

Issues: Group II Written Notice with 1-day suspension (failure to perform assigned work), and arbitrary and capricious performance evaluation; Hearing Date: 03/22/04; Decision Issued: 04/29/04; Agency: UVA; AHO: Carl Wilson Schmidt, Esq.; Case No. 580, 612



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 580 / 612

Hearing Date: March 22, 2004
Decision Issued: April 29, 2004

PROCEDURAL HISTORY

On December 8, 2003, Grievant was issued a Group II Written Notice of disciplinary action with a one workday suspension for:

Failure to Performed Assigned Work: [Grievant] has been given clear direction to reconcile all "non-research" award and project PTAOs in the Department of Environmental Sciences. Recent discovery of a PTAO in the Department, in significant deficit, that has not been reconciled for over a year indicates that this is not being done. The issue of non-compliance with job-related duties such as completing required PTAO reconciliations was first raised in a formal way in November 2002 (see highlighted portion of attached letter). [Grievant] has been given opportunities to both identify and complete his reconciliations His failure to do so as it relates to this particular PTAO review and reconciliations will significantly penalize the Department of Environmental Sciences as funds from another PTAO, which were originally encumbered for other purposes, must now be reprogrammed to cover of this deficit.

On January 6, 2004, Grievant timely filed a grievance to challenge the University's action.

On January 13, 2004, Grievant received a Reevaluation rating his overall performance as "Below Contributor." Based on this, the University removed Grievant from employment. Grievant filed a grievance challenging the performance rating and removal.

The outcome of the Third Resolution Step was not satisfactory to the Grievant and he requested a hearing. On February 24, 2004, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 22, 2004, a hearing was held at the University's regional office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency Counsel
Witnesses

ISSUES

1. Whether Grievant should receive a Group II Written Notice of disciplinary action with suspension for failure to perform assigned work.
2. Whether Grievant's reevaluation was arbitrary 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 and that its reevaluation of Grievant was not arbitrary 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 University hired Grievant as an Administrative and Office Specialist III (Fiscal Technician) in July 2001. He had worked in previous positions with the University. The purpose of Grievant's position was:

The incumbent is the fiscal contact for all state, local and gift PTAOs. This includes performing all reconciliation and cost transfers. The incumbent also prepares reports for faculty and initiates corrective action for overages and/or non-compliance with University and budget guidelines. Prepare and submit payables including demand payments, cost transfers, travel and reimbursements.¹

Grievant reported to the Grants Administrator. The Grants Administrator began working in her position in October 2002.² She reports to the Associate Chair. Grievant's former supervisor rated his overall 2002 work performance as "Contributor."³

The University maintains a database of accounts for various monies such as grants and gifts. These accounts must be monitored and periodically reconciled. Specific accounts are distinguished by their PTAO. Accounts containing a "G" were the responsibility of another Fiscal Tech, Mr. HW. Accounts containing a "F" were Grievant's responsibility.⁴

On November 15, 2002, the Associate Chairman sent Grievant a letter regarding their prior meeting:

We spoke about several examples including not providing the reconciled PTAEAO reports that I need for the Department activities that I track, the same situation for several faculty whose PTAEAOs you also reconcile, and the long delays in providing reimbursements to Department personnel. *** I am requiring that you distribute reconciled PTAEAO reports to appropriate faculty for the projects/awards that reside on your desk by the 20th of each month. All reimbursements need to be processed by you within 10 days of receipt.⁵

On August 12, 2003, Grievant received a Group I Written Notice for unsatisfactory job performance. Grievant failed to bring all of his tasks current. He did not provide or implement any plan to complete his backlog of work.⁶

On August 15, 2003, the Associate Chairman sent Grievant an email stating:

¹ Grievant Exhibit I.

² Grievant received favorable evaluations while working under the former Grants Administrator.

³ Grievant Exhibit J.

⁴ There were some exceptions to the distinction between "G" and "non-G" accounts. For the most part, however, Mr. HW handled "G" accounts and Grievant handled "non-G" accounts.

⁵ Agency Exhibit 1.

⁶ Agency Exhibit 18.

