

Issues: Group II (failure to follow instructions and unsatisfactory performance), Group II (failure to follow instructions and unsatisfactory performance), and Termination (due to accumulation); Hearing Date: 03/27/17; Decision Issued: 04/15/17; Agency: Norfolk State University; AHO: Ternon Galloway Lee, Esq.; Case No. 10974; Outcome: Full Relief.

DECISION OF HEARING OFFICER

In the matter of

Case Number: 10974

Hearing Date: March 27, 2017

Decision Issued: April 15, 2017

SUMMARY OF DECISION

The Agency had found Grievant's job performance was unsatisfactory and Grievant failed to follow instructions and policy. The Agency then issued Grievant a Group II Written Notice. Subsequent to issuing this Group II Written Notice, the Agency found Grievant's job performance was again unsatisfactory and Grievant failed to follow his supervisor's instructions. The Agency then issued Grievant a second Group II Written Notice with termination.

After careful consideration of the evidence, the Hearing Officer found that the Agency failed to meet its burden regarding both Group II Notices. Thus, the Hearing Officer vacated the written notice and reinstated Grievant.

HISTORY

On January 27, 2017, the Agency issued Grievant a Group II Written Notice for failure to follow instructions and unsatisfactory job performance on January 9, 2017. Moreover, on or about February 10, 2017, the Agency issued Grievant a second Group II Written Notice for failure to follow supervisor's instructions and unsatisfactory job performance. This second group notice also indicated that the Agency had terminated Grievant. On or about February 13, 2017, Grievant timely filed his grievance to challenge the Agency's action. The Office of Employment Dispute Resolution ("EDR") appointed the undersigned as the Hearing Officer in this matter effective February 28, 2017. The Hearing Officer held a pre-hearing conference ("PHC") by telephone on March 2, 2015.¹ Thereafter, by order dated March 7, 2017, she issued a scheduling order that set forth in writing the rulings made and matters discussed during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented. The Hearing Officer admitted, without objection, Agency Exhibits 1 through 11, including the Agency's proposed chronology of events. In addition, the Hearing Officer admitted, without objection, the Grievant's Exhibits 1 through 4. Without objection, the Hearing Officer admitted for the record the scheduling order.

At the hearing both parties were given the opportunity to make opening and closing

¹ This was the first date that the parties were available.

statements and to call witnesses.² Each party was provided the opportunity to cross examine any witness presented by the opposing party.

During the proceeding, the Agency was represented by its advocate. Grievant represented himself.

APPEARANCES

Advocate for Agency
Agency's Representative
Witnesses for the Agency (3 witnesses)
Grievant
Witnesses for Grievant (5, including the Grievant)

ISSUE

Were the Group II Written Notices with termination warranted and appropriate under the circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") §5.8(2). 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 all the evidence presented and observing the demeanor of each witness who testified in person at the hearing, the Hearing Officer makes the following findings of fact:

1. The Agency is an institution of higher learning and known here as the University. Grievant had been employed by the Agency for about three years. (A Exh. 3).
2. Under Grievant's Employee Work Profile ("EWP"), dated by the Grievant on November 9, 2016, Grievant held the title of Assistant Director of Facilities Management for Grounds. Prior to that time, Grievant had been in charge of both housekeeping and grounds maintenance. As Assistant Director of Facilities Management for grounds, his primary responsibility included

² Prior to the hearing, the Hearing Officer held a subsequent PHC on March 22, 2017, to address the Agency's objections to certain individuals testifying for the Grievant during the hearing. Specifically, the Agency objected to four of Grievant's potential witnesses. After hearing arguments from the parties, the Hearing Officer overruled the Agency's objection to Grievant's Witness 4. She took under advisement the objection to Grievant's Witness 1. During the hearing, Grievant's Witness 1 was allowed to testify. .

