

Issue: Termination due to poor performance; Hearing Date: 06/14/12; Decision Issued: 07/16/12; Agency: W&M; AHO: Teron Galloway Lee, Esq.; Case No. 9831; Outcome: Full Relief; **Administrative Review: AHO Reconsideration Request received 07/23/12; Reconsideration Decision issued 08/14/12; Outcome: Original decision affirmed, back pay awarded; Administrative Review: EDR Ruling Request received 07/23/12; EDR Ruling No. 2013-3390, 2013-3402 issued 09/21/12; Outcome: AHO's decision affirmed; Administrative Review: DHRM Ruling Request received 07/23/12; DHRM Ruling issued 10/11/12; Outcome: AHO's decision affirmed.**

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9831**

**Hearing Date: June 14, 2012**

**Decision Issued: July 16, 2012**

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### **SUMMARY OF DECISION**

The Agency had found Grievant failed to complete her 3-month performance plan. It therefore terminated Grievant. The Hearing Officer has found the 3-month performance plan was unreasonable and fundamentally unfair to Grievant; the Agency could not meet its burden; and the Agency violated its own policy and penalized Grievant for being on short term disability leave during a portion of the 3-month performance plan. The Hearing Officer therefore vacated the termination, ordered a re-evaluation period and subsequent re-evaluation.

### **PROCEDURAL HISTORY**

On March 26, 2012, the Agency terminated Grievant for failure to complete her 90 day performance plan.

On April 3, 2012, Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the outcome and requested a hearing. On May 9, 2012, the Department of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on May 16, 2012, and subsequently a scheduling order was issued.

I scheduled the hearing for June 14, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. None were presented by the Grievant. The Agency however, argued that Grievance's Exhibit 20 should not be admitted because it was irrelevant. I heard arguments on the Agency's objection and overruled it. I then admitted all exhibits offered at the hearing. Thus, those admitted were Hearing Officer's exhibits one through 25, the Agency's exhibits one through 9B, and Grievant's exhibits one through 21.<sup>1</sup>

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<sup>1</sup> During the course of the hearing, Grievant contended, for the first time, that the Agency failed to provide her with all documents requested/within the scope of the order compelling the Agency to produce certain documents. After discussions during the hearing the parties were granted leave to submit additional documents/pleadings to me regarding the documents requested. The following submissions were received from the parties: 1) email dated June 22, 2012, from Agency's counsel with affidavit and a document titled "Restructuring Act Authority and Human Resources Policies"; 2) email dated June 22, 2012, from Grievant with copy of email sent December 8, 2011; 3) email dated June 25, 2012, from Counsel for Agency with December 8, 2011 meeting agenda. The parties were then given an opportunity to object to the post hearing submissions. There were none and I have admitted the above identified post

At the hearing both parties were given the opportunity to make opening and closing statements, to call witnesses disclosed pursuant to the hearing officer scheduling order.<sup>2</sup> Each party was also given the opportunity to cross-examine any witnesses presented by the opposing party. Also during, the proceeding, the Grievant represented herself and the Agency was represented by its attorney advocate.

### **APPEARANCES**

Attorney Advocate for Agency  
Witnesses for the Agency (1 witness, Agency Representative)  
Grievant and Witnesses for the Grievant (1 witness, Grievant)

### **ISSUE**

Was the termination warranted and appropriate under the circumstances? Specifically,

- (i) Should the Agency have given Grievant additional time to complete the 90-day plan (“3-month plan”) due to the time frame being interrupted by Grievant’s short term disability;
- (ii) Was the 90-day plan completed by Grievant;
- (iii) Was the 90-day plan defective in that it was not substantive and there were no means employed by the Agency to determine whether Grievant completed it;
- (iv) Did any meeting(s) take place to address Grievant’s performance status during the 90 day period; and
- (v) Was the 90-day plan a pretext to management’s predetermined decision to terminate Grievant?

### **BURDEN OF PROOF**

In termination actions, the burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the

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hearing submissions as Hearing Officer Exhibit 26.

<sup>2</sup> The Agency sought to have a witness not disclosed prior to the hearing to testify as a rebuttal witness. Grievant objected arguing that this witness had not been disclosed pursuant to the scheduling order. The agency's request was denied as the witness had not been disclosed pursuant to the scheduling order.

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, I make the following findings of fact:

1. Until her termination on or about April 6, 2012, Grievant had been the manager of the Accounts Payable Department (“AP”) of the Agency. Grievant’s immediate supervisor, prior to her termination, was the Agency’s Assistant Director of Financial Operations (“Agency Witness”). Agency Witness had supervised Grievant for 3 years prior to her termination. (Testimony of Agency Witness).

2. On or about November 4, 2011, Grievant received her annual performance evaluation which rated Grievant’s performance as unsatisfactory for the period November 2010, to October 2011. (Testimony of Agency Witness; G Exh. 20 email dated November 9, 2011 referencing appealing “my Evaluation for October 2011”).<sup>3</sup>

3. Under Agency policy with the title “Performance Planning and Evaluation Policy for Operational Employee,” when an employee receives an unsatisfactory job performance, the employee must be re-evaluated three (3) months after their unsatisfactory evaluation. The Performance Planning and Evaluation Policy (“agency policy/policy”) became effective on February 1, 2011. No versions of this policy preceded the February 1, 2011 one. (A Exh. 9A, p. 7).

4. Three months after Grievant received her November 4, 2011 unsatisfactory job performance was February 4, 2012. Barring no tolling of the 3 month period, Grievant’s re-evaluation should have been performed after February 4, 2012. (Referencing calendars for November 2011, through February 2012; Exh. 9A, p. 7; A Exh. 9A).

5. Grievant received a performance improvement plan on November 18, 2012, from her supervisor. It was to be utilized as the basis of Grievant’s re-evaluation. At the time Grievant received the plan, she met with her supervisor and the plan was reviewed. This meeting lasted 1.5 hours. (Testimony of Agency Witness).

#### **A. THREE MONTH PERFORMANCE IMPROVEMENT PLAN**

6. The performance improvement plan listed five (5) job responsibilities/competencies on which Grievant would be re-evaluated. (A Exh. 2). Each area of responsibility or competency was assigned a percentage which purportedly reflected the weight that would be given to the respective responsibility/competency. (A Exh. 9A, p. 4, §VI(B). The 5 competencies listed in the performance plan and the weight assigned to each are below:

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<sup>3</sup> Neither party presented Grievant’s 2010-2011 performance evaluation as evidence.

<u>Responsibility/Competency area</u>	<u>Percentage</u>
Job Knowledge and professional development	40%
Leadership skills/People development	20%
Problem-solving and decision-making	20%
relationship building and communication skill	15%
Other assignments	5%

(A Exh. 2, pp. 1-5).

7. **RESPONSIBILITY/COMPETENCY-“KNOWLEDGE AND PROFESSIONAL DEVELOPMENT,”**

The performance evaluation reflects that under the competency category “Knowledge and Professional Development,” three goals were listed. Each of these goals along with their performance standards and timetables as reflected in the performance plan is listed below:

**Goal 1:** Increase proficiency in basic knowledge of policies and procedures, including providing and interpreting information for customers.

Performance Standard: Employee meets expectations when employee:

- (i) leads research and interpretation of policies and procedures, independent of direct supervisor;
- (ii) provides accurate, problem-solving information to customers;
- (iii) establishes additional departmental guidelines and prepares written documentation to address the department’s needs;
- (iv) produces written documentation establishing guidelines that is [sic] complete, clear, and correct before submitting to supervisor for review and approval; and
- (v) when unable to find answers to supervisor's assignments through employee’s only initiative, proactively asks supervisor questions to help guide employee and save time.