For the 2002-2003 fiscal year, you will first create a list of all instances where you do not have appropriate paper back-up as required by the University for the PTAOs that you are responsible for.⁷

On October 24, 2004, Grievant received a performance evaluation rating his overall job performance as "Below Contributor."⁸ Out of six core responsibilities, Grievant received ratings of "Below Contributor" in three of them. For these three core responsibilities, Grievant's evaluation states:

Core Responsibility	Comment
Financial Reports and Reconciliation	[Grievant's] PTAO reconciliations were incomplete for a complete 12-month cycle. The PTAO reconciliations did not have the audit required documentation attached and were not printed correctly (by unique PTAO combination – [Grievant] would combine the project and the awards into one report.) The PTAO reports have not been provided within the requested time frame (by the 20 th of each month) on a consistent basis.
Account Management	Because the PTAO reconciliation were delinquent in being prepared, minimal examination of the expenditures has been done. Many corrections that related to payroll were never examined and no corrections were flagged or initiated by [Grievant]. An example is the instruction PTAO. Several months of payroll expenditures had defaulted to this PTAO; [Grievant] never initiated any conversation regarding the need for correction.
Payments	[Grievant] had a large backlog of accounts payable items; some many weeks late in the payment process. In February the Dean's office forwarded a prompt pay listing to the Associate Chair for the period of July 2002 through December 2002, 247 payments were late in that 6-month period. In another instance, two months of American Express charges were not cost transferred until 6 months after the original charges were made. In another example, tuition payments, the cost transfers for spring 2002, and fall 2003 did not occur until spring of 2003. While [Grievant] has made improvement, particularly since August, in reducing the number of late payments, he needs to continue to exercise vigilance in this endeavor.

On November 5, 2003, the Grants Administrator discovered that PTAO account FA00105 with a project number 117394 had not been reconciled in over a year and that

⁷ Agency Exhibit 1.

⁸ Agency Exhibit 26.

the account showed a deficit of over \$14,000.⁹ If the account had been timely reconciled, the deficit could have been brought to the attention of the faculty member responsible for the account and the account balance could have been corrected. Because the deficit was not discovered timely, Grievant's Department had to pay the deficit from funds that would otherwise have been devoted for Department priorities. Grievant did not realize the account was his responsibility. On November 10, 2003, the Grants Administrator sent Grievant an email stating, "You are the project manager for all state, local, gift and endowment awards and projects. Regardless of the organizational number on the PTAO report, you need to reconcile each month, all state, local, gift and endowment awards and projects of the Department"¹⁰

Grievant received a Performance Plan outlining his specific work responsibilities and measures:

% Time	Responsibility	Measures for Responsibilities
60%	<p>A. Financial Administration</p> <p>Incumbent monitors and provides in-depth financial oversight of the budgets in all state, local and gift awards and projects to ensure accuracy.</p> <p>Monitoring and in-depth financial oversight include: examination of expenses and receipts in the monthly reconciliation process, maintenance of records for all non-sponsored (state, local and gift) awards and projects, prepare and ensure all corrections are successfully completed, ensure that all costs are allowable according to the State requirements and ensure that expenditures are within the budget allowances.</p> <p>Prepares all required forms and documents for the completion of the PTAO reconciliation process. Monitors non-sponsored funding and notifies</p>	<p>Reviews all appropriate Oracle and Discoverer reports for non-sponsored awards. Works closely with the supervisor to assure correction of deficit balances.</p> <p>Completes all financial reconciliation and transactions in an accurate and timely manner within the departmental guidelines. Prepares all PTAO reports and backup documentation, and reviews with the responsible party, and receives their required signature monthly. Processes cost transfers to fix erroneous charges in a timely manner. Reviews with supervisor monthly the status of all PTAO reconciliations. Prepares a status report monthly of outstanding documentation needed to complete the reconciliation process.</p>

⁹ The account began to run a deficit in October 2002. The last charge to be applied to the account was in November 2002.

¹⁰ Agency Exhibit 28.

