

Issue: Group I Written Notice (unsatisfactory job performance); Hearing Date: 02/25/16; Decision Issued: 03/16/16; Agency: W&M; AHO: Ternon Galloway Lee, Esq.; Case No. 10738; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Numbers: 10738**

**Hearing Date: February 25, 2016**

**Decision Issued: March 16, 2016**

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### **SUMMARY OF DECISION**

The Agency had found Grievant's work performance was unsatisfactory and that she failed to follow instructions and/or policy. Management then issued Grievant a Group II Written Notice. During the third step of the grievance process, management reduced the discipline to a Group I Written Notice for unsatisfactory performance. The Hearing Officer found the discipline was warranted and appropriate. Thus, the Hearing Officer upheld the Group I Written Notice.

### **HISTORY**

On September 8, 2015, the Agency issued Grievant a Group II Written Notice for unsatisfactory work performance and failure to follow instructions and/or policy. During the third resolution step of the grievance process, the Group II Written Notice was amended to a Group I Written Notice for unsatisfactory work performance. Grievant timely filed her grievance challenging the Agency's Group I Written Notice. Thereafter, the Office of Employment Dispute Resolution (EDR) assigned the undersigned as the hearing officer to this grievance on December 17, 2015.

The Hearing Officer held a telephonic prehearing conference (PHC) on January 5, 2016<sup>1</sup>. Based on discussions during the PHC, the Hearing Officer found the first available date for the hearing was February 25, 2016. Accordingly, by agreement of the parties, the hearing was set for that date. On January 6, 2016, the Hearing Office issued a scheduling order addressing those matters discussed and ruled on during the PHC.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Office. None were raised as a prior disagreement between the parties regarding an exhibit had already been resolved.

Regarding exhibits, the Hearing Officer admitted Agency Exhibits 1 through 6, to which Grievant did not object. She also admitted Grievant's Exhibits 1 through 6 and 12 through 15, without objection. By agreement, Grievant withdrew her proposed exhibit 11. The parties then stipulated to the amount of one donor's gift as referenced below in the "Findings of Fact" section.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

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<sup>1</sup> The parties agreed to this date.

During the proceeding, an attorney represented each party.

### **APPEARANCES**

Advocate for Agency  
Witnesses for the Agency (2 witnesses)  
Grievant  
Witnesses for Grievant (1, Grievant)

### **ISSUE**

Was the amended Group I Written Notice warranted and appropriate under the circumstances?

### **BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary actions against Grievant were warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

### **FINDINGS OF FACT**

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

1. The Agency is a college. Grievant has been employed by the Agency for 23 years. She works in the Department which manages the Department’s Foundation. (Testimony of Grievant).
2. Grievant’s current boss became her supervisor in June 2014. (Testimony of Supervisor). Supervisor manages the Department and the Department’s Foundation. Upon her arrival, management significantly increased the foundation’s annual fundraising goal to \$35,000,000.00. One related and major responsibility of Supervisor is to assure that donors of the foundation receive acknowledgements of their gifts. One of Grievant’s responsibilities, among others, is to monitor the acknowledgment process and assure that thank you letters are sent to donors. (Testimonies of Supervisor and Grievant).

### **GIFT of DONOR 1**

3. During 2015, Donor 1 decided to provide for the Agency in his last will. As currently written, Donor 1’s will gives the Agency a \$100,000.00 monetary gift. (Stipulation by the Agency).

The Department’s policy is to promptly acknowledge such gifts, to the extent possible, prior to the death of the donor. The acknowledgment is in the form of a personalized thank you

letter. These letters foster relationships with the donors and encourage future giving. Moreover, timely sending thank you correspondence to donors is crucial to helping the Department's Foundation reach its fundraising goal. Therefore, these letters are required to be sent once the donor bequeaths in his will a gift to the Agency and indicates to the Agency his/her commitment that the Agency will receive the gift upon his death. (Testimony of Supervisor).

Donor 1's testamentary gift was major to the Agency. This is so because it was one of the largest gifts received by the Foundation in 2015. In addition, the gift assisted the Agency in reaching its sizeable fundraising goal. Moreover, Donor 1 perceived his bequest to be substantial as he had been considering the donation for several years. What is more, Donor 1 had to cut out his other alma mater to donate the \$100,000.00 to the Agency. Of equal importance, the Agency desired to continue to foster its relationship with Donor 1 and encourage him to continue to give to the Agency. (Testimony of Supervisor).

4. Consistent with the acknowledgement policy, by email on April 14, 2015, Supervisor instructed Grievant to prepare a thank you note for Donor 1. The purpose of this correspondence was to acknowledge his gift. Procedures in the Department had also been established that once Grievant prepared a draft thank you note for the donor, she was required to forward it to the head of the Department. The department's head would personalized the note further and sign it on the Department's letterhead. Grievant was responsible for maintaining an exact copy of the finalized letter that was actually sent to the donor. (Testimony of Grievant and Supervisor).