Goals and Timetables: Employee must begin work on projects independently, without relying on extensive direct supervisory involvement. Employee must contribute to work not specifically assigned but within scope of normal job responsibilities, including policy interpretation and development to ensure clarity of rules and application of procedures by AP staff and customers.

Employee must create written guidelines aimed at the future dissemination of information, both within AP and throughout the campus community, which will improve departmental efficiency. Employee, when faced with minor changes in work situations, should not delay action until further supervisory direction is received. Employee must take independent action as appropriate and update her supervisor. Employee must demonstrate flexibility and adaptability to unique request from the campus community.

**Goal 2:** Assigned projects, deadlines and completeness of work.

Performance Standard: Employee meets expectations when employee:

- (i) meets project deadlines;
- (ii) produces quality work that is complete and thorough;
- (iii) understands the requirements of the assignment; and
- (iv) submits work that meets management's expectation of a management level employee.

Goals and Timetables: Employee must work on the project list assigned by supervisor. At the end of each week, employee must present a written outline to supervisor providing a status update on each project. Employee may have to adjust her schedule to ensure completion of all tasks by the established due dates.

**Goal 3:** Employee provides accurate, complete and clear information to the department.

Performance Standard: Employee meets, expectations when employee:

- (i) recognizes that certain inquiries from departments require further examination and research before answers can be provided;
- (ii) exhibits initiative to research the root of the problem before denying payment to a department;
- (iii) changes approach by providing improved customer service;
- (iv) utilizes all resources available, including FOCUS network, to research potential solutions to issues;
- (v) seeks supervisor's guidance if unable to find the answer and unsure on how to proceed; and
- (vi) understands that problem-solving is a requirement of someone at employee's management level.

Goals and Timetables: Employee must exhibit initiative by researching the root of the problem to find solutions. After conducting research, and if unsure how to proceed, employee must discuss the problem with supervisor. This discussion must include the results of employee's research and together supervisor and employee will decide what guidance to offer the customer. Employee must document all exceptions made to departmental policy and the reasoning behind decisions.

**Goal 4:** Department training and professional development opportunities.

Performance Standard: Employee meets expectations when employee:

- (i) provide AP staff with organized training opportunities, enabling AP staff to utilize available resources;
- (ii) utilizes training opportunities to enhance employee's own knowledge;
- (iii) understands that the employee's own development is not solely the responsibility of the agency management; and
- (iv) understands that providing and taking advantage of training and professional development is a requirement of employee's position.

Goals and Timetables: employee must identify AP technicians' knowledge gaps and work with each AP technician to ensure a full understanding of policies and procedures. Employee must document, in writing, training goals for the department. Employee must select training methods. Employee must schedule a time to meet with supervisor during the first month of this evaluation period to present a written training proposal that outlines training needs, identified training opportunities, and a timeline for the training of employee and AP technicians.

The weight assigned to this responsibility/competency was 40%.

(A Exh. 2, pp. 1-2).

## 8. **RESPONSIBILITIES/COMPETENCY--"LEADERSHIP SKILLS/PEOPLE DEVELOPMENT"**

The performance evaluation reflects that under the second competency category "Leadership Skills/People Development," two goals were listed. Each of these goals along with their performance standards and timetables is listed below:

**Goal 1:** Workload management and managerial oversight of Accounts Payable production.

Performance Standard: Employee meets expectations when employee:

- (i) oversees a pre-audit of travel reimbursements that occurs within 5 days of receipt in AP;

- (ii) oversees timely notification to departments of documentation issues with travel reimbursements during the pre-audit process;
- (iii) monitors travel reimbursements weekly to ensure AP technicians are pre-auditing timely; and
- (iv) monitors travel reimbursements weekly to ensure AP technicians are processing timely and within two weeks of receipt in AP.

Goals and Timetables: Employee must maintain a travel reimbursement log in the J drive. Employee must schedule a meeting with supervisor at the end of each week to review the travel reimbursement log. Employee must work with AP technicians and require overtime if needed to ensure work is completed within the allotted time.

**Goal 2:** Accept responsibility for conduct, work, and actions.

Performance Standard: : Employee meets expectations when employee:

- (i) accepts responsibility for work performed and does not shift the responsibility;
- (ii) becomes accountable and does not shift responsibility to other departments, AP technicians, supervisor, or management when issues arise;
- (iii) demonstrates a high level of supervisory effectiveness;
- (iv) demonstrates uniformity of message between supervisor directions and information, and we provide AP technicians or others; and
- (v) understands that accepting responsibility is a requirement of employee as a manager.

Goals and Timetables: Employee must communicate with AP technicians in a manner that supports management efforts. Employee must recognize the influence that employee yields within the AP unit, and must use this influence to build the confidence and consensus needed to accomplish management goals. Employee must schedule a meeting with supervisor at the end of each week to discuss any concerns employee may have about direction provided by management. This will provide employee the opportunity to voice concerns regarding management's directions. Unless a concern is voiced, management will understand that employee concurs with management's decisions and that employee is effectively implementing management's directions. Employee must accept responsibility for employee's actions, policy determinations, communications with the AP unit, and communications with customers.

The weight assigned to this responsibility/competency was 20%.

(A Exh. 2, pp. 2-3).



9. **RESPONSIBILITY/COMPETENCY-“PROBLEM-SOLVING AND DECISION-MAKING,”**

The performance evaluation reflects that under the third competency category “Problem-solving and Decision-making,” two goals were listed. Each of these goals along with their performance standards and timetables is listed below:

**Goal 1:** Increase the accuracy of guidance provided to the campus community.

Performance Standard: Employee meets expectations when employee:

- (i) provides quality customer service;
- (ii) contributes to work/projects not directly assigned but within the scope of normal job responsibilities instead of passing responsibility to other individuals or departments;
- (iii) takes independent action, as appropriate; and
- (iv) demonstrates flexibility/adaptability to individual or unique requests and provides accurate guidance to customers.

Goals and Timetables: When confronted with questions from customers that are outside the normal sphere of written policy, employee must perform a comprehensive analysis of the situation before responding to customer about whether the expenditure is appropriate and payable. Employee must utilize available resources to research issues before responding to the customer. Where employee is unsure how to proceed, employee must schedule a meeting with supervisor to discuss employee’s research and determine how to proceed. Whenever and each time any expenditure is disallowed, the employee must place a phone call to the customer to provide findings and explain the decision-ensuring that the customer fully understands the rationale behind the decision.

**Goal 2:** Decrease actions that preclude employee from finding positive ways to resolve issues and conflict.

Performance Standard: Employee meets expectations when employee:

- (i) does not react negatively or defensively;
- (ii) works collaboratively with others; and
- (iii) respectfully and professionally addresses concerns with supervisory guidance.

Goals and Timetables: Employee must consider and understand the opinions of others before responding to communications. Employee must exercise a positive approach to differences of

opinion, both within the department and with customers, minimizing negative and challenging responses.

The weight assigned to this responsibility/competency was 20%.

(A Exh. 2, p. 3).

