

Issues: Group I Written Notice (unsatisfactory job performance), and arbitrary and capricious performance evaluation; Hearing Date: 03/10/04; Decision Issued: 04/09/04; Agency: VCU; AHO: Carl Wilson Schmidt, Esq.; Case No. 506, 592



**COMMONWEALTH of VIRGINIA**  
*Department of Employment Dispute Resolution*

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 506 / 592**

Hearing Date: March 10, 2004  
Decision Issued: April 9, 2004

**PROCEDURAL HISTORY**

On October 7, 2003, Grievant was issued a Group II Written Notice of disciplinary action for:

*On 9/18/2002, expectations of Custodial staff concerning entryway mats was communicated. On 9/9/2003, an email reminder was sent to [Grievant] that these standards were not being met. Mats were not aligned per standards on Fri. 9/12/03, Mon. 9/15/03 and Tues. 9/30/03 per my personal observation.*

On October 29, 2003, Grievant timely filed a grievance to challenge the University's action. During the Step process, the University reduced the disciplinary action to a Group I Written Notice. Grievant requested a hearing.

On October 27, 2003, Grievant timely filed a grievance to challenge her 2003 evaluation. The EDR Director issued her Ruling Nos. 2003-526 and 2003-527 consolidating the two grievances. On February 11, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 10, 2004, a hearing was held at the University's regional office.

## **APPEARANCES**

Grievant  
Grievant's Representative  
Agency Party Designee  
Agency Advocate  
Witnesses

## **ISSUE**

1. Whether Grievant should receive a Group I Written Notice of disciplinary action for unsatisfactory work performance.
2. Whether Grievant's 2003 evaluation was arbitrary and/or capricious.

## **BURDEN OF PROOF**

The burden of proof is on the University to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievant bears the burden of proving her evaluation was arbitrary and/or capricious. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

## **FINDINGS OF FACT**

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

The Virginia Commonwealth University employs Grievant as a Housekeeping Supervisor. She supervises six employees. The purpose of her position is to "perform regular and project cleaning of the University Student Commons; and to perform regular and project cleaning outside of the Commons." No evidence of prior disciplinary action was introduced at the hearing.

On September 18, 2002, the Supervisor sent Grievant an email stating:

Please make sure that the custodial staff who work the Phase 1 and Phase 2 sides of the building are aware of our expectations of them concerning the entryway walk-off mats. The inside walk-off mats should be flush against the door frame or door threshold on the floor (not away from the door) and parallel to the doors. The outside walk-off mats should be no more than 1" away from the door frame or door threshold on the

floor whenever possible (unless this interferes with door operation) and parallel to the doors. These mats should be checked regularly during the day shift (e.g. start of shift, before or after the restroom checks, & end of shift) plus during the night shift as well.<sup>1</sup>

Grievant informed her staff that, "All floor mats are to be one inch from the doors. Please make sure you are doing this. Also please see attached e-mail." She attached a copy of the Supervisor's September 18, 2002 email.

On September 9, 2003, the Supervisor sent Grievant an email stating:

Last school year, standards were set for placement of inside & outside entryway mats – as part of the 1<sup>st</sup> duties of the day, the mats were to be straightened & moved to within a few inches of the door threshold. This has not been happening yet this school year.<sup>2</sup>

On October 3, 2003, the Supervisor sent Grievant an email asking if she had notified her staff of the requirements for mat placement and if she had counseled or disciplined any of her staff for failing to properly place mats.<sup>3</sup> Grievant had taken no action against her staff.

Mats placed near building entrances need to be straightened periodically in order to give the University building a better appearance and to ensure that twisted or folded mats do not create a safety problem for guests entering and leaving the building. There were six mats inside and five outside a building for which Grievant was responsible.

On September 12, 15, and 30, 2003, the Supervisor checked the building mats at approximately 8 a.m. and observed some of the mats askew. They were not positioned in accordance with his instructions.

