

Issues: Group I Written Notice (unsatisfactory job performance), Group I Written Notice (unsatisfactory job performance), Group I Written Notice (unsatisfactory job performance), arbitrary or capricious performance evaluation; Hearing Date: May 24-25, and June 1, 2001; Decision Date: July 27, 2001; Agency: Virginia Polytechnic Institute and State University; AHO: Carl Wilson Schmidt, Esquire; Case Numbers: 5162, 5175, 5186, 5198



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Grievance No: 5198

Hearing Date: June 5, 2001
Decision Issued: July 27, 2001

PROCEDURAL HISTORY

This decision applies to four separate grievances which were consolidated into one grievance. On April 9, 2001, the Director of the Department of Employment Dispute Resolution issued a Compliance Ruling to consolidate grievance numbers 5162, 5175, and 5186. On April 25, 2001, grievance number 5198 was added, consolidating four grievances into one. Four days of testimony were conducted with the final day being June 5, 2001. Several hundred pages of documents were introduced into evidence and read by the Hearing Officer. Upon the motion of a party, the Hearing Officer found just cause to extend the 30-day time frame for issuing the decisions.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Volunteer
4H Extension Agent
Volunteer
Volunteer
Master Gardener Volunteer
Master Gardner Coordinator
District Director
Associate Extension Agent

Secretary Senior
Area Coordinator
Program Support Technician
Supervisor at VDOT

ISSUES

1. Whether Grievant should receive a Group I Written Notice of disciplinary action issued on January 30, 2001.
2. Whether Grievant should receive a Group I Written Notice of disciplinary action issued on February 1, 2001.
3. Whether Grievant should receive a Group I Written Notice of disciplinary action issued on March 21, 2001.
4. Whether Grievant's 2000 evaluation was arbitrary or capricious.

BURDEN OF PROOF

With respect to the first three issues, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against the Grievant were warranted and appropriate under the circumstances. GPM § 5.8.

With respect to the fourth issue, the burden of proof is on the Grievant to show by a preponderance of the evidence that her evaluation was arbitrary or capricious. GPM §§ 4.1(b)(3); 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:

General Findings of Fact

The Virginia Tech Extension Office employs Grievant as Administrative Program Specialist, III. She began working for the Extension Office in May 1998. She reports directly to the Unit Coordinator who supervises all staff in the Extension Office. The chief objective of Grievant's position is to:

Work independently with general direction from the Unit Coordinator as office manager providing clerical/administrative support to unit/area faculty and staff in a confidential manner. Maintain and reconcile ledgers of accounts and personnel and inventory records.

(Agency Exhibit 1).

Staff in the Extension Office provide numerous agricultural and horticultural services to the community. The Extension Office relies heavily on the good will and skills of its many volunteers.

Grievant and her mother had a very close relationship. Grievant's mother entered the nursing home in April 1998. Grievant visited her mother frequently. On July 19, 2000, Grievant learned her mother was terminally ill. She had been ill for a long time. On October 30, 2000, Grievant's mother died. Grievant was devastated. In addition to the loss of her mother, Grievant was involved in the dissolution of a close family relationship in October 2000. This also upset her.

In December 1999, Grievant's performance began to decrease. Her co-workers and several volunteers noticed that she was rude and difficult to get along with. On some days Grievant was pleasant and easy to speak to but on other days she would not speak without first being spoken to. She sometimes responded to others with short, curt, and abrasive comments. The Unit Coordinator spoke with Grievant about her poor interpersonal behavior in March and April 2000.

On June 15, 2000, Grievant met with the Unit Coordinator and he informed her that her poor attitude in the office was unacceptable. He instructed her to improve her negative behavior towards her co-workers and instructed her to keep her personal matters out of the workplace.

On August 1, 2000, the Extension Office had a staff meeting which included Grievant. During that meeting the Unit Coordinator commented regarding the unpleasant work environment that had developed in the office. He also stated that staff should leave at home their personal and family problems rather than letting those problems affect an employee's work or relationship with co-workers. (Agency Exhibit 3).