10. **RESPONSIBILITIES/COMPETENCY-"RELATIONSHIP BUILDING AND COMMUNICATIONS "**

The performance evaluation reflects that under the fourth competency category "Relationship Building and Communications," two goals were listed. Each of these goals along with their performance standards and timetables is listed below:

**Goal 1:** Maintain open communication with other staff members.

Performance Standards: Employee meets expectations when employee:

- (i) is routinely polite;
- (ii) exercises a positive tone during conversations;
- (iii) takes pride in and responsibility for work;
- (iv) does not react negatively or defensively in response to professional constructive criticism; and
- (v) recognizes management's right and responsibility to assign workload as management believes necessary to accomplish the mission of the University and department.

Goals and Timetables: Employee's written and verbal communications must be positive and polite. Employee must cooperate with supervisor which will be demonstrated by employee's (a) willingness to utilize supervisor as a resource during employee's day-to-day activities, (b) respect for supervisor's decisions, and (c) cooperative promotion of departmental goals. Employee must develop and maintain a positive, collaborative professional outlook.

**Goal 2:** Improve the quality of communications across campus and within the financial operations department.

Performance Standards: Employee meets expectations when employee:

- (i) answers the phone when a customer or coworker calls;
- (ii) uses a positive tone during conversations;

- (iii) treats customers and coworkers politely, respectfully, and works collaboratively;
- (iv) offers assistance to customers when issues arise; and
- (v) seeks and finds solutions to customers' and coworkers' problems.

Goals and Timetables: Employee managerial communications must inspire customer satisfaction and aid in relationship building. Employee's conduct must not give rise to justified consumer complaints.

The weight assigned to this responsibility/competency was 15%.

(A Exh. 2, p. 4).

#### 11. **RESPONSIBILITY/COMPETENCY-"OTHER ASSIGNMENTS"**

The performance evaluation reflects that under the fifth competency category "Other Assignments," one goal was listed. This goal along with its performance standards and timetables is listed below:

**Goal 1:** IRS publications and tax reporting as it relates to accounts payable.

Performance standards: Employee meets expectations when employee:

- (i) prints, reviews and analyzes the reports necessary to produce accurate 1099-MISC reports;
- (ii) prints and mails all 1099-M ISC forms by the published IRS deadline;
- (iii) submits IRS compliant file using IRS BIRB by the published IRS deadline;
- (iv) handles all 1099-MISC inquiries from vendors; and
- (v) understands 1099-MIS C to be a core responsibility of this position.

Goals and Timetables: Within the first month, employee must work on testing 1099 processes to prepare for actual 1099 run and PROD. Employee must work with supervisor to review her understanding of the process and ask any pertinent questions. Employee must run the actual 1099 process, review its accurate, place documentation on the J drive, and inform supervisor of progress on a weekly basis during the month of January. Employee must communicate with supervisor and ask any questions during the actual 1099 run. Accuracy of 1099 information will be determined based on supervisory review. The deadline to complete this project and mail the 1099s is January 31.

The weight assigned to this responsibility/competency was 5%.

(A Exh. 2, p. 4).

## **B. CONCERNING MEETINGS, COMMUNICATIONS, EMAILS, ETC.**

### **1. Meetings**

12. Grievant was not on notice that she was required to schedule meetings for the weeks of November 7, 2011, and November 14, 2011, as she had not received the 3-month performance plan. Grievant scheduled meetings with her supervisor for the following dates:

December 1, 2011;  
December 2, 2011;  
January 6, 2012; and  
January 9, 2012

(G Exh. 19).

13. The December 1, 2011 meeting concerned the Reves Center Project. The meeting was held during which time Grievant timely presented her supervisor with the completed Reves Center project. (G Exh. 19; Testimony of Grievant).

14. The December 2, 2011 meeting was cancelled by Grievant due to it conflicting with another work place meeting/activity. (Testimony of Agency Witness).

15. A meeting was also scheduled for December 8, 2012. The agenda for that meeting lists performance evaluation progress as one of the topics to be discussed at the meeting. (Testimonies of Agency Witness; HO Exh. 26, pp. 9 and 11).

16. The January 6, 2012 meeting was not held because Grievant's supervisor called in sick. (Testimony of Agency's Witness).

17. Grievant rescheduled the January 6, 2012 meeting for January 9, 2012; however, on January 9, 2012; Grievant was out on sick leave. Grievant remained on sick leave for January 10 and 11, 2012. Thereafter Grievant was on short-term disability leave until March 26, 2012. (Testimonies of Agency Witness and Grievant; G Exh. 2).

18. Informal meetings were held between Grievant and her supervisor during the 3-month performance plan period. (Testimony of Grievant).

### **2. Relocation reimbursement vouchers/Complaint; Emails**

19. On or about December 13, 2011, Grievant's supervisor received a complaint about the lengthy time it took for a reimbursement relocation voucher to be processed by AP. The voucher had been received by AP on or about October 31, 2011, and processed on December 13, 2011. The complainer asserted that upon AP's initial finding of an error with his voucher, Grievant -as the AP manager- should have reviewed his entire voucher to prevent it from being returned to

him several times for piecemeal corrections that prolonged processing the voucher. (G Exh. 9B; Testimony of Agency Witness).

20. No other complaints regarding moving relocation vouchers were made during the 3-month performance period. On or about December 14, 2011, Grievant met with a dean of the Agency regarding this dean's relocation reimbursement voucher. Grievant did a good job handling and processing this dean's voucher. (Testimonies of Agency Witness and Grievant).

21. Grievant and her supervisor exchanged a series of emails from December 2, 2011, to December 4, 2011, regarding the accusation that invoices from the Agency's athletic department were not being charged by AP as requested. Grievant's supervisor deemed Grievant's emails as nonresponsive to the supervisor's request. (Testimony of Agency Witness; A Exh. 4).

22. Grievant has invited Agency employees to visit the AP office so she can discuss the proper way to complete vouchers. (G Exh. 9A); Testimony of Grievant).

### **3. Reves Center, CAPP, and 1099**

23. **Reves Center Assignment** - Grievant was out of the office on Monday, November 28, 2011. At 11:27 a.m. on that day, Grievant's supervisor forwarded Grievant an email acknowledging Grievant was not in the office on November 28, 2011, and instructing Grievant to complete an assignment known as the Reves Center project. The supervisor set Wednesday, November 30, 2011, as the due date for the project's completion. Grievant had no prior experience performing such a project. The project was not identified on Grievant's 3-month performance plan.<sup>4</sup> (Testimony of Grievant; G Exh. 16; A Exh. 2).

24. Grievant timely completed the Reves Center project, set up a meeting with the supervisor regarding the project as instructed, and attended the scheduled meeting. (Testimony of Grievant; G Exh. 16, p. 2).

25. **CAPP Assignment** – On Monday, November 28, 2011, at 11:38 a.m., Grievant's supervisor assigned Grievant another task – the CAPP Assignment. The acronym CAPP represents Commonwealth Accounting Policy and Procedures. Usually changes to the CAPP are published in the fall, normally on or about October 1 of a calendar year. 2011 CAPP changes were published about the first week of November 2011. (Testimonies of Agency Witness and Grievant; G Exh. 15, p.8).

The supervisor's November 28, 2011 email requested Grievant review the CAPP changes and advise the supervisor of the changes by noon on November 29, 2011. The supervisor received the changes from Grievant on or about November 30, 2011. Emails followed between

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<sup>4</sup> Grievant testified that in August 2011, the supervisor was given the Reves Center Assignment to perform, but it was not done. Further, the supervisor delegated the assignment to Grievant on November 28, 2011. Grievant's testimony was not contradicted. The Hearing Officer therefore finds the Reves Center Assignment was initially presented to the supervisor as a task in August 2011. It was then delegated to Grievant November 28, 2011. (Testimony of Grievant).