Several weeks passed and Supervisor had not seen a final copy of the thank you note that was supposed to have been sent to Donor 1. Hence, by email on May 7, 2015, Supervisor requested Grievant provide her a copy of the final letter. Grievant failed to do so. Thus, on May 14, 2015, and again on May 26, 2015, Supervisor asked Grievant for a copy of the final letter sent.

While Grievant informed Supervisor that she provided a draft of the letter to the employee of the Department who was actually assigned Donor 1 as a client, Supervisor's investigation revealed no such draft was provided. Because Grievant could not produce the final letter, Supervisor assumed that Donor 1 had not been thanked for his gift. Supervisor was also concerned about the adverse effect this non-acknowledgement would have on the Department's ability to raise funds, or receive addition gifts from this donor. Therefore, Supervisor arranged for the Agency's president to send a late letter of appreciation to Donor 1. (Testimony of Supervisor; A Exh. 6, pp. 06001 – 06004; A Exh. 1, pp. 01003 – 01005).

Even though Supervisor asked Grievant repeatedly over a six week period about the letter, and Grievant failed to produce a final copy of it, Grievant never took action after her supervisor's original request to prepare a thank you letter for the donor. (A Exh. 1, p. 01004).

## **FAILURE TO SCHEDULE MEETING**

5. On May 19, 2015, Supervisor gave Grievant the tasks of scheduling a meeting with Supervisor and four other individuals. When Grievant set up the meeting, she forgot to include one of the persons her boss instructed Grievant to include in the meeting. In addition, Supervisor

gave Grievant the directive to schedule the meeting on May 19, 2015. But it was not until eight days later that Grievant took any action on her supervisor's instruction. (Testimonies of Supervisor and Grievant; a Exh. 6, p. 06010).

11. The type of meeting Supervisor instructed Grievant to set up is critical to the Agency. This is so because this type meeting assists the Department in its fundraising efforts. (Testimony of Supervisor).

### **EMAILS**

12. Supervisor contends that Grievant's communication skills are deficient. Specifically, Supervisor contends that Grievant has sent her inappropriate/disrespectful emails. Supervisor identified emails from Grievant and dated May 26 and 27, 2015, as examples of this deficient communication. (A Exh. 1, p. 1005; Testimony of Supervisor; G Ex. 1, pp. 0014-0016).

### **GROUP NOTICE**

13. On September 8, 2015, management issued Grievant a Group II Written Notice for unsatisfactory performance and failure to follow instructions and/or policy. The conduct described involved the Donor 1 gift, failing to make sure an acknowledgement letter was sent, and deficient communication skills. This conduct is set forth in more detail in the above "Findings of Fact" and the Agency's Exhibit 1, pp. 01003 – 01005, and Grievant's Exhibit 1, pp. 0003 – 0005).

At the third step of the grievance process, management reduced the Group II Written Notice to a Group I Written Notice for unsatisfactory job performance.

### **JOB DUTIES REGARDING ACKNOWLEDGMENT TO DONORS**

14. In pertinent part, Grievant's job description states that her duties include, among others, the following:

Manage extensive correspondence with board members, donors, prospects and follow-up for Director of Development and Dean and Director. Prepare donor acknowledgements and recognitions. Prepare donor stewardship, communications of various kinds such as mailings and gifts;

Maintain confidential administrative files of the Foundation and Foundation donor records. Performs Foundation gift processing and deposits at [Department] and provides required gift accounting information to [Agency] Central Development Office and [Department] Finance Office. Obtain signature authorizations and maintenance, liaison with bank for administrative files; Coordinate confidential materials with Foundation President, Dean and Director's Office.

(A Exh. 5, pp. 5003 5004).

## **OTHER**

15. Prior to June 2014, when Supervisor became Grievant's boss, Grievant had been rated (excluding one year) an "exceptional employee" on her annual work performance evaluations. (Testimony of Grievant; G Exh. 15).
16. Grievant's first annual evaluation under Supervisor rated Grievant a "satisfactory worker." (Testimony of Grievant).
17. Grievant believed this evaluation to be unfair and grieved it. Grievant contends that Supervisor retaliated against her after Supervisor became aware of this grievance. The evaluation was upheld. (Testimony of Grievant).
18. Grievant managed 392 acknowledgement letters in 2015. (Testimony of Supervisor).
19. Grievant assists her supervisor in scheduling about 100 meetings a year. (Testimony of Supervisor).
20. Prior to receiving the group notice referenced in "Finding of Fact" # 13 above, Grievant did not receive verbal or written counseling from her supervisor regarding her job performance in the areas mentioned in the group notice. (Testimony of Grievant).
21. Counseling is not required prior to management issuing a group notice. (A Exh. 4, p. 04006).

## **DETERMINATIONS AND OPINION**

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

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

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

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

Under the Standards of Conduct, Group I offenses are categorized as those that are less severe in nature, but warrant formal discipline; Group II offenses are more than minor in nature or repeat offenses. Further, Group III offenses are the most severe and normally a first occurrence warrants termination unless there are sufficient circumstances to mitigate the discipline. *See* Standards of Conduct Policy 1.60.