On October 4, 2000, the Unit Coordinator wrote a letter to Grievant stating:

Things are **not** okay in the front office. You are expected to be a professional in this office as you serve clients, and you should treat your co-workers with at least the same courtesy and politeness as you do clients.

(Agency Exhibit 9).

On December 18, 2000, the Unit Coordinator and District Director met with Grievant to counsel her regarding her behavior. The Unit Coordinator informed her that her attitude towards the Secretary Senior needed improvement. He identified examples of when her actions and attitudes were inappropriate. (Agency Exhibit 4). In a follow up memorandum, the Unit Coordinator described Grievant's behavior as:

One day you seem tolerable, the next several days you are withdrawn, avoiding eye contact, or even looking in the direction from which a staff member or client is speaking to you. Those off days, you seldom speak to anyone and when you do, it is cold, aggressive, and unpleasant. *** As quoted when I concluded the meeting, I also conclude this letter of communication, "[Grievant], this meeting is not about your personal problems or your home life, it is about your quality of work and your relationship to your co-workers." It seems you always want to create a controversy in our office. All of the above discussed behavior/attitude/actions have negatively influenced the productivity and cohesiveness of this staff. Furthermore, if your performance, attitude, and behavior does not improve immediately, I will take appropriate disciplinary actions.

(Agency Exhibit 4).

Written Notice 1-30-01

On January 30, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

Employee was counselled relative to unprofessional behavior on 12-18-00 as referenced in memo dated 1/3/01. Employee was unprofessional, uninterested and exhibited unwillingness to assist a volunteer/client with a problem over the telephone. Volunteer/client complained. Unit Coordinator hearing of the complaint on 1/7/01 followed up with complainant on 1/25/01.

On December 28, 2000, Volunteer RR called the Extension Office to ask for assistance from the Secretary Senior regarding the 4-H program. Volunteer RR had collected money from as part of the 4-H program and could not determine which 4-H member should receive credit for generating the money. Grievant answered the phone and listened to the Volunteer RR's question. Grievant said she did not know the answer because she did not work primarily in the 4-H program. Volunteer RR already knew Grievant had only limited knowledge of the 4-H program and that only the Secretary Senior could help her. Grievant offered to take a message for the Secretary Senior so that the Secretary Senior could call the Volunteer RR at a later time. Volunteer RR declined and said she would call the Secretary Senior later in the day. Volunteer RR then stated that she was trying to decide whether to solve the problem herself or to leave it with the Extension Office. Grievant stated words to the effect of "Anything you

could handle yourself would be good” and then said Goodbye and hung up the phone. Volunteer RR was surprised by Grievant’s response but did not think Grievant’s response was rude or unprofessional.

Written Notice 2-1-01

On February 1, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

Employee burdened client with personal/family/marriage problems during an incoming telephone conversation. Client did not ask for, nor appreciate personal information of negative nature.

(Agency Exhibit 9).

On January 9, 2001, Volunteer TT called the Extension Office for information about the 4H program. She and Grievant knew each other but were not close friends. Grievant answered the telephone and spoke with Volunteer TT regarding her question. Without being prompted by Volunteer TT, Grievant changed the subject of the conversation to personal matters. Grievant mentioned that her mother had died and that Grievant was experiencing a difficult family situation. Grievant expressed feelings of hardship to Volunteer TT.

Volunteer TT was surprised and felt uncomfortable that Grievant was addressing personal matters. Volunteer TT later told the Unit Coordinator:

She [Grievant] unloaded on me – attempting to tell me her personal problems I didn’t ask for this information. I didn’t appreciate it. She seemed to be wanting sympathy.

(Agency Exhibit 11).

Written Notice 3-21-01

On March 21, 2001, Grievant was issued a Group I Written Notice of disciplinary action for:

Disruptive, unprofessional, unfriendly attitude towards co-workers. Unit Coordinator continues to receive complaints both verbal and written, from co-workers concerning [Grievant’s] unprofessional, unfriendly attitude. U.C. observes, on a daily basis, the unpleasant and disruptive attitude displayed by [Grievant] toward co-workers, including himself often in front of clientele. She has not, and does not acknowledge she has a problem nor has shown any effort to improve. In fact, her attitude has eroded to a lower level since discussions, acknowledgements, and her request for written documentation about her behavior began. This unprofessional,

unfriendly, cold attitude has continued to reduce her inter-office communication and interaction between herself and co-workers/staff. This has resulted in a counter productive working environment.