Grievant and her supervisor from December 4, 2011, to December 6, 2011. On or about December 4, 2011, Grievant's supervisor instructed Grievant for the first time to (i) prepare a document for the college community which provides a comprehensive list of the 2011 CAPP changes and (ii) place the document on the Department of Financial Operations/AP's website and link the document to the Agency's digest.

The parties concede updating the campus community on CAPP changes fell within Grievant's job description; but, historically, Grievant's supervisor had performed this task and had never informed Grievant she expected Grievant to complete it. (G Exh. 15, p.6; Testimony of Grievant).

Prior to Grievant receiving the CAPP assignment from her supervisor, she and her staff had advised the various departments of the Agency of the 2011 CAPP changes upon their being published. (G Exh. 15, pp. 4-6).

26. **1099 Assignment** - The Department of Financial Operations which includes AP is responsible for issuing 1099s to vendors who have provided services to the Agency. The 1099 MISC and tax reporting form summarizes payments made to a vendor during a tax year. Every vendor receives the 1099 miscellaneous form. A lot of work is entailed in preparing the 1099. In February 2011 Grievant was assigned the task of becoming thoroughly familiar with the 1099 process by completing testing of the 1099 process and becoming capable of producing the 1099s by January 31, 2012, for vendors paid in calendar year 2011. (Testimony of Agency Witness).

27. Benchmarks were set for Grievant to become familiar with the testing and to complete testing of the 1099 process. Those benchmarks were April 2011, August 2011, and October 2011. Grievant's supervisor rated Grievant unsatisfactory in this area on her 2010-2011 performance evaluation. (Testimony of Agency Witness).

28. The 1099 assignment comprised the "Other Assignment" competency in Grievant's 3-month performance plan. According to this plan, during the first month of the 3-month performance plan Grievant was to "work on testing the 1099 processes to prepare for actual 1099s running in PROD." (A Exh. 2, p. 4). According to the performance plan, the entire 1099 project (testing, production of the 1099s, and mailing them) was to be completed by January 31, 2012. (A Exh. 2, p. 4). The performance plan also specified that during January 2012, Grievant was required to run the actual 1099s process, review its accuracy, place documentation on the J drive, and inform supervisor of progress on a weekly basis during the month of January. Grievant was also required to communicate with her supervisor and ask any questions during the actual 1099s run. (Agency Exh. 2, p. 4). The production phase of the 1099 project takes about a month. (Testimony of Agency Witness).

29. By December 15, 2011, Grievant had worked on the 1099 project for several weeks. However, she had difficulty running the program and was in need of training to process the 1099s. (Testimony of Grievant; A Exh. 7C).

30. By email dated December 7, 2011, Grievant informed her supervisor that the accounts

payable staff was in need of 1099 training. She then requested 1099 training. 1099 training had previously been scheduled for April 2011, but it did not take place because Grievant's supervisor failed to attend the scheduled training session. (Testimony of Grievant; G Exh. 10).

31. Grievant was on either sick leave or short term disability leave from January 9, 2012, to March 26, 2012. (Testimonies of Agency Witness and Grievant; G Exh. 2; A Exh. Calendar).

32. On January 11, 2012, Grievant's supervisor reassigned the 1099 assignment to another team within the Financial Operations' Department. (Testimony of Agency Witness; A Exh. 7A).

#### **4. Communications – Answering Telephones**

33. Grievant's supervisor instituted a new policy on November 18, 2012, regarding the AP department answering telephone calls. The policy was instituted to address concerns that many telephone calls from customers to the AP department were not being answered. The new policy required the AP department to answer all telephone calls. The supervisor informed Grievant of the new policy on November 18, 2011, and directed Grievant to inform her subordinates - AP technicians - of the new policy. The supervisor suggested to Grievant that when Grievant communicate the new policy to her subordinates that she inform them that some of the technicians were doing a good job answering the telephones. (Testimony of Agency Witness).

34. Prior to the supervisor instituting the above noted policy, she had informed the technicians by email that they were not required to answer all telephone calls. This directive was provided with situations in mind when technicians were involved in tasks that required their full concentration such as processing vouchers. The supervisor did not intend for AP staff to ignore all telephone calls or answer calls only one time during their shift. The supervisor perceived that the latter was occurring. Thus, she instituted the new policy on November 18, 2011, regarding the AP staff answering telephone calls. (Testimony of Agency Witness; A Exh. 3).

35. After receiving the instruction from her supervisor, on November 18, 2011, Grievant met with her subordinates and communicated the new policy regarding answering telephone calls. The subordinates had an opportunity to raise their concerns during the meeting. The supervisor was not in attendance at the meeting. Subsequent to the meeting on November 18, 2011, Grievant sent an email to her subordinates informing them of the policy change. Grievant's email to the technicians stated the following:

Ladies,

[Supervisor] and I met today to discuss several concerns with AP department. As a result, two new rules have been established:

- 1) it is now mandated that the AP staff answers all phone calls, including calls from the front desk.
- 2) please submit, to my attention, a daily count of travel vouchers received in the mail.

If there are any questions/concerns, please feel free to advise.

Thanks,

[Grievant]  
Accounts Payable Manager

(A Exh. 3, pp. 3-4).

36. Grievant's supervisor was disappointed with the style and approach Grievant employed to communicate the new policy regarding AP staff answering telephone calls. About 10 days later, three of Grievant's subordinates emailed Grievant about concerns they had with the new policy. Grievant's supervisor was copied on the emails. (A Exh. 3, p. 2).

### **C. GRIEVANT'S TERMINATION**

37. Grievant's last day of work before being terminated was January 6, 2012. Grievant was on sick leave from January 9, 2012, to January 11, 2012. Grievant was placed on short term disability leave from January 12, 2012, to March 26, 2012. (Testimonies of Grievant and Agency Witness; G Exhs. 2-3).

38. While Grievant was on short term disability leave, Grievant's supervisor re-evaluated Grievant on or about January 17, 2012, under the 3-month performance plan. (Testimony of Agency Witness). Management, including Grievant's supervisor, met on January 20, 2012 and decided to terminate Grievant. Management waited until Grievant returned to work from her short term disability leave on March 26, 2012, to execute the termination which became effective on or about April 6, 2012. (Testimony of Agency Witness; G Exh. 4; A Exh. 8).

39. Grievant's supervisor represented that she re-evaluated Grievant under the performance plan by referring to daily notes she kept on Grievant's performance to determine progress. The Agency did not provide those notes as evidence at the hearing, nor did it offer a reason for not supplying them. (Testimony of Agency Witness).

Several months are needed to prepare and post a job opening. Grievant's supervisor posted a job opening for Grievant's job on March 28, 2012, two days after Grievant was notified of her termination. (Testimony of Grievant; G Exh. 5). (Testimony of Grievant; Testimony of Agency Witness).

### **D. OTHER**

40. Grievant and Grievant's supervisor have a serious communication problem. Grievant considers her supervisor disrespectful of Grievant as AP manager. Grievant's manager deems Grievant disrespectful of her as a supervisor. (Testimonies of Grievant and Grievant's supervisor).



41. By e-mail dated February 16, 2012 Grievant supervisor expressed she desired to find a way to terminate grievant. (G Exh. Space 21, pp. 2-3).

42. Grievant maintained a travel log from November 28, 2011, to January 5, 2012. The travel was in the Agency's possession at all times. (Testimony of Grievant; G Exh. 11).