Regarding the Agency's objection to two other proposed witnesses of the Grievant, during the March 22, 2017 PHC, the Grievant conceded that those two witnesses were unnecessary. He then withdrew those individuals as possible witnesses. Thus, no ruling was required regarding whether those individuals should be permitted to testify.

maintaining the campus' grounds. (A Exh. 9).

3. The University has a sizeable campus. (Judicial Notice).

4. The administration had approved 20 positions for grounds maintenance. However, eight (8) positions were unfilled during the time Grievant was responsible for the maintaining the University's grounds. (Testimonies of Director of Administrative Services, Director of Facilities Management, and Grievant's Witness 3).

5. Thus, the Hearing Officer finds that Grievant worked with only 60 % of the staff that the administration had approved (and presumably was needed) to adequately upkeep the campus' grounds.

6. In addition, during Grievant's term, his staff lacked certain competencies to upkeep the grounds. By way of example, even though Grievant was expected to maintain the grounds, none of his staff were qualified to treat weeds. (Testimony of Grievant's Witness 3).

7. After Grievant's termination on February 10, 2017, the administration filled some of the 8 vacancies with permanent workers. (Testimony of Grievant's Witness 3).

8. While Grievant was permitted to obtain temporary workers at times due to the staff shortage referenced above, those workers were not good/experienced workers. (Testimonies of Director of Administrative Services and Grievant).

Relationship between Grievant and his Supervisor

9. Grievant's immediate supervisor was the Director of Facilities Management. (Testimony of Director of Facilities Management).

10. 5. Grievant and his supervisor, experienced a disharmonious relationship. Among other features of this affiliation, there were multiple disagreements. Some disputes were coupled with the two raising their voices at each other. The loud disputes could be heard by other employees. Other staff observed Grievant and his supervisor display disrespect toward each other. Reportedly, on occasions Grievant's supervisor would give instructions directly to those who reported to Grievant instead of communicating those instructions to Grievant so that Grievant could then give them to his subordinates. Grievant disliked this about his supervisor and felt such a practice left him "out of the loop." Grievant saw this practice by his boss as one example of his supervisor disrespecting Grievant. (Testimonies of Director of Administrative Services, Assistant Director of Facilities Management, and Director of Facilities Management. Grievant's Witness 1).

Moreover, there were times during weekly meetings when Grievant's supervisor declined to accept recommendations of Grievant to address issues within the area of facilities' management. (Testimonies of Assistant Director of Facilities Management and Director of Facilities Management).

January 9, 2017 Incident

11. The weekend of January 7 – 8, 2017, a major snow storm occurred in the area. As a result, snow accumulation exceeded two (2) inches. Also on campus, sidewalks, steps, and building landings were covered with snow. Frozen snow and ice followed. These conditions prevented the campus from being open for classes on January 9, 2017. (Testimonies of Director of Administrative Services and Director of Facilities Management).

12. Due to the hazardous conditions mentioned, the University's Chief of Police directed the administration to hold a meeting on January 9, 2017, to plan for snow removal and clean up on the campus. (Testimony of Director of Facilities Management).

13. That meeting was held at noon on January 9, 2017.³ Those attending, among possible others, included Grievant's immediate supervisor, the Director of Facilities Management, Grievant, the Assistant Director of Facilities Management, and the Director of Administrative Services. (Testimony of Director of Facilities Management).

14. During the meeting, the Director of Administrative Services instructed those attending that removing the snow and ice would be the responsibility of all staff to ensure that classes could resume on January 10, 2017. (Testimony of Director of Administrative Services).

15. In addition, the Director of Administrative Services made the final decisions during the meeting regarding who would be assigned what tasks for the cleanup on January 9, 2017. Specifically, the Assistant Director of Facilities Management was assigned the task of cleaning the steps and building landings. This task was assigned to the Assistant Director of Facilities Management even though this job was one normally considered as a responsibility of Grievant. Moreover, Grievant during the meeting was assigned the task of clearing parking lots and sidewalks. (Testimony of Director of Facilities Management; A Exh. 9).