The University alleges eight incidents of Grievant behaving poorly. These examples are discussed below.

2000 Performance Evaluation

On September 27, 1999, Grievant and the Unit Coordinator signed Grievant's performance plan for the upcoming performance cycle. The performance plan sets forth four major performance expectations – (1) Office Management, (2) Financial and Budget, (3) General Clerical, and (4) Clientele Contact. These essential expectations are weighted by the percentage of time devoted to the expectation. Specific tasks are listed under each expectation. Certain performance standards are used to define expectations and responsibilities. These performance standards include, communications, attendance, punctuality, safety, planning, analytical skills, decision making, and interpersonal skills. An employee with good interpersonal skills is one who "Provides positive, friendly service to customers and other staff; willingly assists others; minimizes conflict and resolves disagreements with co-workers to maintain a productive work environment." (Grievant's Exhibit 2).

As the 2000 performance cycle was ending, the Unit Coordinator solicited the comments of other Extension office staff who received services from Grievant. For example, he provided a copy of Grievant's performance expectations to the Master Gardner Coordinator and the Associate Extension Agent and asked for their written comments. (Agency Exhibits 12, 27). The Unit Coordinator also asked Grievant to provide him with a self-evaluation. He reviewed the comments before ranking Grievant's performance.

Grievant's 2000 performance evaluation showed her overall performance level as "Performance needs improvement to fully meet expectations of position." (Agency Exhibit 1). He rated her duties under Office Management as "Performance needs immediate improvement"; under Financial and Budget as "Performance fully meets expectations"; under General Clerical as "Performance needs improvement to fully meet expectations of position"; and under Clientele Contact as "Performance fully meets expectations." (Grievant's Exhibit 2).

Grievant's 1999 performance evaluations showed her overall performance level as "Performance consistently exceeds expectations", the highest level possible. The Unit Coordinator stated:

Employee has shown her willingness to advance her knowledge/understanding of Extension's system and resources at a very rapid pace. She is self-motivated to go the extra level – to accomplish the task at hand. She brought with her valuable knowledge and skills she had

previously learned with another state agency especially leadership and financial management.

(Grievant's Exhibit 2).

The Financial and Budget portion of Grievant's 1999 and 2000 evaluations are the same:

Financial and Budget

- Assist Unit Coordinator with preparation, reconciliation and monitoring of budgets
- Prepare accurate budget documents for review
- Manage local checking accounts
- Verify, compile, and submit for payment all expenditures forms maintaining prompt pay status
- Coordinate the purchasing of equipment, supplies, and services
- Serve as liaison with local, district and University accounting offices

Grievant's 1999 evaluation rates her performance for Financial and Budget as "Performance consistently exceeds expectations." (Grievant's Exhibit 2).

CONCLUSIONS OF LAW

All employees have good days and bad days. It is abundantly clear to the Hearing Officer, however, that Grievant experiences deeper and more varying changes in her emotional disposition. On those days when she feels things are not as she would prefer, she has only limited ability to hide her feelings from others in her office. For example, on some days she fails to greet or speak with co-workers unless she must do so.

Grievant's occasional change in disposition is amplified for several reasons. Grievant works in the center of the office area making her highly visible to other staff. Whereas other staff can retreat to their offices when they are not in a good mood, Grievant cannot. In addition, when Grievant has good days, she is abundantly cheerful and pleasant to be around. When Grievant is not in a good mood, her temperament appears more dramatic because it is compared to her temperament when she is in a good mood.

Grievant's testimony supports the conclusion that Grievant's disposition can sometimes be unpleasant. Grievant has experienced several unfortunate events in her life. She has had a close family member become ill and die, and has had a long-standing family relationship crumble. For Grievant to be unaffected by these events would be unusual.