43. The Agency was closed from December 24 to January 2, 2012, for Christmas break. (Testimony of Agency Witness).

## **E. AGENCY PERFORMANCE PLAN AND EVALUATION POLICY**

44. In accordance with the Restructured Higher Education, Financial and Administrative Operations Act, Chapter 4.10, Title 23 of the Code of Virginia and the Management Agreement effective July 1, 2006, the agency has adopted the Performance Planning and Evaluation Policy for Operational Employee. (A Exh. 9A).

45. Sections VIII(C), (E) of the Performance Planning and Evaluation Policy for Operational and Employees addresses performance evaluations. These sections of the policy provide in pertinent part the following:

### **C. Unsatisfactory Performance.**

1. Employees who receive an overall performance rating of Unsatisfactory Performer are not eligible for any salary increase (see "Compensation Policy") and must have their performance reevaluated three (3) months after their unsatisfactory evaluation. Failure to improve performance to a satisfactory level typically results in termination. (See (5), below.) [sic]
2. Within ten (10) business days of the unsatisfactory evaluation, the supervisor must develop a performance improvement plan and meet with the employee.
  - a. The Performance Planning and Evaluation Form should be used for this purpose.
  - b. The plan should include performance objectives that can reasonably be met within the 3 month period and also may include appropriate opportunities for employee development.
  - c. The employee shall receive a copy the [sic] performance improvement plan.
3. The employee should be re-evaluated approximately 2 weeks before the end of the 3 month period.

- a. Re-evaluations are considered official forms and are retained along with the original performance evaluation in the employee's personnel file.
  - b. The employee shall receive a copy of the re-evaluation form.
4. If the employee receives a rating of fair performer or higher,
- a. the employee will continue in his or her position and
  - b. the supervisor will prepare a Performance Plan for the new performance year.
5. Employees who do not meet the objectives of the performance improvement plan and a [sic] rated as an Unsatisfactory Performer typical will be terminated at the end of the 3-month re-evaluation period. In unusual cases, the College may exercise its discretion to demote or transfer an employee to another position rather than terminate.

**NOTE:** The re-evaluation process does not prevent the supervisor from taking disciplinary action based on the employee's poor performance or unsatisfactory behavior as outlined in the disciplinary process. See State Policy 1.60.

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- E. Consideration of Leave in Performance Decisions: the fact that an employee has taken any of the following types of leave cannot have a negative impact on the employee's overall performance rating, or any salary increase: Workers' Compensation, military, Family and Medical Leave, or Short- term Disability and Long term Disability Working status under the Virginia Sickness and Disability Program (VSDP).

(A Exh. 9A, pp. 7-9).

## **F. DHRM POLICY REGARDING PERFORMANCE PLANNING AND EVALUATIONS**

46. Policy Number 1.40 of the Department of Human Resource Management addresses performance planning and evaluations. Regarding re-evaluations this policy provides the following:

### **REEVALUATION**

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

## Re-evaluation Plan:

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.

- (i) Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- (ii) The supervisor should develop an entire performance plan, including, "Employee Development."
- (iii) 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 reevaluation purposes. The form should clearly indicate that it is a reevaluation.
- (iv) the supervisor must discuss with the employees specific recommendations for meeting the minimum performance measures contained in the reevaluation plan during the reevaluation period.
- (v) The employee's reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- (vi) If the employee transfers to another position during the re-evaluation period, The reevaluation process will be terminated.

Note: regardless of the employees move to another position during this reevaluation period, the employee will not be eligible for a performance increase.

## Three month reevaluation:

The employee must be reevaluated within approximately 2 weeks prior to the end of the three-month period. If an employee is absent for more than 14 consecutive days during the three (3) month reevaluation. The period

will be extended by the total number of days of absence including the first 14 days.

If performance does not improve:

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-month reevaluation.

Demote, or reassign:

An employee whose performance during the reevaluation period is documented as not improving, may be demoted within the three (3) month period to a position in a lower pay band or reassigned to another position in the same pay band that has lower-level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period.

When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the re-evaluation period, the action is considered a Performance Demotion and the agency must reduce the employee salary at least 5%. (See Policy 3.05).

Reduce Duties:

As an alternative, the agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation to remain in his or her position and reduce the employee's duties. Such a reduction should occur following and based on the reevaluation and must be accompanied by a concurrent salary reduction of at least 5%. (See policy 3.05, Compensation).

Terminate:

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

Disciplinary action:

The re-evaluation process does not prevent the agency from taking disciplinary action based on the employee's poor performance or other reasons stipulated in Policy 1.60 Standards of Conduct, or issuing

additional Improvement Needed/Substandard Performance Forms.

(A Exh. 9B, pp. 12-13).

## **DETERMINATIONS AND OPINION**

### **I. Analysis of Issue before the Hearing Officer**

#### **A. Was the termination warranted or appropriate under the circumstances?**

An employee who fails to meet the objectives of the performance improvement plan and is rated as an unsatisfactory performer typically will be terminated at the end of the 3-month re-evaluation period. The performance improvement plan must be reasonable. *See* Performance Planning and Evaluation Policy for Operational Employees, Section VIII (C)(2) and (5).

The Agency has failed for several reasons to meet its burden and show by a preponderance of the evidence that termination of Grievant was warranted under the 3-month performance (“plan”).

#### **1. Can the Agency show Grievant’s Performance was Unsatisfactory?**

##### **a. 1099 Assignment and Other Projects**

First, the Hearing Officer turns to the 1099 assignment noted on the 3-month performance plan. She finds the 1099 assignment was an unreasonable tasks for Grievant to perform during the 3-month performance plan period; the supervisor showed inconsistent expectations; and Grievant was penalized for her leave/short term disability.

In general, the Hearing Officer notes that the Agency’s interpretation of its policy holds Grievant accountable for the 3-month plan even before it existed. Particularly, according to the Agency's interpretation of its policy known as the Performance Planning and Evaluation Policy for Operational Employees (“Policy”), the 3-month performance plan became effective November 4, 2011, the date Grievant received her annual unsatisfactory performance evaluation. This is so, according to the Agency even though the 3-month plan did not exists as of November 4, 2011. Further by the supervisor’s own admission, it was created by her after November 4, 2011, and was not provided to Grievant until November 18, 2011. This date is two weeks after her 3-month period commenced under the supervisor’s interpretation of the policy. The Agency justifies setting the running of the 3-month clock before the inception and issuance of the 3-month plan because the Agency reasons, in part, that Grievant received an unsatisfactory annual performance evaluation and knew she should be working on something to improve her performance. This explanation fails to satisfy the precepts of fundamental fairness and notice to Grievant of specifically what she needs to do to improve her performance.

That said, the Hearing Officer finds, regarding the 1099 assignment, inconsistent expectations communicated to Grievant by the performance plan and Grievant's supervisor. The testimony of Grievant's supervisor at the hearing demonstrated that the supervisor assigned great weight to Grievant's completing the 1099 assignment and expected Grievant to complete the 1099 testing by December 15, 2011; that is, only 27 days after Grievant received the plan (41 days after Grievant received her annual evaluation). This expectation was also reflected in an e-mail Grievant's supervisor sent to Grievant on January 11, 2011, while Grievant was on sick leave.<sup>5</sup>

The Hearing Officer notes that a review of the 3-month plan regarding the 1099 assignment reflects that the goals, timetables, and percentage of time assigned to this task or weight it carried regarding Grievant's performance are not consistent with the supervisor's expectations expressed in her January 11, 2012 email and testimony. Specifically, a careful reading of the goal/timetable does not reflect that Grievant was required to complete testing by December 15, 2011. This is so because a specific "complete testing by December 15, 2011" directive does not appear in the assignment.