16. The job assignments made by the Director of Administrative Services on January 9, 2017, indicate that Grievant was not the only employee responsible for grounds maintenance or clearing the snow on that day.

17. After the 12:00 noon meeting had concluded, the Director of Facilities Management encountered Employee Twin about 1:30 p.m. The Director of Facilities Management instructed Employee Twin to "get a crew together and clear the entrance of the Great Hall." The Director of Facilities Management mistakenly presumed that Employee Twin was Grievant's Witness 2. Further, the Director of Facilities Management assumed that Employee Twin reported directly to Grievant. (Testimonies of Director of Administrative Services; Director of Facilities Management; and Grievant's Witness 2).

³ Although the evidence does not establish the length of the meeting which began at noon, the evidence does demonstrate that it had concluded by 1:30 p.m. This is so because Director of Facilities Management encountered a worker to whom he gave a directive to get a crew together and clear the entrance to The Great Hall. Accordingly, the Hearing Officer finds that the cleanup following the noon meeting had begun no later than 1:30 p.m. (Testimony of Director of Facilities Management).

The Director of Facilities Management was mistaken. Employee Twin is the twin brother of Grievant's Witness 2. Employee Twin reports directly to the Assistant Director of Facilities Management. The Assistant Director of Facilities Management was the housekeeping manager at the time. Employee Twin informed his supervisor, the Assistant Director of Facilities Management, of the Director of Facilities Management instruction to clear snow from the entrance to the Great Hall. The Assistant Director of Facilities Management did not begin working on the assignment because he was working on another task. (Testimony of Grievant's Witness 2).

Grievant was not informed of the instruction that was given to Employee Twin by the Director of Facilities Management. Grievant's Witness 2 learned of the instruction that evening when he saw his twin brother after work hours. (Testimony of Grievant's Witness 2).

18. The evidence is insufficient to establish that Grievant and the Director of Facilities Management encountered each other about 1:45 p.m. on January 9, 2017. Hence, the evidence is insufficient to establish that the Director of Facilities Management instructed Grievant to clear snow from the entrance of the Great Hall at 1:45 p.m. on January 9, 2017, or told Grievant of the instruction that was given to Employee Twin. (Testimonies of Grievant and Director of Facilities Management).

19. By 3:30 p.m., the entrance to the Great Hall had not been cleared of snow. Temperatures were at or near freezing at that time, and it was difficult to shovel the snow away. Because the administration was expecting the Provost the next morning at the Great Hall and hoped to resume classes the next day, University staff from all areas were summons to clear snow from the entrance of the Great Hall. As such approximately 50 employees and a Bobcat were employed to clear the snow. (Testimonies of Director of Facilities Management and Grievant's Witness 2).

20. Prior to the crew of 50 people being employed to clear snow from the Great Hall, a significant smaller number of employees worked on the task.

21. The evidence is insufficient to establish that temperatures on January 9, 2017, were above freezing on that day. (G Exh. 2, p. 14; and Testimonies of Director of Administrative Services and Director of Facilities Management).

Group II Written Notice Regarding the January 9, 2017 Incident

22. Regarding what occurred on January 9, 2017, management issued Grievant a Group II Written Notice on January 27, 2017, stating the following:

On January 9, 2017, [Director of Facilities Management] was reviewing the sidewalk conditions at [the Great Hall] following the accumulation of snow and freezing rain. After [Director of Facilities Management] shoveled the area in front of the doorways, he returned to the facilities building and inform you that he had made a request to [Employee Twin] to proceed with the to (sic) clearing of the snow to the front entrance of [the Great Hall] to prevent the area from refreezing.

