20] The responsible authority for the agency must either correct the disputed data or notify the party that the agency believes the data to be correct.[21] That determination may be appealed through a contested case.[22] The authority to make a final determination as to whether data is accurate and complete rests with the Commissioner of Administration.[23]

Data is "accurate" when it is "reasonably correct and free from error."[24] Data is "complete" when it "reasonably reflects the history of an individual's transactions with the particular entity."[25] Data on an individual may not contain omissions regarding an individual's history that place the individual in a false light.[26] Data is not accurate and complete if it is missing essential facts or if it contains conclusions based on factual assertions that are untrue.[27] Mere dissatisfaction with a subjective judgment or opinion cannot support a challenge under the MGDPA.[28]

III. Undisputed Factual Background

In 2019 the Department posted an open position for a Principal Engineer.[29] According to the posting, the position's responsibilities included "supervis[ing] the State Aid Pavement Engineer and pavement support program."[30] Yang applied for, was

[16] *Sauter*, 70 N.W.2d at 353.
[17] *Id.*
[18] Minn. Stat. §§ 13.02, subd. 16, .05 (2022); Minn. R. 1205.0200, subp. 12 (2023).
[19] Minn. Stat. § 13.05, subd. 5(a)(1).
[20] Minn. Stat. § 13.04, subd. 4(a) (2022).
[21] *Id.*
[22] *Id.*, subd. 4(a).
[23] *Id.*; *Hennepin Cty. Cmty. Servs. Dep't v. Hale*, 470 N.W.2d 159, 164 (Minn. Ct. App. 1991).
[24] Minn. R. 1205.1500, subp. 2A (2023).
[25] *Id.*, subp. 2B.
[26] *Id.*
[27] *Schwanke v. Dep't of Administration*, 851 N.W.2d 591, 594 n.2 (Minn. 2014).
[28] *Id.* at 595.
[29] Aff. of Joshua Root (Nov. 28, 2023) (Root Aff.), Ex. 2 (Job Posting). The Job Posting states that the working title for the position was "State Aid Operations Engineer."
[30] Job Posting, 1.

offered, and accepted the position, which she has held since May 2019.[31] In June 2020, Appellant received a positive performance appraisal for her work in 2019.[32]

At times during 2021 and 2022, Appellant was on medical leave or a medically reduced work schedule.[33]

In 2021, Appellant's supervisor told her that she would share supervisory responsibilities over the State Aid Pavement Engineer with another Department employee, Bill Meinholz.[34] Appellant objected to sharing supervisory responsibilities.[35]

Appellant's performance appraisal for the period between June 15, 2020 and December 14, 2021, reflects a "needs improvement" overall performance rating.[36] The 2021 Performance Appraisal was completed on January 5, 2022, and Appellant declined to sign.[37] Appellant submitted comments to her 2021 Performance Appraisal.[38]

Appellant's performance appraisal for the period between December 15, 2021 and January 14, 2023, was presented to Appellant on May 4, 2023.[39] Appellant received an "unsatisfactory" overall performance rating.[40] Appellant declined to sign the 2022 Performance Appraisal.[41]

On September 24, 2022, Appellant requested corrections to her position description and her 2022 Performance Appraisal.[42] On October 5, 2022, the Department's Responsible Authority wrote to Appellant that it had concluded that the challenged data were accurate and complete.[43]

On April 11, 2023, the Department offered to try to resolve the dispute informally.[44] This offer was not accepted, and, on May 18, 2023, the Department notified Appellant that it would initiate this proceeding.[45]

[31] Aff. of Mao Yang (Dec. 10, 2023) (Yang Aff.), 1; Vizecky Aff., 1.
[32] Yang Aff., 2; Affidavit of Joshua Root (Nov. 28, 2023) (Root Aff.), Ex. 4 (2020 Appraisal), at 3 (rating Appellant's work performance as "exceeds expectation.").
[33] Yang Aff., 2; Root Aff., Ex. 1.
[34] Yang Aff., 2.
[35] *Id.*
[36] Root Aff., Ex. 5 (2021 Performance Appraisal).
[37] Root Aff., Ex. 5, at 3–4.
[38] Root Aff., Ex. 5, at 10–19.
[39] Root Aff., Ex. 6 (2022 Performance Appraisal).
[40] *Id*. at 4.
[41] *Id.* at 5.
[42] Letter from Craig Gustafson to Appellant (Oct. 5, 2022).
[43] *Id*.
[44] Letter from Taya Moxley-Goldsmith to Appellant (Apr. 11, 2023), *attached to* Notice and Order for Hearing.
[45] Letter from Taya Moxley-Goldsmith to Appellant (May 18, 2023), *attached to* Notice and Order for Hearing.

