

Issues: Group II Written Notice (failure to follow instructions), Termination (due to accumulation) and Arbitrary/Capricious Performance Evaluation; Hearing Date: 07/21/09; Decision Issued: 07/24/09; Agency: UMW; AHO: Frank G. Aschmann, Esq.; Case No. 9083, 9107; Outcome: Partial Relief; **Administrative Review:** **EDR Ruling Request received 08/06/09; EDR Ruling #2010-2387 issued 08/31/09; Outcome: Remanded to AHO; Remanded Decision issued 09/02/09; Outcome: Decision Modified; Administrative Review: DHRM Ruling Request received 08/06/09; DHRM Ruling issued 09/11/09; Outcome: AHO's decision affirmed.**

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

In the matter of: Case Nos. 9083 & 9107

Hearing Date: July 21, 2009  
Decision Issued: July 24, 2009

**PROCEDURAL ISSUE**

No procedural issues raised.

**APPEARANCES**

Agency Counsel  
Four Agency Witnesses  
Grievant  
Three Grievant Witnesses

**ISSUES**

Did the Grievant fail to perform her duties satisfactorily, between January 28, 2009 and February 11, 2009 such as to warrant disciplinary action under the Standards of Conduct (#9107)? Was the “below contributor” rating on Grievant’s 2008 Performance Evaluation appropriate (#9083)?

**FINDINGS OF FACT**

In October 2008 a Performance Evaluation was made for the Grievant. The Grievant received an overall rating of “Below Contributor.” Nine sections were graded with five sections being graded “Below Contributor” and four sections being graded “Contributor.” The Grievant’s high level of skill in performing many office duties was recognized, however, she received numerous admonishments for failing to communicate appropriately with coworkers and customers.

In section P, the Grievant was rated “Below Contributor” for disregarding her conflict of interest contract. The Grievant submitted a request for counseling form for a customer of the Agency. She submitted the form in her own name in an attempt to assist this customer get help with his business. The Grievant’s supervisor inferred a potential conflict of interest and initiated an investigation. After consultation with others, the supervisor denied the request for counseling. The grievant was counseled about this incident and reacted defensively. The supervisor found the Grievant’s reaction to be rude and unprofessional. There was no violation of the conflict of interest contract. The Grievant and the customer were never in business together.

On September 18, 2008, a Group II Written Notice was issued to the Grievant for unsatisfactory performance and failing to follow policy/instructions, offense codes 11 & 13. This Written Notice is active in her personnel folder. The Written Notice was issued for having a dispute with a coworker, speaking inappropriately with customers, and being disrespectful to her supervisor. Included in this Written Notice was a notice that employee performance needed improvement. This notice required training and maintaining appropriate interactions with coworkers and customers.

On October 22, 2008, a Group II Written Notice was issued to the Grievant for unsatisfactory performance and failing to follow policy/instructions, offense codes 11 & 13. This Written Notice is active in her personnel folder. The Written Notice was issued for failing to take training as instructed and making inappropriate and unprofessional conversation during work hours. This notice required training and maintaining appropriate interactions with coworkers and customers.

On March 5, 2009, a Group II Written Notice was issued to the Grievant for unsatisfactory performance and failing to follow policy/instructions, offense codes 11 & 13. This Written Notice issued a sanction of employment termination. The Written Notice was issued for rude and unprofessional treatment of customers. This Written Notice gave the Grievant three active Group II Written Notices in her personnel folder.

On December 2, 2008, the Grievant was issued a performance plan with specific objectives and requirements. These included training and maintaining appropriate interactions with coworkers and customers.

The Grievant worked in a small office where cooperation among coworkers was required and internal communications were easily overheard and disruptive if inappropriate. The office provides services to outside customers and acts as a contact point for the public. This division of the Agency is considered an important representative of the Agency making customer service a major concern.