On the same day, during a department meeting to discuss what areas of the campus needed cleaning you failed to identify the Great Hall. Later that afternoon [Director of Facilities Management] and other staff did a drive around campus and discovered that the snow in front of [the Great Hall] had not been cleared and had refrozen. [Director of Facilities Management] had to pull personnel from every area to address the removal of the ice in order to accommodate the University's timeframe to reopen the University on Tuesday, January 10, 2017.

(A Exh. 10, p. 3).

January 17, 2017 Incident [HERE](#)

23. On January 17, 2017, the Agency received a complaint from alumni that the University's grounds were not maintained. The Alumni also complained that the Neighboring Community was littered with trash discarded by the University's students. (A Exh. 11).

24. As a result of this complaint, on February 10, 2017, the Agency issued Grievant his second Group II Written Notice with removal. The notice described the complaint as follows:

On Tuesday, January 17, 2017, the University's President received an e-mail from a very concerned University alumni (sic). The alumni discussed the condition of the campus grounds and surrounding neighborhood. The individual stated that the campus was in dire need of constant upkeep when it comes to the trash discarded by students. In addition, alumni addressed the ongoing issue in the [Neighboring Community]. Residents have to constantly deal with bags of trash containing beer, soft drink cans, and other assorted trash items left in the neighborhood which usually remain uncollected for days at a time. This area is a valid part of your job. Your ongoing failure to perform the job satisfactorily in accordance with management's instructions has brought negative attention to [the University]. You currently have a Group two (2) on file.

24. Grievant's Witness 3 is a groundskeeper supervisor. He has held this position for 19 years. During the University's football season, groundskeeping staff are responsible for clearing the Neighboring Community of debris caused by the University's students and patrons. (Testimony of Grievant's Witness 3).

This policy was established by the University's upper management to foster a good neighbor relationship with the Neighboring Community. Grievant's Witness 3 had been informed of the policy. The groundskeepers practiced clearing the Neighboring Community of debris caused by the University's clients during the football season. (Testimonies of Director of Facilities Management and Grievant's Witness 3).

Grievant's Witness 3 had not been informed by management to clear debris caused by the University's clients from the Neighboring Community on a regular basis. (Testimony of Grievant's Witness 3).

25. Grievant's Employee Work Profile ("EWP") does not state that he is responsible for maintaining the Neighboring Community or any other community that is in the area of the University. (Testimony of Director of Facilities Management).
26. Maintaining the trash in trash containers on campus that are under the control of private contractors was/is the responsibility of private contractors, not Grievant. (Testimony of Director of Facilities Management).
27. Grievant's Witness 4 is an alumnus. She also is a regular visitor on campus. Because of her regular visits to the campus, she became aware of the condition of the campus grounds before and during the time Grievant was responsible for maintaining them. Grievant's Witness 4 observed remarkable improvement in the upkeep of the campus' grounds when Grievant was the Assistant Director of Grounds. During Grievant's tenure as the Assistant Director of Grounds, Grievant's Witness 4 received numerous comments from other alumni expressing that the campus grounds had improved in appearance and were beautiful. (Testimony of Grievant's Witness 4).
28. Grievant's Witness 4 is the Grievant's mother. (Testimony of Grievant's Witness 4).
29. The evidence is insufficient to show Director of Facilities Management employed racial discrimination. (Testimony of Assistant Director of Facilities Management).
30. The evidence is insufficient to establish that the Agency retaliated against Grievant.
31. A Neighboring University was closed for classes on January 9 and 10, 2017, due to the major snowstorm. (G Exh. 2, p. 10). The Neighboring University is large in size also. (Judicial Notice).
32. The University resumed classes after the snow storm on Wednesday, January 11, 2017. (G Exh. 2, p. 15).

DETERMINATIONS AND OPINION

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

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

It shall be the policy of the Commonwealth, as an employer, to encourage

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁴

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Under the Standards of Conduct, Group I offenses are acts of misconduct that are minor in nature. Group II offenses include misconduct of a more serious nature and/or of a repetitive nature that require more formal disciplinary action. In addition a second Group II offense normally warrants discharge. Finally, the most serious offenses are categorized as Group III offenses. *See* Standards of Conduct Policy 1.60(B)(3).