Grievant's inconsistent disposition has had a cascading effect on the other staff in her office. Other staff have been offended by Grievant's occasional demeanor towards them thereby causing those staff to express displeasure with her. When Grievant's feels that displeasure, she reacts negatively towards those staff thereby perpetuating a cycle of unflattering behavior between Grievant and the other staff in her office.

It is not the Hearing Officer's responsibility to assess the relationships among employees and try to find a solution. The Hearing Officer is responsible for determining when an employee has engaged in behavior warranting disciplinary action and when an evaluation is arbitrary or capricious. The relationship between the parties, however, cannot be ignored given that it is the underlying source of the disciplinary action and the poor evaluation.

1. Written Notice 1-30-01

The Agency contends Grievant should receive a Group I Written Notice for failure to properly address the needs of Volunteer RR. The Agency believes Grievant acted improperly when she said "Anything you could handle yourself would be good."

The Agency has failed to establish that Grievant's behavior warrants disciplinary action. Grievant informed Volunteer RR that the Secretary Senior handled the 4-H program and would be a better person with whom to address her problem. Volunteer RR knew that Grievant was not the person who could help her with the 4-H program and Grievant did not mislead her to believe otherwise. Volunteer RR raised the question of whether she should try to resolve the issue herself. Grievant did not tell Volunteer RR she would try to resolve the issue herself -- Grievant only added a comment in the form of a general truism. Volunteer RR did not try to resolve the matter on her own because of Grievant's comment; Volunteer RR later called the appropriate person who assisted her in resolving her problem.

The Group I Written Notice dated January 30, 2001 must be reversed.

2. Written Notice 2-1-01

An employee who discusses unsolicited personal matters with an Agency's customers may cause those customers to be reluctant to contact the Agency. On June 15, 2000, August 1, 2000, and December 18, 2000, Grievant had been instructed to keep her personal feelings and problems out of the normal course of business. When Grievant mentioned her family situation to a volunteer with whom she had no relationship other than a business relationship, Grievant acted contrary to the instructions she was given. Grievant's behavior constitutes inadequate or unsatisfactory work performance thereby justifying the Agency in giving her a Group I Written Notice.

3. Written Notice 3-21-01

The University alleges eight events occurred giving rise to the Written Notice issued on March 21, 2001. To determine whether the disciplinary action must be upheld, the Hearing Officer must examine each factual scenario separately and then consider them together.

1. *February 16, 2001.* Only two long distance telephone lines are available for use in the Extension Office. Grievant spent an extended amount of time on the telephone. Staff complained she was inappropriately making personal calls and delaying Extension business.

Contrary to the University's assertion, Grievant was calling staff in the University's Human Resource office or with the Department of Employment Dispute Resolution. Her calls were official University business. The University's assertion lacks merit.

2. *February 19, 2001.* The University alleges that Grievant had a conversation with an Association President and made an untrue statement about the Unit Coordinator.

The Association holds annual dinner meetings during which materials are distributed to members for review. Grievant had attended the annual Association meetings in previous years in order to assist the Unit Coordinator distribute materials and record attendance. She believed he would ask for her assistance again for the current meeting but did not know for certain. The Association President called her and asked if she would be attending the meeting. Grievant responded that she did not know yet because the Unit Coordinator had not told her whether she should attend. The Association President invited her to attend as his guest. The Unit Coordinator was surprised to see Grievant at the meeting and mistakenly believed she appeared on her own accord. The University did not call the Association President as a witness or obtain a statement from him in order to rebut Grievant's testimony about her conversation with the Association President. The University has failed to establish that Grievant made any untrue statement to the Association President.

3. *February 27, 2001.* The University contends the Unit Coordinator was assisting a client obtain information about possible tobacco settlements. He asked Grievant for the two telephone numbers to call. Grievant responded that the numbers were in pamphlets next to him. The Unit Coordinator continued to look but could not find the numbers. Grievant became agitated and insisted the numbers were in the pamphlets and if the Unit Coordinator looked more carefully, he would find them. Grievant finally got up from her desk and looked at the pamphlets only to realize only one number appeared. Grievant did not apologize or otherwise acknowledge her mistake.