The Grievant demonstrated many outstanding administrative skills. Her organization of the storage room was an exceptional improvement. Her performance of duties involving purchasing and credit accounts were performed at a high level. Her work on the IC system was excellent. She performed many clerical duties well and in many instances had good relationships with coworkers and customers. A small percentage of the customers presented challenges to the Grievant which she was unable to handle and at times she would make rude or inappropriate comments to them. These instances are detailed in the exhibits. The Grievant received good performance evaluations from her supervisor since his arrival in the office in 2002 until the 2008 evaluation that is the subject of grievance #9083.

In 2007 the office personnel changed. A new counselor was hired into the office. The Grievant has an openly hostile relationship with this counselor. Conversely, the supervisor has a good relationship with the counselor, confiding in her and soliciting her opinion on office issues. The Grievant believes the counselor is treated with favoritism by the supervisor. The arrival of the counselor changed the personnel dynamics of the office. The Grievant feels her importance

in the office was diminished and her opinions no longer valued at the same level. The Grievant was very devoted to her supervisor and repeatedly testified, "I would do anything for that man." The Grievant's relationship with the supervisor deteriorated with the personnel change.

Ultimately, the Grievant requested a transfer. The Agency administration has discretion to offer transfers but declined, deciding it was not in the best interests of the Agency to do so. The Agency reviewed the matter, considered all factors and the Grievant's employment with the Agency was terminated.

### APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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. The Agency uses these policies for its Standards of Conduct.

Performance evaluations of employees are issued regularly to keep employees informed of their level of performance in their duties. They provide an opportunity for correction of deficiencies and recognition of positive contributions. The Grievant has challenged the rating of "Below Contributor" received on her 2008 evaluation. The Grievant has always been rated as a "Contributor" in prior years. Thus the 2008 rating marks a distinct change from a long pattern of quality performance. Inspection of the evaluation itself reveals that the finding of "Below Contributor" is very close with five elements being rated "Below Contributor" and four elements being rated "Contributor." Further examination of the evaluation reveals that in the performance of her clerical duties, organization and computer work the Grievant has done a good job contributing to the function of the office. The Grievant's primary failure in her performance is in

her interactions with her supervisor, coworker and a few customers. She has been downgraded in several elements for this behavior.

The evaluation is defective in one significant issue. In element P the Grievant is downgraded for disregarding her conflict of interest contract. This is not correct. The evidence from the Grievant shows she was not in business with the customer. There is a stipulation in the record from the customer stating this fact. The Grievant denies any business relationship and produces tax returns that show no income from this business. The Agency even corroborates this finding. The supervisor candidly gives credible testimony that his investigation did not find any business relationship and that ultimately it was the way the Grievant reacted to his investigation which he found disrespectful, unprofessional and inappropriate. The Grievant was already marked down for this type of behavior. Because the Grievant was marked down on an incorrect premise it is appropriate to change the rating in this element. Element P should not be rated as "Below Contributor." Changing this element changes the ratio of "contributor" to "Below Contributor" elements. Combined with the numerous positive contributions of the Grievant it is clear the Grievant made a significant contribution to the office and should be rated as "Contributor."

The Agency's evidence shows that the Grievant was involved in several incidents where she was disrespectful to her supervisor. The Agency's evidence shows that the Grievant also engaged in unprofessional conduct with a coworker. Numerous customer complaints were presented as well. The Agency's burden is to show by a preponderance of the evidence that its actions were justified. The Agency has met its burden to produce evidence.

Overall the Grievant appears to be a skilled administrative assistant. Unfortunately, she was unable to maintain her professionalism in regard to the counselor who joined the office in 2007. This in turn soured her relationship with her supervisor and undermined her effectiveness in the office. Maintaining professionalism was particularly important in the office because it was small, the staff had to work together and the public had access. Having two employees that are openly hostile towards each other in a small office is a difficult situation to manage and was unacceptable to the supervisor.

The Grievant openly admits that there were customers which she found difficult to deal with and did not know how to satisfy them. As the face of the Agency it was the duty of the Grievant to find a way to satisfy these customers or at the very least treat them in a professional manner. The Grievant reacted to some of the difficult customers with sarcasm and insults. This behavior was not professional and was detrimental to the function of the division and the image of the Agency as a whole.