	<p>supervisor of awards to be funded. Incumbent acquires the necessary signatures for review of long-distance telephone charges and files approvals with the appropriate PTAO reconciliation documents.</p>	<p>Stays abreast of University and Dean's office policies, procedures, and requirements regarding financial matters including financial reconciliation.</p> <p>Answers questions in a polite, patient and timely manner, researching answers to questions or issues as needed when they are beyond the scope of current knowledge.</p>
35%	<p>B. Payments/Receivables</p> <p>Incumbent has oversight of all facets of accounts receivable and accounts payable. S/he deposits all cash and other receipts or expenditure credits according to University procedures, ensuring all are recorded correctly.</p> <p>Process all travel vouchers and personnel reimbursements. Reconciles all receipts and payments against awards and projects as assigned. Prepares cost transfers for American Express and tuition remission.</p> <p>Incumbent researches and resolves all issues with payments, vendors, and related procurement problems in concert with the Departmental Buyer and Assistant Buyer.</p> <p>Incumbent requests copy cards and oversees their use, maintaining all required records.</p> <p>Incumbent is responsible for departmental cost transfers (intra-departmental) activities and maintains cost recovery PTAO's.</p>	<p>Prepares and processes all deposits and cash receipts in accordance with the University guidelines.</p> <p>Processes all reimbursements within the departmental guidelines.</p> <p>Completes all payment transactions in an accurate and timely manner in accordance with prompt pay act/guidelines. Reviews with supervisor monthly the status of all payables, cost transfers, and reimbursements. Prepares and submits to supervisor a monthly payable log.</p> <p>Process all departmental cost transfers in a timely manner according to the UVA Policy.</p> <p>Answers questions in a polite, patient and timely manner, researching answers to questions or issues as needed when they are beyond the scope of current knowledge.</p>
5%	Performs other duties as assigned by	[Willingly] accepts additional

	supervisor.	assignments and completes them accurately and in their entirety in a timely manner.
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Grievant's Employee Learning/ Career Development Plan provided:

1. Monitor the PTAO budgets monthly and initiate updates/corrections; i.e. unfunded balances, deficits, inappropriate charges, etc.
2. Provide in-depth financial oversight by – a) examining the expenditures for appropriateness, b) examining expenditure types for accuracy c) determine if expenses are within the policy guidelines, d) determine if the expenses are within the budget allowances.
3. Report any discrepancies to the grants administrator and initiate corrective action.
4. Prepare the cash cover sheet required by the Dean's office for all cash PTAO's beginning July 1, 2003 and bring them current within 90 days.
5. Continue to prepare the weekly payable log and submit to the Associate Chair and the grants administrator And continue weekly meetings to review PTAO reconciliations and payables.
6. Prepare all departmental cost transfers.
7. Prepare PTAO reports for all non-sponsored awards and projects and bring current all outstanding PTAO reports within 90 days.
8. Develop a team approach and enhance communication with supervisor related to all aspects of duties and responsibilities, enhance communication with staff and faculty to facilitate positive interactions.

On December 8, 2003, Grievant received a Notice of Improvement Needed Substandard Performance.

In January 2004, Grievant had not reconciled all of his PTAO accounts. For example, PTAO FA00105 remained un-reconciled.

In January 2004, the University concluded that Grievant had nine files with no reports in their folders.¹¹ One of those files included FA00105 which Grievant must

¹¹ Agency Exhibit 6.

have known was his responsibility as of December 8, 2003 when he was disciplined for not reconciling that account.¹²

On January 13, 2004, Grievant received an Employee Performance Evaluation with an overall performance rating of “Below Contributor.”¹³ Two of the four core responsibilities were described as “Below Contributor” as follows:

Core Responsibility	Comment
<u>Financial Administration</u>	[Grievant] has been unable to bring current all the PTAO combinations for which he is responsible. [Grievant] was instructed to identify any delinquent PTAO reconciliations and to bring them all current within the 90 day reevaluation period. There exist PTAO combinations that have not been fully reconciled as of January 9 th , 2004. [Grievant] has still not grasp the need to examine commitments and expenditures as a part of the PTAO management process. The level of supervision and instruction required for [Grievant], given his tenure in the position, is inappropriate.
<u>Payments</u>	The accounts payables are again showing a backlog on the weekly payable reports. Reimbursements continue to lag beyond the 10 day reimbursement time frame as required by the department policy. Secondly, [Grievant] continues to exhibit a lack of motivation and follow through in the reimbursement process. [Grievant] continued to be consistent in depositing the cash receipts.

On January 13, 2004, the Grants Administrator met with Grievant to review his reevaluation. She advised him that he would be reevaluated as below contributor and would be removed from employment effective January 23, 2004.¹⁴

CONCLUSIONS OF POLICY

Group II 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

¹² Grievant had been advised by the Grants Administrator on January 21, 2003 that he should organize his files “by vendor/student/faculty and set up folders for them.” See Agency Exhibit 8.