What is more, the 3-month performance plan assigned a percentage to each area of competency to which Grievant was supposed to be evaluated. The percentages totaled 100%. The plan assigned a percentage of 5% to the 1099 assignment. This slight percentage assigning is contrary to evidence/argument presented at the hearing that Grievant's succeeding in this competency area was of surmountable importance to Grievant receiving more than an unsatisfactory performance rating at or near the conclusion of the 3-month re-evaluation period. Moreover, the Hearing Officer notes that the evidence reflects that during the 3-month period, Grievant requested her supervisor provide 1099 training for staff Grievant supervised, presumably to assist not just the staff but Grievant also in her 1099 task. Further, the evidence shows that 1099 training for the AP department had been scheduled on or about April 2011, but it did not take place because Grievant's supervisor failed to appear. The Hearing Officer finds that this evidence - not providing/responding to the request for 1099 training - also contradicts the supervisor's claim that she gave elevated importance to the 1099 assignment in the 3-month performance plan and communicated such to Grievant.

Considering the above, the Hearing Officer finds that the performance plan with respect to the 1099 assignment was unreasonable. This is so as discussed above because the supervisor failed to communicate in the plan her expectations regarding the 1099 assignment. Moreover, Grievant/Grievant staff was not provided needed training to assist Grievant in completing the 1099 assignment. The Hearing Officer also notes that the unreasonableness of the assignment is corroborated by the fact that during the 2010-2011 annual evaluation period (November 2010 to October 2011), the supervisor had assigned Grievant the 1099 task. The evidence shows that the supervisor during that time expected Grievant to conduct the 1099s testing (only one phase of the 1099 assignment) over an eight month period or provided Grievant this time period to work on the testing. The first benchmark for testing was April 2011; the second August 2011; and the

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<sup>5</sup> The evidence shows Grievant was out on sick leave/short term disability from January 9, 2012 to March 25, 2012.

third October 2011. This evidence suggests that just the 1099s testing phase of the assignment needed significantly more time than allotted during the 3-month re-evaluation period. Yet, during the re-evaluation period, Grievant's supervisor represented that she expected Grievant to finish the testing and production of the 1099s in less than 90 days.

Also, the Hearing Officer notes that Grievant was out on sick leave from January 9 through 11, 2012 and short term disability leave from January 12, 2012, to March 25, 2012. The Agency policy specifically provides that the fact that an employee has taken short term disability leave cannot have a negative impact on the employee's overall performance. *See* Performance Planning and Evaluation Policy for Operational Employees, Section VIII (E).

The Hearing Officer finds the Agency, contrary to its own policy and disability policy, penalized Grievant due to her leave, to include short term disability leave. This is so because the 3-month performance plan indicates that during the month of January 2012 Grievant was to run the 1099 process, review it for accuracy, place documentation on the J drive, and inform her supervisor of the progress on a weekly basis. Due to Grievant's short-term disability during the majority of January 2012, she was unable to perform these tasks. Yet knowing this, Grievant's supervisor evaluated Grievant about three weeks before Grievant's 3-month period would have ended had she not been on leave. What is equally disturbing is the evaluation took place even before the 1099 assignment was due.<sup>6</sup>

For the reasons noted above, the Hearing Officer finds the unsatisfactory performance rating regarding the 1099 assignment was not appropriate. Further, the Hearing Officer finds that because the Agency based Grievant's overall unsatisfactory rating in part on Grievant's rating regarding the 1099 assignment, the overall rating is also not warranted.

The Hearing Officer is also mindful that the Agency offered evidence regarding the Reves Center Assignment and CAPPS project to support its position that Grievant failed to complete major assignments. The Hearing Officer is not persuaded.

Regarding the Reves Center project, the evidence shows that (i) Grievant had never been required to complete such an assignment in the past; (ii) Grievant was assigned the tasks when she was out of the office and received less than 48 hours to complete the assignment; and (iii) Grievant timely completed the project.

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<sup>6</sup> The Hearing Officer is cognizant of Agency's claim that Grievant was required to be evaluated approximately two weeks before the end of the 90 day period under section VIII(C)(3) of its policy. However, the Hearing Officer finds the Agency's interpretation of its policy a fallacy. An equal provision of the policy provides that the employee's re-evaluation must occur after the 3-month period. *See* Performance Planning and Evaluation Policy for Operational Employees, Section VIII (C)(1). Grievant had not been put on notice that the policy provision decreasing the amount of time she had to improve her performance was the applicable provision. Thus, the Hearing Officer finds Section (C) (1) is applicable. Accordingly, had Grievant not been on short term disability, the Agency's policy required her to be re-evaluated after February 4, 2012, and not before.

Concerning the CAPP project the Hearing Officer finds Grievant provided the changes to CAPP to the supervisor and the college community in a timely manner. Thus, the Hearing Officer finds the evidence was insufficient to show Grievant failed to complete this assignment.<sup>7</sup>

#### **b. Travel Reimbursement Log**

Next, the Agency contends Grievant failed the performance plan in part because she did not maintain a travel reimbursement log. The evidence shows that Grievant did prepare a travel reimbursement log from November 28, 2011, through January 5, 2012.<sup>8</sup> Further, this log was in the possession of the Agency. However the log did not come to the supervisor's attention until after Grievant was terminated and Grievant requested this document, along with others, to assist her in preparing her case for the grievance hearing. After becoming aware of and reviewing the travel log subsequent to Grievant's termination, the supervisor provided another reason for Grievant's not meeting expectations regarding the travel log assignment.<sup>9</sup> Specifically the supervisor testified that the travel reimbursement log failed to meet the expectations under the performance plan because the log did not provide the supervisor with the number of travel reimbursement vouchers at an Accounts Payable Technician's desk on any given day and the number of vouchers that had been processed by an Accounts Payable Technician on any given day.

Contrary to the supervisor's testimony, Grievant testified that she had routinely provided the travel reimbursement log(s) to her supervisor as an attachment to e-mails. Further, she testified that the e-mails provided the detailed information requested by Grievant's supervisor such as the receipt and processing of vouchers by the Accounts Payable technicians and the Accounts Payable department.

Considering the above, the Hearing Officer concludes that Grievant did attach emails to the travel log provided to the Agency/supervisor. This inference is made because the evidence establishes that Grievant's supervisor instructed Grievant to prepare a travel reimbursement log, Grievant prepared one as is evident by the Agency's production of it. The Hearing Officer does note that the emails forwarded by Grievant with the attached log were not provided as evidence by either party.<sup>10</sup> Grievant represented she was unable to provide them because the Agency disabled her access to the Agency's emails. As noted previously, the Hearing Officer concludes that emails accompanied the travel log prepared by Grievant. Accordingly, the Hearing Officer does not accept the Agency's claim that Grievant failed to provide the detailed information

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<sup>7</sup> The Hearing Officer also notes that the supervisor did not specifically identify either the Reves Center or CAPP project on the performance plan. Further no specific means were provided on the performance plan for measuring success of such projects.

<sup>8</sup> As noted previously Grievant was on either sick leave or short term disability leave from January 9, 2012, to March 25, 2012. Thus, she was not able to continue maintaining the log.

<sup>9</sup> When the supervisor completed the re-evaluation, she noted that Grievant failed to maintain a travel log.

<sup>10</sup> The evidence shows Grievant was unable to obtain the emails due to her termination from the Agency.



requested regarding the travel log. The Hearing Officer also notes that the notation on the re-evaluation that Grievant failed to maintain a travel log is erroneous.