The University has met its burden of proof that Grievant failed to act appropriately during her conversation with Unit Coordinator in front of a client.

4. *February 28, 2001.* The University alleges Grievant was copying and collating large volumes of material when the Secretary Senior offered her assistance. Grievant rejected that assistance. The University contends, "It is hard to visualize that one person can collate and staple faster than two." (Agency Exhibit 13).

The University has failed to meet its burden of proof regarding this incident. The assignment was given to Grievant. No evidence was presented that Grievant had been instructed to obtain or accept the assistance of the Secretary Senior. In addition, Grievant testified that she was far enough along in the process that the Secretary Senior's assistance would have delayed completion. The Hearing Officer has no reason to doubt the Grievant's comments.

5. *February 28, 2001.* The University contends Grievant spoke with a client and incorrectly informed him to bring only three of the seven things required. The Unit Coordinator overheard portions of Grievant's conversation with client.

The University has shown that Grievant failed to fully inform the client of the required paper work and that Grievant knew what was required.

6. *March 5, 2001.* According to the University, Grievant had an injured toe impairing her ability to walk while she was attempting to carry a box of envelopes to the post office. The Secretary Senior offered to help but Grievant rejected the offer in an unappreciative tone without saying "thank you".

The evidence presented shows Grievant acted rudely towards the Secretary Senior. Grievant's foot hurt, which may have contributed to her rudeness. This incident is not one which rises to the level requiring disciplinary action.

7. *March 5, 2001.* Grievant typed a newsletter for the Unit Coordinator. She tossed the final draft on his desk and said, "you must have been drunk or asleep when you wrote this." She was neither laughing or smiling when she made the statement.

Grievant contends she was joking when she made her statement to the Unit Coordinator. The evidence showed, however, that the parties were no longer joking as they once had and that Grievant's comments were inappropriate. The University has met its burden of proof regarding this incident.

8. *March 15, 2001.* The 4H Extension Agent complained to the Unit Coordinator that Grievant was making numerous phone calls and making poor use of her time. In addition, she was not speaking to other staff members unless spoken to.

Grievant explained that her telephone calls were to the counselors at the Department of Employment Dispute Resolution or to University Human Resource officers. She also credibly stated that she timely and efficiently completed her duties.

The University has failed to establish that the 4H Extension Agent's allegations warrant disciplinary action.

Conclusion. When these incidents are examined separately, only Grievant's statement to the Unit Coordinator that "you must have been drunk or asleep when you wrote this" gives rise to disciplinary action. Her statement reflects contempt and insubordination. In light of the numerous counseling sessions Grievant received asking her to act courteously towards others, her behavior rises to the level justifying a Group I offense.

4. Evaluation

The University may not conduct arbitrary or capricious performance evaluations of its employees. Arbitrary or capricious is defined as "Unreasonable action in disregard of the facts or without a determining principle." 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).

To determine whether an evaluation is arbitrary or capricious, the Hearing Officer must review each job element of the evaluation and the evaluation as a whole to determine whether a material fact or determining principle is missing. Based on the Hearing Officer's review, the Hearing Officer concludes that with respect to the Financial and Budget Performance Expectation Grievant's evaluation is arbitrary or capricious.

Procedural Considerations

The Department of Human Resource's *Performance Evaluation Handbook for Supervisors* recommends seven basic steps in the evaluation process:

1. Collect, organize, and analyze performance data.
2. Evaluate and rate performance on each job element.
3. Document ratings.
4. Provide comments on overall performance.
5. Determine the overall performance level.
6. Have the evaluation reviewed.
7. Conduct the performance evaluation interview.

Although these steps are not mandatory, a supervisor's failure to follow these basic steps may be one indicator that an evaluation is arbitrary or capricious.

The Unit Coordinator followed each of these steps. He collected factual data and sought the comments of staff receiving services from Grievant. He asked Grievant to provide a self-assessment. (Grievant's Exhibit 3). He formed an opinion based on the information available to him and drafted the evaluation. After having the evaluation reviewed by his supervisor, the Unit Coordinator explained the evaluation to Grievant.