The Grievant has received three Group II Written Notices for the same infraction. Two or more Group II Written Notices warrants termination from employment. Standards of Conduct, section B.2b. While this matter might have been resolved by a transfer, that is a matter solely in the discretion of the Agency. The Agency's decision to terminate employment as a sanction is supported by the number of active written notices in the Grievant's personnel folder. The Agency applied progressive discipline and gave the Grievant numerous chances to get training and change her behavior. The Grievant argues her time in service and her ability to

handle the majority of the customers should mitigate the sanction. These factors are considered but are insufficient to overcome the Agency's need to have customer service rendered at a higher level in this position. The Agency has placed priority on the interaction between the division and its customers. The Agency is entitled to do so and states a legitimate reason. The satisfaction of customers of this division reflect significantly on the entire Agency. Maintaining this interest of the Agency justifies its action to terminate the employment of the Grievant.

## DECISION

In grievance #9083 it is found that the Grievant's 2008 performance evaluation needs to be corrected. It shall be corrected as follows: Sections 34P and 35P shall be eliminated. Section 42 shall be changed to "Contributor." The old evaluation shall be removed from the personnel folder of the Grievant and the corrected evaluation put into the Grievant's personnel folder.

In grievance number #9107 the disciplinary action of the Agency is affirmed.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets 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 three 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. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

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. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

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 15 calendar days of the date of the original hearing decision. (Note: the 15-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 15 days; the day following the issuance of the decision is the first of the 15 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 15 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 DHRM, 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 contrary 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.

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Frank G. Aschmann  
Hearing Officer

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

In the matter of: Case Nos. 9083 & 9107

Hearing Date: July 21, 2009  
Decision Issued: July 24, 2009

**ORDER**

UPON the remand of the Director of the Department of Employee Dispute Resolution it is hereby held that the Decision in the above styled matter is amended such that in case number 9083 it is ORDERED that the Agency repeat the evaluation process for the Grievant's evaluation which is the subject of case number 9083. It is recommended that the rating be changed to "contributor." All other findings and provisions of the original Decision shall remain in effect.

ENTERED this 2<sup>nd</sup> day of September, 2009.

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Frank G. Aschmann



September 11, 2009

RE: **Grievance of Grievant v. University of Mary Washington**

Dear Parties:

The agency head of the Department of Human Resource Management (DHRM), Ms. Sara Redding Wilson, has asked that I respond to your requests for administrative reviews of the hearing officer's decision in the above referenced case. The DHRM will not interfere with the decision for the reasons stated below.

Concerning the request made by the grievant, please note that, pursuant to the Grievance Procedure Manual, §7.2(a), either party to the grievance may request an administrative review within 15 calendar days from the date the decision was issued if any of the following apply:

1. If you believe there is 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 refer to the specific policy and explain why you believe the decision is inconsistent with that policy.
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.

In each instance where a request is made to this Agency for an administrative review, the party making the request must identify with which human resource policy, either state or agency, the hearing decision is inconsistent or the decision violates. In our opinion, the grievant's request does not identify any such policy. Rather, it appears that the grievant disagrees with how the hearing officer assessed the evidence and with his resulting decision. Thus, we have no basis to conduct an administrative review.

Concerning the University of Mary Washington's request for an administrative review, the Agency, through its representative, requested that the Department of Employment Dispute Resolution (EDR) review the hearing decision because "The Decision of the Hearing Officer does

not comply with §7.2(a) of the *Grievance Procedures Manual* (GPM) and the *Rules for Conducting Hearings* (Rules), because it orders a remedy that is not within the authority of the hearing officer.”

In a ruling dated August 31, 2009, EDR remanded the decision to the hearing officer to comply with the provisions of the GPM and the Rules. Upon remand, the hearing officer amended his decision in order to comply with the provisions of the cited references. The Agency, in turn has requested that the DHRM not disturb the hearing decision.

The Department of Human Resource Management will not interfere with the application of the hearing decision because (1) the grievant has not identified any human resource policy that the hearing decision violates or with which it is inconsistent and (2) the amended hearing decision complies with the provisions of the GPM and the Rules.

Sincerely,

Ernest G. Spratley  
Assistant Director, Office  
of Equal Employment Services