On or about January 27, 2017, management issued Grievant a Group II Written Notice. Then, on or about February 10, 2017, the Agency issued Grievant a second Group II Written Notice with termination.

Next, the Hearing Officer examines the evidence to determine if the Agency has met its burden in showing the discipline was warranted and appropriate under the circumstances.

I. Analysis of Issue before the Hearing Officer

Issue: Whether the discipline was warranted and appropriate under the circumstances?

A. Did the employee engage in the misconduct described in the Group II Written Notice issued on January 27, 2017? If so, did that behavior constitute misconduct?

An examination of the evidence shows the Agency has failed to meet its burden.

On Monday, January 9, 2017, the University was recovering from a major snowstorm that had occurred during the immediate past weekend. The administration had cancelled classes for January 9, 2017, due to the hazardous conditions caused by the storm. Particularly, the sidewalks, parking areas, steps, and building landings were covered with snow that in many cases had frozen. The administration sought to have the snow sufficiently cleared so that classes

⁴ GPM §5.8

could resume on January 10, 2017. Moreover, management anticipated the Provost would be visiting on January 10, 2017, and wanted to assure this dignitary that classes were in session upon her visit.

With these objectives, on January 9, 2017, the administration scheduled a meeting to take place at noon on that same date. The sole purpose of this meeting was to develop a plan to enable the reopening of classes on January 10, 2017. Although the evidence does not establish how many employees attended this meeting, the evidence shows that those in attendance included, among possibly others, the Director of Administrative Services, the Director of Facilities Management, the Assistant Director of Facilities Management, and Grievant. During that meeting, the Director of Administrative Services emphasized that clearing the snow for classes to open the next day was an “all hands on deck” task. She stressed that all employees present on campus on January 9, 2017, were responsible for ensuring that the campus was ready for classes to resume on January 10, 2017. The evidence shows that this meant that administrative personnel, maintenance and grounds staff, as well as housekeeping staff were responsible for clearing the snow.

In employing this strategy, during the meeting, the Director of Administrative Services assigned specific tasks. To this point, the evidence establishes that the Director of Administrative Services assigned Grievant and his subordinates the job of cleaning the sidewalks and parking areas throughout the campus. Moreover, she assigned to the Assistant Director of Facilities Management and his crew the tasks of clearing snow from the steps and landings. This latter task was assigned to the Assistant Director of Facilities Management even though it was normally a job falling within Grievant’s job description. Accordingly, the evidence demonstrates that due to the widespread hazardous effects of the storm on the campus’ grounds and management’s urgency to resume classes the next day, upper management modified job responsibilities for January 9, 2017, that pertained to the campus’ grounds.

Specifically, and as referenced previously, management dictated during the meeting that in some cases employees - such as the supervisor of housekeeping – would be assigned work outside their normal work area. This modified policy for January 9, 2017, was implemented because the administration desired that the campus grounds would be in such a condition that classes could reopen the next day. Thus, the Hearing Officer finds that the directives given during the meeting illustrate that Grievant was not the only employee responsible on January 9, 2017, for clearing the snow.

The evidence also shows that by 1:30 p.m., the referenced meeting held on January 9, 2017, had concluded. It was about this time that the Director of Facilities Management encountered Employee Twin. The evidence establishes that the Director of Facilities Management mistakenly presumed that Employee Twin was supervised by Grievant. However, Employee Twin worked for the Assistant Director of Facilities Management who was at that time the housekeeping manager. The Director of Facilities Management instructed Employee Twin to get a crew together and clear the entrance of the Great Hall. The evidence shows that Employee Twin informed his supervisor, not Grievant, of the instruction given by the Director of Facilities Management. Nevertheless, the Assistant Director of Facilities Management did not immediately follow the directive. This is so because the evidence establishes that the Assistant

Director of Facilities Management was working on another assignment. Of particular note, the evidence shows that when he was informed of the instruction by Employee Twin, the Assistant Director of Facilities Management indicated that he was currently involved with another tasks.