Word Processing Error

Approximately half of Grievant's Position and Performance Activity Form is completed at the beginning of the performance cycle and the other half is completed at the end of the performance cycle. Part VI of the document lists four major Performance Expectations – (1) Office Management, (2) Financial and Budget, (3) General Clerical, and (4) Clientele Contact. This portion is completed before the performance cycle begins. Under the first three expectations are bulleted items representing work tasks and duties comprising the major expectation. There are word processing errors under these expectations that change how the elements are interpreted.¹

Grievant's Office Management performance expectations lists five bulleted items when it should have listed six. The sixth item appears as a continuation of the fifth bulleted item. For example, the document states,

- Provide leadership for the day-to-day operation of the unit office
Identify unit operational problems and recommend solutions to the Unit Coordinator.

The sentence beginning with "Identify" should have been preceded by a bullet because it does not relate to the sentence beginning "Provide".

Grievant's Financial and Budget performance expectations lists five bulleted items when it should have listed six. The sixth item appears as a continuation of the fifth bulleted item. For example, the document states,

- Coordinate the purchasing of equipment, supplies, and services
Serve as liaison with local, district and University accounting offices

The sentence beginning with "Serve" should have been a bulleted item. It does not relate to purchasing duties.

Grievant's General Clerical performance expectations lists eight bulleted items when it should have listed nine. The ninth item appears as a continuation of the eighth bulleted item. For example, the document states,

- Perform other unit/area duties as assigned by the Unit Coordinator
Tasks and duties will be performed in compliance with EEO/AA/CR policies and procedures.

The sentence beginning with "Tasks" should have been a separate bulleted item.

¹ The May 18, 1998 performance plan correctly states the additional bulleted items. (Grievant's Exhibit 2).

The Unit Coordinator testified that he rated each of the bulleted items in order to arrive at a conclusion for each of the four major performance expectations. He did not realize that the performance plan contained a word processing error and, thus, he evaluated what should have been two bulleted items as one item for the three major expectations.

On the surface, the Unit Coordinator's method of evaluation may appear arbitrary or capricious because he was unaware of the word processing error and incorrectly read the duties and tasks. Grievant, however, was also unaware of the error when she and the Unit Coordinator signed the performance plan on September 27, 1999. Grievant did not appeal the performance plan. Consequently, the performance plan including the error became the basis upon which Grievant's performance was to be evaluated. The Unit Coordinator's reliance on the incorrectly drafted performance plan is not arbitrary or capricious.

Evaluations are an opinion regarding an employee's performance. Grievant's opinion of her performance differs dramatically from the Unit Coordinator's opinion.

Grievant's performance plan incorporates performance standards that account for interpersonal relationships. The Unit Coordinator believes Grievant's interpersonal skills declined dramatically adversely affecting her performance. The University has presented substantial credible evidence that Grievant's performance changed during the performance cycle. To the extent the Unit Coordinator's assessment of Grievant's performance depends on consideration of Grievant's interpersonal skills, the Unit Coordinator's assessment is not arbitrary or capricious.

Grievant's Contentions

Grievant contends her 2000 evaluation fails to consider 80 percent of her job duties and tasks. She testified that she attended several different Tours, Forums, Expos and those duties were not included in her evaluation. Grievant failed to establish that the Unit Coordinator did not consider her additional duties and that those duties were material to her performance.

Grievant contends she assumed responsibility to assist a new Associate Extension Agent. The Associate Extension Agent testified that he began doing most of his work after he noticed that Grievant was making too many mistakes and that she was difficult to work with. It is not clear that assisting the Associate Extension Agent greatly added to Grievant's workload.

Grievant argues it simply is not possible for her overall performance to change from the highest rating in 1999 to the second to last rating in 2000. The Extension Office has demonstrated, however, that Grievant's rating for three of the Performance Expectations changed due to Grievant's change in her interpersonal relations. Grievant's position is far more than a clerical or administrative position. Grievant is the pivotal point for the exchange of information in the office. When she is not

communicating well with other staff, the entire office can shut down. In many respects she has the most important job in the office.