**c. Communication/Building Relationships**

Third, the Agency contends Grievant failed the performance plan in part because she did not foster positive relationships with the college community.

Evidence was presented by the parties to address this assertion. That evidence included the exchange of e-mails regarding invoices not being charged as requested and relocation reimbursement vouchers. The Hearing Officer notes the evidence involving invoices not being charged as requested involved one department of the Agency and the allegation that the charges were not processed as requested on an invoice occurred prior to and immediately after Grievant received her performance plan.

Further, the evidence regarding relocation reimbursement vouchers indicated on December 13, 2011, an email was forwarded to Grievant's supervisor pursuant to a conversation the supervisor had with the associate director of auxiliary services. This email provided a timeline of this employee's request for reimbursement for relocating and indicates from the time AP received the invoice, it was processed in about six weeks. Evidence also shows that Grievant met with a dean of the Agency to assist in processing the dean's relocation reimbursement voucher. Grievant's supervisor noted that Grievant did a good job handling the dean's matter as no complaint was lodged against AP.

The Hearing Officer notes that all of the examples provided by the Agency to support its contention that Grievant had failed to improve in the area of building relationships with the college community were for a one month period immediately following Grievant receiving the performance plan. The Hearing Officer finds this evidence does not suffice for the Agency to meet its burden and show Grievant failed this area of competency during the 3-month performance plan period. Further, the Hearing Officer finds Grievant was prejudiced by the Agency not giving her additional time to complete the performance plan once she returned to work on March 26, 2012, in light of her short term disability leave.<sup>11</sup>

In addition, the Agency contends Grievant failed the "Leadership Skills/People Development Competency" under the performance plan. As an example of this, the Agency presented an exchange of e-mails sent from November 18, 2011 to November 30, 2011. The Hearing Officer has reviewed these e-mails and note that they occurred either the same day Grievant received her performance plan or within 12 days of Grievant receiving it. Further, the exchange was regarding Senior management's change in the policy for the AP staff to answer all telephone calls. Grievant's supervisor contends that the emails from Grievant's subordinates that the supervisor was copied on reflected that Grievant's communication to her subordinates about the new policy regarding answering telephones divided the AP staff/technicians and Senior management. The supervisor relies on emails she received from three of Grievant's

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<sup>11</sup> The Hearing Officer is cognizant of the assertion that delayed processing of the relocation reimbursement vouchers has tax implications for the employee.

subordinates. One of the emails was provided as evidence by the Agency and Grievant. The other two were not. Having reviewed the exchange of emails and considered the testimony of the witnesses the Hearing Officer finds insufficient evidence to support an unsatisfactory rating in this area. Moreover, the Hearing Office again notes that the examples provided are for the first 12 days after Grievant received the plan. What's more, although Grievant's supervisor contends she maintained daily notes regarding Grievant's performance she presented none to substantiate her claim that Grievant did not meet expectations or performed unsatisfactory in any competency area.

#### **d. Weekly Meetings/Reports**

The Agency contends that Grievant failed to meet even the simple requirements of the performance plan. For example Grievant's supervisor contends that Grievant failed to schedule weekly meetings and keep her supervisor informed of her work assignments. The evidence shows that Grievant scheduled several formal meetings, but not necessarily weekly meetings. A December 2, 2011 meeting was scheduled, but Grievant cancelled due to it conflicting with another meeting she had on campus. A January 6, 2012, meeting was scheduled, but Grievant's supervisor called in sick and the meeting was cancelled. The meeting was rescheduled for January 9, 2012, but Grievant was out sick. The evidence does establish that Grievant and her supervisor had informal meeting during the performance period. Further, the evidence shows that meetings were not scheduled when Grievant was on short term disability leave. Considering the totality of the circumstances, the Hearing Officer does not find Grievant's failure to schedule formal meetings on a weekly basis during the performance period renders her total performance during the re-evaluation period unsatisfactory. Further, the Hearing Officer notes that had the Agency had a matter of concern nothing precluded it from scheduling a meeting to discuss the issue(s) or receive updates from Grievant.

#### **1. Was the Performance Plan Reasonable and Fair?**

Under the Agency's policy regarding the 90 day performance plan, the performance plan must include performance objectives that can reasonably be met within the three-month period. *See* Performance Planning and Evaluation of Policy for Operational Employees § VIII (C) (2)(b).

For the reasons previously noted her, the Hearing Officer has already found that in the competency area "Other Assignment" the Agency's expectations of Grievant were unreasonable.

Moreover, a review of the "Job Knowledge and Professional Development" section of the performance plan reflects unreasonableness and fundamental unfairness for the reasons noted below:<sup>12</sup>

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<sup>12</sup> Also, the Hearing Officer notes that the examples provided by the supervisor on the re-evaluation are for a two to four week period immediately following Grievant's receipt of the performance plan. Grievant has been penalized as she was not permitted to continue working on her performance in the competency area upon return from her short term disability leave.

**1. Reason 1**

**Goal 1: increases proficiency in basic knowledge of policies and procedures, including providing and interpreting information for customers.**

This goal is defective because it is too vague and fails to identify with specificity which policies and procedures to which Grievant must become knowledgeable and proficient. Further, the plan does not identify the means for measuring Grievant's proficiency.

**2. Reason 2**

**Goal 3: the employee provides accurate, complete and clear information to departments.**

This goal is defective because in the manner it is written, it fails to provide sufficient notice to the Grievant of (i) what task she must perform and (ii) how her success is to be measured.

Also, a review of the "Leadership Skills/People Development" section of the performance plan reflects unreasonableness and fundamental unfairness for the reason noted below:<sup>13</sup>

**1. Reason 1**

**Goal 2: accept responsibility for conduct, work, and actions.**

This goal is unreasonable and too broad. Further, as written, it is not capable of being measured.

Likewise, a review of the "Problem Solving and Decision" section of the performance plan reflects unreasonableness and fundamental unfairness for the reason noted below:<sup>14</sup>

**Reason 1**

**Goal 1: increases accuracy of guidance provided to the campus community.**

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<sup>13</sup> Also, the Hearing Officer notes that of the two examples provided by the supervisor on the re-evaluation one example predates Grievant receiving her performance plan. The other example occurred within 12 days of Grievant receiving her plan. Again, Grievant has been penalized as she was not permitted to continue working on her performance in the competency area upon return from her short term disability leave.

<sup>14</sup> Also, the Hearing Officer notes that the examples provided by the supervisor on the re-evaluation appear to be for a two to four week period immediately following Grievant's receipt of the performance plan. Grievant has been penalized as she was not permitted to continue working on her performance in the competency area upon return from her short term disability leave

This goal is not measurable as written. For example, the evidence showed that Grievant was penalized or received criticism from her supervisor regarding Grievant's work on the CAPP task. A review of the performance plan reflects that Grievant was provided no notice under the plan of how to meet this goal.

What is more, a review of the "Relationship Building and Communication" section of the performance plan reflects unreasonableness and fundamental unfairness for the reason noted below:

### **Reason 1**

#### **Goal 1: maintain open communication with other staff members.**

As written this goal is not measurable.

Accordingly, for all the reasons above, the Hearing officer finds the performance plan is fatally flawed as it is unreasonable and fundamentally unfair to Grievant. In addition the Hearing Officer finds the unreasonableness of the plan is further corroborated because Grievant was provided the plan 14 days after the 3-month period commenced. Further, she was on short term disability leave for 24 days during the 3-month period (over 25% of the 3-month performance period). Also, the Hearing Officer notes that while policy does not require the Agency consider holidays, the Agency was closed for 10 days during the Christmas holiday. This period fell during the 3-month performance period.