IV. Analysis

Appellant asserts that a hearing is necessary to evaluate the accuracy and completeness of her position description and performance appraisal. Specifically, she alleges that when she returned from medical leave in April 2021, "her job title and job responsibilities . . . changed."[46] She contends that "[t]he added responsibilities are not accurate," and that she was evaluated based on the "new and arbitrary changes" to her responsibilities.[47]

The Department argues that Appellant has not demonstrated a material factual dispute. It asserts that Appellant has not pointed to an inaccuracy in the position description or her performance appraisal, or presented facts that could establish that they are incomplete but seeks to have them changed only because she is dissatisfied with what they contain.

For the reasons set forth below, there are no genuine issues of material fact in dispute and the Department is entitled to summary disposition in its favor.

A. No Genuine Issue of Material Fact

Appellant has challenged the following data: two statements in her position description referring to her supervisory responsibilities; sections in her 2022 performance appraisal relating to her supervisory responsibilities; and, the ratings she received in those sections. The Department's Responsible Authority determined that the challenged data are accurate and complete. At issue is whether the Responsible Authority's determination was correct.

1. Position Description

Appellant asserts that her job responsibilities, as reflected in her position description, "are not accurate." However, Appellant does not point to specific facts that could establish an inaccuracy.

Appellant undoubtedly disagrees that she *should* share responsibility for supervising the State Aid Pavement Engineer. She asserts that the assignment that she share the responsibility was surprising,[48] arbitrary,[49] discriminatory,[50] complicating for her disability-accommodation process,[51] unclear,[52] and that it violated her rights as a veteran.[53] It appears as though Appellant regarded the shift in her responsibilities as an

[46] Appellant Yang's Memorandum of Law (Yang Mem.), 4.
[47] *Id.*
[48] Yang Mem., 4.
[49] Yang Mem., 4.
[50] Yang Aff., 3.
[51] Yang Aff., 2.
[52] Yang Aff., 3.
[53] Appellant's veteran status is discussed more in section IV.A.3., below.

unwelcome reduction or demotion-in-fact.[54] But Appellant's dissatisfaction with, and objection to, changes in her position—whether or not justified—do not render her position description inaccurate.

Appellant has not disputed that the Department, *in fact*, assigned her co-supervisory responsibilities. Appellant acknowledges that she was told in 2021 that she was responsible, along with another person, for supervising the State Aid Pavement Engineer.[55] Her position description accurately reflects her assigned responsibilities, even by her own admission.

Appellant has not shown there is a genuine dispute for trial that would affect a determination of the accuracy or completeness of her position description.

2. Performance Appraisal

Appellant's argument that her performance appraisal is inaccurate or incomplete is founded on the premise that the appraisal was based upon an erroneous understanding of her job responsibilities. There is no better evidence of Appellant's job responsibilities than her position description. Appellant's claim in this proceeding is not that an authoritative source of Appellant's job responsibilities exists outside Appellant's position description, but that the position description differs from Appellant's understanding of her responsibilities.[56]

Appellant concedes that the performance appraisal she challenges was based upon expectations described in her position description. As discussed above, there is no genuine dispute that her assigned responsibilities were accurately and completely reflected in her position description. Appellant knew she was assigned shared supervisory responsibility for the State Aid Pavement Engineer—she disagreed with the assignment and its timing.[57]

Additionally, the Department provided Appellant the opportunity to add comments to her 2021 Performance Appraisal, which she accepted.[58] Her comments are included in the appraisal.[59] In her comments, she noted: "[t]he reason for the less than meets expectations were added and created after the period an annual review would be conducted."[60] That is, she objected to the untimeliness of the performance appraisal,

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[54] *See* Yang Aff., 3 (. . . the transition of my role as a supervisor to a secondary co-supervisor[.]"), 4 ("I see this removal of the supervisor role for myself and promotion to supervisor role for Mr. Meinholz in SEMA4 [a]s a change in roles and responsibilities.").
[55] Yang Aff., 2.
[56] Motion Hearing Digital Recording (Minn. Office Admin. Hearings Feb. 2, 2024).
[57] *See* Yang Aff., 2 ("After I returned in 2021 . . . Mr. Vizecky informed me that the pavement engineer position, left vacant by Mr. Ulrung, would take on responsibilities from me and Mr. Meinholz. . . . I questioned and challenged this decision of Mr. Vizecky[.]").
[58] Root Aff., Ex. 4, at 10–19.
[59] *Id.*
[60] Root Aff., Ex. 4, at 10.

but implicitly conceded that she was aware of the supervision-related expectations that resulted in her "needs improvement" appraisal during the 2021 appraisal period.[61]

Any misunderstanding of Appellant's supervisory responsibilities in 2022 was hers and not the Department's. A gap between the contents of Appellant's position description and her understanding of her responsibilities does not constitute or point to a factual dispute material to the determination of the accuracy or completeness of her performance appraisal.