The Hearing Officer notes that the evidence establishes that Grievant's Witness 2 is the twin brother of Employee Twin. Further, Grievant's Witness 2 reports directly to Grievant. However, Grievant's Witness 2 only learned of the instruction to clear the entrance to the Great Hall when his brother (Employee Twin) told Grievant's Witness 2 about the directive the evening of January 9, 2017. By then the work day had concluded and the twins were off campus.

Accordingly, the evidence establishes that Employee Twin did not make Grievant aware of the instruction given to Employee Twin on January 9, 2017.

The Agency also contends that Grievant knew of his immediate supervisor's directive to clear snow from the entrance of the Great Hall because of an encounter between Grievant and his boss at 1:45 p.m on January 9, 2017. According to the testimony of the Director of Facilities Management, he encountered Grievant at 1:45 p.m. on January 9, 2017. Further, during that encounter, the Director of Facilities Management informed Grievant of the directive he had given Employee Twin about clearing snow from the entrance of the Great Hall. To the contrary, Grievant testified that he had no meeting with his boss at that time. Grievant further stated that he was elsewhere on campus clearing sidewalks and parking areas as he had been instructed to perform during the noon meeting that took place earlier that day. Grievant also testified that he had photographs to back up that he was not in a meeting with his boss at 1:45 p.m.⁵ Having observed the demeanor of the witnesses during the hearing regarding this point and considering other evidence related to this matter, the Hearing Officer finds the evidence inconclusive regarding Grievant receiving the referenced instruction from his supervisor.

The Agency also offers Grievant's EWP in support of its contention that Grievant engaged in misconduct and unsatisfactory work on January 9, 2017. The Agency argues that Grievant's job description as mentioned in the EWP requires Grievant to maintain the campus' grounds. According to the Agency, this is the case, notwithstanding whether or not Grievant was informed of his boss' directive to Employee Twin during the 1:00 p.m. hour. The Agency avers that the snow was untimely removed from the Great Hall's entrance and that pursuant to Grievant's EWP, Grievant was ultimately responsible for this unsatisfactory work product.

This argument is not persuasive for the reasons noted here. The evidence establishes that the "all hands on deck" strategy was not employed until the afternoon of January 9, 2017. Even with implementation of this plan, by the time the meeting concluded giving this instruction, less than 4.5 hours remained of day light. To this point, the Hearing Officer takes judicial notice of the large size of the University's campus that the Grievant had to clear of snow. Further, the evidence fails to demonstrate that temperatures were above freezing. As such, the HO finds that it is reasonable to conclude that such weather conditions would make the task more laborious

⁵ The Hearing Officer notes that Grievant's Exhibit II, pp. 5 through 9 appears to contain photographs taken by Grievant on January 9, 2017, between 1:05 p.m. and 2:47 p.m. The photographs purport to depict sidewalks and parking areas on campus being cleared of snow by Grievant's crew under Grievant's monitoring.

and lengthy. Also, the Hearing Officer cannot find evidence sufficient to show the snow clean up could have been completed in less than five hours. Moreover, the evidence shows that Grievant was substantially understaffed. Specifically, Grievant was working with a crew of no more than 12 persons⁶ to clear the sidewalks and parking lots of a sizeable campus. By the Agency's own admission, Grievant was short staffed by eight persons; that is he needed a work force of about 20, but had only 12 persons. In addition, during the planning meeting that commenced at noon, Grievant was not told which parking lots and sidewalks to clear first. He was simply instructed to clear sidewalks and parking lots.⁷