As referenced previously here, on September 8, 2015, management issued Grievant a Group II Written Notice which was eventually reduced to a Group I Written Notice. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue(s) before the Hearing Officer**

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

**A. Did the employee engage in the alleged conduct? Further, if so did that behavior constitute misconduct?**

The Agency contends that Grievant's work performance was unsatisfactory for several reasons.

First, the Agency contends that Grievant failed to properly monitor and assure that Donor 1 was acknowledged for his gift.

Grievant's job duties required her to shoulder the responsibility of making sure acknowledgement letters were sent to donors. Grievant admitted the same. From April 14, 2015, to May 27, 2015, Supervisor repeatedly asked Grievant to provide her a copy of any thank you letter that was transmitted to Donor 1 for his testamentary gift. Grievant was unable to do so. What is more, even though Grievant could not guarantee the referenced task was completed, she failed to subsequently take action to remedy the uncertainty after her supervisor's initial request. Such remedial action could have included drafting another thank you letter and making sure a final letter of acknowledgement was sent to Donor 1.

Of note, the evidence clearly demonstrates that Grievant acknowledged her responsibility regarding assuring acknowledgment letters are sent to donors. She also admitted failing to perform this task regarding Donor 1.

Second, the evidence established that during the same time period Grievant failed to assure the thank you letter was sent, Supervisor directed Grievant to schedule a meeting with Supervisor and four other named individuals. Also, the evidence shows that the type meeting Grievant was instructed to schedule is instrumental in promoting the fundraising goals of the Agency. While Grievant scheduled the meeting, one of the individuals that Grievant's supervisor had asked Grievant to include in the meeting was not invited to it. Grievant concedes that it was her responsibility to schedule the meeting as directed by her supervisor. Further she admits that she mistakenly omitted one of the individuals from the meeting.

The Hearing Officer finds that Grievant's failure to schedule the meeting as directed and to assure the thank you note was sent constitutes unsatisfactory job performance. The Hearing Officer makes this finding after giving much consideration to the timeframe in which these deficiencies in job performance occurred (over a six week period), the responsibilities of Grievant, the goals of the Department, and the possible impact on those goals resulting from Grievant's failures.

Accordingly, the Hearing Officer finds the Agency has met its burden and shown that Grievant's work performance was unsatisfactory.<sup>2</sup>

Having made this decision, the Hearing Officer has considered Grievant's argument that she should have been counseled first. Indeed the Hearing Officer finds unpersuasive management's claims that Grievant had been counseled before being issued a group notice. That said, a review of the Standards of Conduct, Policy 1.60 shows that the Agency is not required to counsel an employee before issuing a group notice. Thus, management's lack of counseling Grievant does not exonerate Grievant's unsatisfactory work performance.

Grievant has also contended that because she grieved the evaluation Supervisor gave her, Supervisor is retaliating against her. The Hearing Officer finds the evidence insufficient to establish this claim.

### **B. Was the discipline consistent with policy and law?**

Policy 1.60 identifies unsatisfactory performance as a group I offense. As discussed above, the evidence establishes that Grievant's work performance during a six week period was unsatisfactory. Thus, the Agency's discipline – a Group II Written Notice reduced to a Group I Written Notice - is consistent with policy.

## **II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>3</sup> EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel

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<sup>2</sup> The Hearing Officer finds that the Agency has not shown that Grievant's communication was deficient.

<sup>3</sup> Va. Code § 2.2-3005 and (c )(6)



officer”” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>4</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>5</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

The Hearing Officer has found that Grievant engaged in the conduct described in the group notices and that the behaviors constituted misconduct. Further, the Hearing Officer has found, the Agency’s discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the discipline was unreasonable. In her plea for mitigation Grievant presents her 23 years of employment with the Agency. She notes also that prior to Supervisor becoming her boss, all but one of her evaluations rated Grievant as an “exceptional” employee. Grievant also contends that the two mistakes she made should be considered minuscule considering she prepares 400 thank you letters a year and schedules many meetings during any given year. She also complains that Supervisor has retaliated against her and failed to counsel her before issuing formal discipline.

Having considered the above referenced arguments and all evidence of record whether specifically mentioned or not, the Hearing Officer finds the Agency’s discipline is reasonable.

### **DECISION**

Hence for the reasons stated here, the Hearing Officer upholds the Agency’s discipline.

### **APPEAL RIGHTS**

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

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may

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<sup>4</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>5</sup> *Rules for Conducting Grievance Hearings* VI(B)

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  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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

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

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

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

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>6</sup>

Entered this 16<sup>th</sup> day of March, 2016.

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Ternon Galloway Lee, Hearing Officer  
cc: Agency Advocate/Agency Representative  
Grievant's Advocate/Grievant  
EDR's Hearings Program Director

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.