Appellant has not shown a genuine dispute about the challenged portions of the 2022 Performance Appraisal. Undisputed facts establish that the 2022 Performance Appraisal—both in its description of her supervisory responsibilities and in her supervisor's subjective evaluation of her performance—reasonably reflects the history of Appellant's transactions with the Department. And, for the challenged portions of the appraisal that document the subjective opinions of her supervisor, no facts in the record could establish that those opinions were based on false or incorrect premises.

3. Veteran Status

Although not raised by her attorney, Appellant describes the thrust of her claim:

> This data challenge enables me to bring forward the practice of secondary and primary co-supervisors assigned to one direct report in state agencies, raise concerns with the co-supervisor practice when a veteran is assigned a secondary co-supervisor without training or just cause, provide some documentation to explain the discipline process of co-supervising, and make sure state agencies are transparent in how and when practices of co-supervisors may be reasonably implemented without discrimination or impacting veteran's rights established in Minnesota statutes.[62]

The Judge understands these purposes and has considered them. There is no mistaking Appellant's concern about, and objection to, what she understood to be a reduction in responsibilities in her role at the Department. Appellant objects to the contents of her position description and performance appraisal, at least in part, because she contends that the Department violated her expectations and her rights as a veteran when it made her a co-supervisor of the State Aid Pavement Engineer.[63] Appellant apparently seeks to contest Department decisions about her work responsibilities using this data practices challenge as a vehicle.

However, as Appellant herself cites, enforcement of the Veterans Preference Act is initiated by a petition to the Commissioner of Veterans Affairs.[64] This contested case proceeding is conducted for the Department of Administration under Minn. Stat § 13.04, subd. 4 (2022), upon Appellant's challenge to the accuracy and completeness of data

[61] *See* Root Aff., Ex. 5, at 2 (rating Appellant "needs improvement" for, among other things, failing to timely fill a position that she supervised).
[62] Yang Aff., 4.
[63] Yang Aff., 1.
[64] Yang Aff., 1; Minn. Stat. § 197.481 (2022).

that the Department maintains about her. The scope of this matter is limited by statute to a determination of whether the Responsible Authority correctly determined that the challenged data are accurate and complete.[65]

The Judge does not have authority, in this proceeding under Minn. Stat § 13.04 (2022), to decide a claim under Minn. Stat. § 197.481[66] or make a recommendation to the Commissioner of Veterans Affairs. Any as-yet unrealized claims that Appellant may have based upon her status as a veteran—whether under the Veterans Preference Act or another provision of law—are not within the scope of this proceeding. The only issues that can be properly determined in this proceeding are whether the Department's data are reasonably correct and free from error and whether they reasonably reflect the history of Appellant's transactions with the Department.

B. Summary Disposition is Warranted

The Department has met its burden to show that it is entitled to summary disposition. The Department's Responsible Authority determined that the data that Appellant challenged are accurate and complete. Undisputed facts show that the Responsible Authority's determination was correct.

There is no material dispute that the Department assigned Appellant certain supervisory responsibilities, that in 2021 she was aware enough of the responsibilities to disagree with them, and that her supervisor's 2022 appraisal of her performance was reasonably based in fact. The challenged portions of Appellant's position description and performance appraisal that refer to her supervisory responsibilities are reasonably correct and free from error and reasonably reflect Appellant's transactions with the Department. The Department is therefore entitled to summary disposition in its favor.

V. Conclusion

The Department has shown that there is no genuine issue of material fact. Appellant has not shown a disputed fact that could affect a determination of whether the challenged data are accurate and complete. The challenged position description and performance appraisal are reasonably correct and free from error, and they reasonably reflect the history of Appellant's transactions with the Department. Accordingly, the Department's motion should be **GRANTED**.

C. L. M.

[65] Minn. Stat. § 13.04, subd. 4(d).

[66] Even if the Judge has authority within this proceeding to consider and adjudicate a claim under Minn. Stat. § 197.481, the issue was not raised or briefed by Appellant's counsel in Appellant's memorandum opposing the Department's motion.