Beginning in July 2002, Grievant filed a series of complaints with University senior managers and external agencies. Some of her complaints involved her concerns about her Supervisor.

Grievant's 2003 evaluation rates her performance in six core responsibilities. These responsibilities include: (1) Performance Management; (2) Manages Regular Cleaning of the Commons; (3) Manages Special Cleaning Projects; (4) Monitors & Maintains Cleaning Equipment and Supplies; (5) Supervises Outdoor Cleaning & Landscaping Care; and (6) Monitors Unit's Customer Service. For each core responsibility, Grievant could receive a rating of Extraordinary Achiever, High Achiever,

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<sup>1</sup> Agency Exhibit 2.

<sup>2</sup> Agency Exhibit 2.

<sup>3</sup> Agency Exhibit 2.

Achiever, Fair Performer, and Unsatisfactory Performer. She received a rating of Fair Performer for core responsibilities 2, 5, and 6 with an overall rating of Fair Performer.

Grievant's 2002 evaluation rates her performance as Fair Performer in core responsibilities 5 and 6 with an overall rating of Achiever.

Grievant's 2001 evaluation rated her performance in six core responsibilities as either Extraordinary Contributor, Contributor, or Below Contributor. She received Below Contributor in core responsibilities 5 and 6 with an overall rating of Contributor.

Grievant's 2000 evaluation rated her performance in nine job elements. She received Meets Expectation for eight elements and Exceeds Expectation for one element with an overall rating of Meets Expectations.

Grievant's 1999 evaluation rated her performance in nine job elements. She received Meets Expectation for 7 elements and Exceeds Expectation for 2 elements with an overall rating of Exceeds Expectations.

Grievant's overall performance rating was: Exceeds Expectations in 1998; Meets Expectations in 1997; Exceeds Expectations in 1996; Exceeds Expectations in 1995; Exceeds Expectations in 1994; Exceptional in 1993; and Exceeds Expectations in 1992.

## **CONCLUSIONS OF POLICY**

### Group I Written Notice

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).<sup>4</sup> Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Inadequate or unsatisfactory work performance" is a Group I offense. In order to prove inadequate or unsatisfactory work performance, the University must establish that Grievant was responsible for performing certain duties and that Grievant failed to perform those duties. This is not a difficult standard to meet.

On three occasions, Grievant failed to ensure that mats were properly aligned in accordance with the instructions she had been given by her Supervisor. She could

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<sup>4</sup> The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

have utilized her staff to make sure the mats were aligned or she could have aligned them herself.<sup>5</sup> Her failure to do so is inadequate or unsatisfactory work performance thereby justifying issuance of a Group I Written Notice.

Grievant contends the mats were properly straightened but that student traffic caused them to be moved. Grievant's argument fails because the Supervisor observed the mats within an hour of the building opening at 7 a.m. during a period of time when student traffic is relatively light.<sup>6</sup>

### 2003 Evaluation

State agencies may not conduct arbitrary or capricious performance evaluations of their 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). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

Grievant contends her 2003 evaluation is inaccurate because "[m]y evaluations only started to go down after I made a challenge concerning back pay and refused to harass employees. There is also no supporting evidence to justify the lowering of my evaluations."<sup>7</sup> Grievant filed her complaint against the Supervisor and other University managers in July 2003. Her performance, however, began declining in 2001.<sup>8</sup>

The University presented sufficient evidence of the facts supporting the Supervisor's evaluation of Fair Performer for core responsibilities 2, 5, and 6 in the 2003 evaluation. Given that three of the six core responsibilities reflected a rating of Fair Performer, the 2003 evaluation properly reflects an overall rating of Fair Performer. Bolstering the University's position regarding Grievant's performance in 2003 is that Grievant was rated the same in 2002 and 2001 for core responsibilities 5 and 6. For example, comments in the 2002 evaluation under core responsibility 5 include, "Inconsistency in this area was noted in last year's performance evaluation" and under

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<sup>5</sup> The University is able to identify the date and time of its inspection to verify mats were not properly straightened. Grievant could have rebutted the University's evidence with something as simple as a schedule showing the date and time of staff inspections and initials showing completion of those scheduled inspections. Without such evidence, Grievant is in the weaker position of offering a general denial without evidence of the condition of the mats on specific dates and times.