Considering these factors, the Hearing officer finds it reasonable to conclude that Grievant simply did not have the day light hours, the favorable weather condition, and/or the staff support to clear the entire campus of hazardous snow on January 9, 2017. The latter deficiency is illustrated by the fact that it took 50 people and a Bobcat to clear the snow from just one building area, the Great Hall on January 9, 2017. That said, the Hearing Officer is cognizant of the Agency's argument that had Grievant started working on clearing the snow during the early afternoon, the job could have been accomplished with fewer workers. Again considering the factors noted above as well as the evidence that a Neighboring University of comparable size was not able to open for classes until January 11, 2017, the Hearing Officer finds the Agency's argument unconvincing. Accordingly, the Hearing Officer finds that the large campus, the freezing temperatures, understaffing, and failure of the supervisor to communicate a directive about the Great Hall to Grievant are at fault for the campus not being cleared.

In summary, the Agency cannot meet its burden and show Grievant's work was unsatisfactory and he failed to follow his supervisor's instruction on January 9, 2017.

B. Did the employee engage in the misconduct described in the Group II Written Notice issued on or about February 10, 2017? If so, did that behavior constitute misconduct?

The Agency also contends that on January 17, 2017, Grievant's job performance was unsatisfactory and he failed to follow policy/instruction.

The agency must show these allegations by a preponderance of the evidence to meet its burden.

A careful review of the evidence shows that on January 17, 2017, alumni emailed the University's President. In that correspondence, the alumni stated that trash items discarded by students remained for days at a time in the neighborhood adjacent to the University – the Neighboring Community. They also complained that the campus “was in dire need of constant upkeep when it comes to trash discarded by students.”

⁶ The Hearing Officer is cognizant that the evidence shows that Grievant was permitted during his tenure with the Agency to hire temporary workers. The evidence established, however, that these workers were not usually good workers. Therefore, the Hearing Officer finds it reasonable to conclude that even with temporary workers, the work product would likely be deficient.

⁷ The Hearing Officer is cognizant of the Director of Administrative Services' testimony and other evidence that during the noon meeting, the Great Hall area had not been assigned for snow clearing because the administration had received information indicating the area had been addressed.

First, the Hearing Officer considers the allegation that Grievant was responsible for clearing trash from the Neighboring Community on a regular basis and had failed to do so on January 17, 2017. The Hearing Officer finds the testimony of Grievant's Witness 3 pertinent regarding this assertion. The evidence shows that this witness has held the position of groundskeeper supervisor for 19 years. As such, the Hearing Officer finds that he had considerable familiarity with any practice of the University regarding keeping the grounds of the Neighboring Community clean of trash caused by the University's students or patrons. Grievant's Witness 3 testified credibly that the grounds keeping staff was responsible for removing such trash from the Neighboring Community after football games, not at other times. He stated that this had been the policy and agreement he was informed of between the University and the Neighboring Community. Further, he testified that this was the practice followed by the grounds maintenance staff. The Director of Facilities Management testified that the agreement between the University and Neighboring Community was broader than noted by Grievant's Witness 3. According to the Director of Facilities Management, Grievant was responsible for making sure the grounds of the Neighboring Community was cleared of debris caused by campus clients on a more frequent basis.

The Hearing Officer had an opportunity to observe the demeanor of the witnesses mentioned. She has also carefully studied their testimonies. Further, she has taken judicial notice that the University's football season was not in session on January 17, 2017. Also, the Hearing Officer notes that the Agency conceded that Grievant's EWP does not state Grievant is responsible for clearing trash from the Neighboring Community. After careful consideration of all the evidence, the Hearing Officer gives significant weight to the testimony of the groundskeeper supervisor. This weight is given in view of this supervisor's lengthy tenure as a supervisor of the employees who work the campus' grounds and his knowledge of the agreement between the University and the Neighboring Community.