¹³ Agency Exhibit 33.

¹⁴ Agency Exhibit 31.

force.” DHRM § 1.60(V)(B).¹⁵ 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).

“Failure to follow a supervisor’s instructions, perform assigned work, or otherwise comply with established written policy” is a Group II offense.¹⁶ Grievant was responsible for updating his accounts. He did not know that the University considered FA00105 to be his account. Several years ago, the University’s database assigned the number 10 to state, local, and gift accounts and 11 to grant accounts.¹⁷ Grievant was responsible for accounts assigned 10. Once the number of state, local, and gift accounts became extensive, new accounts that would otherwise have been assigned to Grievant using 10 had to be assigned 11 even though they remained Grievant’s responsibility. When FA00105 was created in April 2002, its prefix began with 11 and Grievant assumed the account was the responsibility of another Fiscal Tech, Mr. HW. When the person serving in the Grants Administrator position changed in October 2002, she was not aware that Grievant was operating under this incorrect assumption and did not see a need to specifically identify those accounts for which Grievant was responsible.

Grievant did not fail to follow a supervisor’s instructions or perform assigned work because he did not know that the instruction given to him included reconciling FA00105. Accordingly, the Group II Written Notice with suspension must be rescinded.

Performance Reevaluation

DHRM Policy 1.40 governs Performance Planning and Evaluations. This policy provides:

An employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed, as outlined below.

Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.

¹⁵ The Department of Human Resource Management (“DHRM”) has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

¹⁶ DHRM § 1.60(V)(B)(2)(a).

¹⁷ The numbers 10 or 11 began the project number for an account.

- Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- The supervisor should develop an entire performance plan including, "Employee Development."
- If the Core Responsibilities and measures of the original performance plan are appropriate, this information should be transferred to a separate evaluation form, which will be used for re-evaluation purposes. The form should clearly indicate that it is a re-evaluation.
- The supervisor must discuss with the employee specific recommendations for meeting the minimum performance measures contained in the re-evaluation plan during the re-evaluation period.
- The employee's reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- If the employee transfers to another position during the reevaluation period, the re-evaluation process will be terminated.

If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3)-month re-evaluation period.

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

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."¹⁸ The question is not whether the Hearing Officer agrees with the evaluation or would have made the same evaluation of the employee, but rather whether the agency has identified sufficient facts to support its opinion regarding the employee's performance.

Grievant's reevaluation was not arbitrary or capricious. The University relied on facts to reach its conclusion that Grievant's performance was Below Contributor. Grievant did not timely monitor and reconcile all of his assigned accounts. For example, Grievant was aware that account FA00105 was his responsibility for reconciliation as of November 10, 2003. After denying he was responsible for that account, the Grants Administrator sent him an email informing him that he was responsible for all state, local, gift and endowment awards and projects "regardless of the organization number on the PTAO report."¹⁹ As of January 2004, Grievant still had not reconciled FA00105.

¹⁸ GPM § 9.

¹⁹ Agency Exhibit 28.

Another account for Professor S was in deficit up to \$35,000 and remained un-reconciled.

Grievant did not provide in-depth financial oversight. He reported discrepancies and initiated corrective action only for those accounts for which he had properly monitored and reconciled. He did not take a team approach to completing his duties.

Grievant contends his poor performance was because he was given additional duties above and beyond his regular duties. The evidence showed that his workload was not materially greater than the workload of other Fiscal Technicians. Grievant was capable of performing his work duties but was unable to do so.

DECISION

For the reasons stated herein, the University's issuance to the Grievant of a Group II Written Notice of disciplinary action with suspension is **rescinded**. The University is directed to provide the Grievant with **back pay** for the period of suspension less any interim earnings that the employee received during the period of suspension and credit for annual and sick leave that the employee did not otherwise accrue. GPM § 5.9(a)(3). Standards of Conduct, DHRM Policy No. 1.60(IX)(B)(2).

The University's reevaluation rating is upheld. Grievant's request for relief including reinstatement 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 14th St., 12th 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 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.²⁰

[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].

Carl Wilson Schmidt, Esq.
Hearing Officer

²⁰ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.