<sup>6</sup> Although it is possible that students moved the mats, it is more likely that the mats had not been straightened as requested by the Supervisor.

<sup>7</sup> Grievant Exhibit 8.

<sup>8</sup> Grievant requested a reclassification of her position in 1999, yet she received an overall performance rating of Exceeds Expectations in 1999. See Grievant's Exhibit 9.

core responsibility 6, "Attention to Custodial Staff dress & appearance, cited in last year's performance evaluation." In other words, Grievant's overall performance rating did not suddenly drop in 2003 as Grievant contends, but has been inadequate for three years.

### Retaliation

Grievant contends she was issued the Written Notice as a form of retaliation. The evidence showed, however, that the notice was issued because the mats were not aligned as required.

Grievant asserts that the Supervisor retaliated against her because she did not take action against another employee in 1995. Given the amount of time that has passed since 1995, the Hearing Officer finds that that incident could not have resulted in any retaliation against Grievant in 2003.

No credible evidence of retaliation regarding Grievant's evaluations was presented. What Grievant describes as harassment often reflected the Supervisor attempting to manage the affairs of the University in a manner with which Grievant did not agree.

### Additional Issues

The Supervisor began keeping a supervisor's file on Grievant in September 2002. Grievant was not given copies of information placed in that file. Grievant argues that any document contained in the supervisor's file must first be reviewed by Grievant. DHRM Policy 6.10 authorizes supervisors to maintain employment-related files on employees. Employees must be given access to any information in the supervisor's file unless that information is protected by law. Employees normally should be given copies of the information at the time it is placed in the file. Employees may attach rebuttals to information in supervisor's files.<sup>9</sup>

Grievant should have been given copies of information placed in the supervisor's file and given an opportunity to attach rebuttals. The Hearing Officer recommends the University begin following this practice. The Supervisor's failure to provide Grievant with copies of information, however, does not affect the outcome of this case. DHRM Policy 6.10 does not specify any consequences resulting from a supervisor's failure to give an employee copies of information placed in the supervisor's file.

The outcome of an employee's evaluation should not come as a surprise to the employee. A supervisor should inform an employee on a regular basis of concerns about the employee's performance. Grievant correctly points out that the Supervisor

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<sup>9</sup> Grievant Exhibit 3.

had not adequately and consistently kept her informed of her performance.<sup>10</sup> DHRM Human Resource Manual discusses the importance of a supervisor's feedback stating, "Supervisors should mentor, coach and reinforce progress toward expected results and outcomes and address areas of concern as they arise."<sup>11</sup> The Hearing Officer recommends the University begin following this practice.<sup>12</sup> The Supervisor's failure to provide Grievant with regular feedback, however, does not affect the outcome of this case. DHRM policy does not specify any consequences resulting from a supervisor's failure to address areas of concern as they arise.

## DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group I Written Notice of disciplinary action is **upheld**. Grievant's request for relief regarding her 2003 evaluation is **denied**.

## APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. 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 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must

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<sup>10</sup> University managers in the Supervisor's chain of command also recognized a communication problem between Grievant and the Supervisor.

<sup>11</sup> Human Resource Manual, Chapter 13, p. 8. Grievant Exhibit 4.

<sup>12</sup> The lack of communication between Grievant and the Supervisor did not result in Grievant's 2003 evaluation being arbitrary or capricious.



state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director  
Department of Employment Dispute Resolution  
830 East Main St. STE 400  
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for 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 grievance arose within **30 days** of the date when the decision becomes final.<sup>13</sup>

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

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Carl Wilson Schmidt, Esq.  
Hearing Officer

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<sup>13</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.