Accordingly, after a careful review of the evidence, the Hearing Officer finds that the Agency cannot meet its burden and show that Grievant and his staff were responsible for clearing debris from the Neighboring Community on January 17, 2017

Next, the Hearing Officer considers the part of the email's complaint stating that on an ongoing basis the campus was "in dire need of constant upkeep." Grievant disputed this accusation. In doing so, he presented Grievant's Witness 4. The Hearing Officer notes that this witness is an alumnus of the University also. Grievant's Witness 4 testified that she often visits the campus. Particularly, she noted having seasons tickets to basketball and football games. Further, this witness testified that she is a member of the Board of Teacher Education and that this board periodically meets on the University's campus. Further, Grievant's Witness 4 testified that she was aware of the condition of the campus' grounds before Grievant became the person in charge of maintaining them. She testified that she had observed a remarkable improvement in the grounds' upkeep once Grievant became responsible for maintaining them. Grievant's Witness 4 also testified that she had received numerous comments from alumni noting how beautiful the campus appeared during the 2.5 years when Grievant was responsible for the grounds' upkeep.

The Hearing Officer had an opportunity to observe this witness and found her believable. To the contrary, the alumni who sent the email did not testify during the hearing. Nonetheless, the Hearing Officer did permit and considered the email as evidence. That said, the Hearing Officer was unable to observe the demeanor and assess the credibility of the email's declarants.

The Hearing Officer recognizes that Grievant's Witness 4 is Grievant's relative. That said, as mentioned above, the Hearing Officer observed this witness' demeanor and assessed her credibility. Hence, the Hearing Officer declines to totally discount the testimony from Grievant's Witness 4. Moreover, the Hearing Officer finds that the testimony of Grievant's Witness 4 is corroborated, in part, by photographs presented by Grievant. These photographs compare the grounds of some areas of the University's campus before Grievant became responsible for them and during the time he was required to upkeep the University's grounds. The Hearing Officer finds that the photographs demonstrate improvement in the grounds' maintenance under Grievant's management.

Thus, after deliberation of the evidence, the Hearing Officer finds that the Agency's evidence is insufficient to show Grievant engaged in misconduct or unsatisfactory job performance on January 17, 2017.

C. Was the discipline consistent with policy and law?

Grievant should not be disciplined for misconduct that the Agency is unable to substantiate. Such is the case here for reasons already mentioned. Thus, the Group II Written Notices with termination are inconsistent with policy and law.

D. Affirmation of Decision

The Hearing Officer affirms her finding that the Agency has failed to meet its burden and show Grievant engaged in the alleged misconduct or unsatisfactory work performance. Thus, the disciplinary actions against Grievant cannot be upheld.

E. Other

The Hearing Officer finds the evidence is insufficient to show the Agency discriminated against the Grievant because of his race or retaliated against Grievant.

DECISION AND ORDER

III. Decision and Order

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not. Having done so, for the reasons noted here, the Agency's issuance to Grievant of a Group II Written Notice which indicates it was issued on January 27, 2017, is rescinded. Further, the Agency's issuance to the Grievant of a second Group II Written Notice with termination on or about February 10, 2017. The Agency is ordered to take the following action:

1. rescind the two Group II Written Notices and the termination;
2. pay full back pay for the period Grievant has been separated from his job; however, back pay is to be offset by any interim earnings;⁸
3. appropriately restore other benefits and seniority;
4. reinstate Grievant to his former position or, if occupied, to an equivalent position.

APPEAL RIGHTS

You may file an **administrative review** request within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 N. 14th St., 12th Floor
Richmond, VA 23219

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

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

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

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

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which the

⁸ Grievant contends he was terminated on February 4, 2017, not February 10, 2017. The Agency is instructed to determine the actual date of the Grievant's termination and then pay full back benefits minus any interim earnings as ordered by this decision.

grievance arose within **30 days** of the date when the decision becomes final.⁹

Entered this 15th day of April, 2017.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant
EDR's Director of Hearings Program

⁹ Agencies must request and receive prior approval from EDR before filing a notice of appeal.