With respect to the Financial and Budget Performance Expectation, Grievant has presented substantial credible evidence that her performance did not decline from 1999 to 2000. In 1999, Grievant received the highest rating possible for this expectation from the Unit Coordinator. In 2000, however, she only met the expectation. The Hearing Officer concludes that the Unit Coordinator downgraded Grievant in the Financial and Budget Performance Expectation because of Grievant's poor interpersonal behavior. Interpersonal skills are not the focus of the Financial and Budget Performance Expectation and the University failed to rebut Grievant's evidence that her performance was consistent between years. Consequent, the University acted arbitrarily or capriciously in evaluating Grievant with respect to the Financial and Budget Performance Expectation.

5. Retaliation

The University may not retaliate against its employees. Retaliation is defined by Section 9 of the Grievance Procedure Manual as: "Actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. 'whistleblowing')."

Grievant contends that the three written notices are acts of retaliation by the Agency because she filed a grievance of her performance evaluation. When a grievance is filed, employees and managers can sometimes become more sensitive regarding how they interact. The Agency's management began closely scrutinizing Grievant's performance before her evaluation and when she filed a grievance to challenge the evaluation, management's scrutiny continued. The Hearing Officer concludes that the Agency has not retaliated against Grievant.

Although the Hearing Officer finds no evidence of retaliation in issuing the written notices, there were certain actions that seemed inappropriate. For example, the Unit Coordinator sent Grievant a memorandum on October 4, 2000 advising her to obtain his approval before leaving the office. He stated she had recently been away from her desk for an hour and twenty minutes to purchase office supplies. (Agency Exhibit 24). The incident that the Unit Coordinator describes as "recent" occurred on August 7, 2000. (Agency Exhibit 2; Grievant's Exhibit 7). Leaving the office to purchase supplies was a regular duty of Grievant and should not have been mentioned by the Unit Coordinator in his October 4, 2000 memorandum.

Another example of a situation the University should have handled differently involved Grievant's responsibilities signing employee time records. The Unit Coordinator's practice was to have Grievant to approve all staff leave on his behalf. She would sign his name. Grievant took her responsibilities seriously and objected to signing the leave slips of employees who were "working off the clock" and who would

otherwise be entitled to overtime pay. Grievant knew that under the *Fair Labor Standards Act* nonexempt employees must be provided overtime compensation for hours worked in excess of 40 hours per week. The Unit Coordinator disagreed regarding how leave was to be recorded. Ultimately, the Unit Coordinator spoke with the District Director who was surprised that Grievant was signing the Unit Coordinator's name to leave records. He instructed the Unit Coordinator to begin personally signing leave records. The Unit Coordinator notified Grievant she would no longer be signing leave records on his behalf, but did not tell him why. Grievant interpreted this to be retaliation for her complaints. Although the Unit Coordinator should have told Grievant the real reason why she would no longer be signing leave, his actions were not retaliation. He unnecessarily allowed her to conclude that his actions were retaliation.

DECISION

For the reasons stated herein, the Agency's issuance on January 30, 2001 to the Grievant of a Group I Written Notice of disciplinary action is **rescinded**. The Agency's issuance on February 1, 2001 to Grievant of a Group I Written Notice is **upheld**. The Agency's issuance on March 21, 2001 to Grievant of a Group I Written Notice is **upheld**. Grievant's request to have her October 2000 evaluation declared arbitrary or capricious is **granted**. The Agency is instructed to repeat the 2000 evaluation without considering Grievant's interpersonal relationship when rating her Financial and Budget Performance Expectation.

APPEAL RIGHTS

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to four types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance.

The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

4. In grievances arising out of the Department of Mental Health, Mental Retardation and Substance Abuse Services which challenge allegations of patient abuse, a **challenge that a hearing decision is inconsistent with law** may be made to the Director of EDR. The party challenging the hearing decision must cite to the specific error of law in the hearing decision. The Director's authority is limited to ordering the hearing officer to revise the decision so that it is consistent with law.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar days** of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or HRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

Carl Wilson Schmidt, Esq.
Hearing Officer