Moreover, the Hearing Officer notes that during the hearing, Grievant's supervisor stated that she rated Grievant's performance in each area based on daily notes she kept of Grievant's performance. The Agency did not introduce any such notes as evidence. Nor did it provide an explanation as to why the notes were not available to present as evidence at the hearing. Accordingly, the Hearing Officer does not find the supervisor's testimony that Grievance performance ratings were based on day to day supervisory documentation persuasive.

### **DECISION**

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not here. For the reasons stated above, the Hearing Officer find the Agency failed to meet its burden and show that the termination was warranted and appropriate. Accordingly, the Hearing Officer vacates the termination for these reasons:

1. The performance plan was not reasonable,
2. The performance plan was fundamentally unfair;
3. Substantively, the plan lacked measurable goals and as noted herein was too broad;
4. The plan reported erroneous information; and
5. Findings were unsubstantiated.

Moreover, the Hearing Officer vacates the termination because the Agency contrary to its own policy penalized Grievant for her short term disability leave by re-evaluating Grievant while she was on short term disability leave and not affording her the opportunity to continue working on her performance upon her return from the leave.

Accordingly, the Agency is ordered to reinstate the Grievant to her former position.

### **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 review 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 decisions 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. Request 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. This request must state the specific requirement of the grievance procedure that the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decisions so that it complied with the grievance procedure. 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.

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 final decisions, a party may appeal on the ground 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 Directory before filing a notice of appeal.

ENTERED Nunc Pro Tunc July 16, 2012

Date: July 17, 2012

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Ternon Galloway Lee, Hearing Officer

cc: Agency Attorney Advocate  
Grievant  
Director of Hearings

**DECISION OF HEARING OFFICER**  
**In the matter of**

**Case Number: 9831**

**Reconsideration/Reopening Decision Issued: August 14, 2012**

**RECONSIDERATION/REOPENING DECISION**

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**I. Procedural History**

This grievance was heard on June 14, 2012. On July 16, 2012, the Hearing Officer issued her decision which vacated the Agency's termination of Grievant and ordered the Agency to reinstate Grievant to her former position.

Grievant timely submitted a request for reconsideration/reopening to the Hearing Officer on July 20, 2012. The Agency timely submitted its own on July 30, 2012. Grievance Procedural Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. "[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request." For prudence, the Hearing Officer has consolidated the requests and considers them below.

**II. Determination**

**A. In support of its request, the Agency makes several allegations.**

**1. Policy Regarding When the Reevaluation Must Take Place**

First, the Agency argues that its policy – Performance Planning and Evaluation Policy for Operational Employees ("Policy") - requires Grievant to be reevaluated approximately two (2) weeks before the end of the three-month ("3-month") performance plan period. It also asserts that the Hearing Officer erred and substituted her reading of the policy for the plain wording of the policy. The Agency references section VIII C3 of this policy to support its assertions.

The Hearing Office notes that the plain reading of the Agency's policy also provides that employees who receive an overall unsatisfactory performance rating must have their performance reevaluated (3) months **after** their unsatisfactory evaluation. *See* Policy at Section VIII C1. (A Exh. 9A, p. 7). The Agency has provided no explanation regarding why section VIII C3 of its policy is superior to its counterpart section VIII C1. Moreover, as noted in the July 16, 2012 decision, at page 28, footnote 6, the evidence does not illustrate that Grievant was provided notice by the Agency that her reevaluation would take place at a time contrary to and prior to that called for in the plain wording of the policy in section VIII C1. The Agency therefore cannot substantiate its claim.

Accordingly, the Hearing Officer's finding that the Agency's policy required it to

reevaluate Grievant after the performance period is supported by the evidence.<sup>15</sup> This determination was entirely within the Hearing Officer's authority. Hence, the Agency has provided no basis to reopen or reconsider the decision on the above-mentioned basis.

## 2. The 1099 Assignment (Testing and Production of 1099s)

Second, the Agency asserts that the Hearing Officer misunderstood the evidence presented at the hearing regarding the testing and production of 1099s.

As noted in the decision, the Agency's own policy requires that the 3-month performance plan ("plan") be reasonable. *See* Section VIII C 2 b (stating in pertinent part that "[t]he **Plan should include performance objectives that can reasonably be met within the 3 month period** and also may include appropriate opportunities for employee development.") (emphasis added).

The Hearing Officer does not doubt the importance of the Agency producing and issuing 1099s to its vendors by January 31, 2012, for tax purposes. But the significance of this task does not equate to the project being a reasonable one to place on Grievant's 3-month performance plan. Considering the evidence of record, the Hearing Officer has found the 1099 assignment was unreasonable. As noted in the decision, the evidence shows that before February 2011, Grievant had not been required to perform the 1099 task. It consisted of two phases – first, testing the 1099s and second, producing them. Further, the evidence showed that from the time Grievant was given the assignment in February 2011, to October 2011 (8 months), she was unable to satisfactorily complete even the first phase of the assignment. Also, during this period, it is important to note that the evidence showed that Grievant received no training in the assignment. The uncontradicted testimony was training had been scheduled for April 2011, but Grievant's supervisor failed to appear for it. Thus, the training was cancelled. Then the evidence shows that Grievant requested training early December 2011, but there was no response from her supervisor. The Hearing Officer found that the totality of this evidence supported a finding that it was unreasonable to expect Grievant to complete both testing and production of the 1099s during the time allotted during the 3 month performance period.

The Hearing Officer's determination is based on the above-mentioned evidence of record and will not disturb it.

Regarding the 1099 assignment, the Agency also disagrees with the Hearing Officer finding that the supervisor failed to adequately communicate her expectations to Grievant. As noted in the decision, Grievant's supervisor asserted that Grievant was required to complete the 1099 testing by December 15, 2011. This expectation was also reflected in an e-mail Grievant's supervisor sent to Grievant on January 11, 2012.<sup>16</sup> Further, the supervisor represented that completion of the 1099 assignment was paramount to Grievant satisfactorily completing the 3-

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<sup>15</sup> The evidence shows specifically that the 3 month performance period ended on February 4, 2012. Thus, Grievant should have been reevaluated after that date.

<sup>16</sup> Of note, Grievant was on sick leave due/short term disability from January 9, 2012, to March 25, 2012.



month performance evaluation. While the 3-month performance plan did indicate that the entire 1099 assignment was to be completed by January 31, 2012, the plan did not require Grievant to complete testing by December 15, 2011. Further, the Hearing Officer finds that it is reasonable to infer that if the supervisor deemed completion of the 1099 assignment paramount to Grievant receiving a satisfactory rating on her 3-month performance evaluation, the supervisor would have provided Grievant training on the tasks. As noted previously, no training was provided. What's more, the plain wording or documentation on the performance plan assigns only a 5% weight to the task. Hence, the Hearing Officer finds that the evidence of record supports her determinations that in addition to the 1099 assignment being unreasonable, the supervisor presented inconsistent expectations of Grievant with regard to the assignment.

Moreover, the Hearing Officer notes she is not swayed by the Agency's argument that when the 1099 task was reassigned, it was completed by the individual or group to which it was reassigned by January 31, 2012. The circumstances surrounding the completion of the tasks once it was reassigned were not provided by the Agency. For example:

Did those working on the assignment labor on it solely, or

Had the assignment been performed by the reassigned group/individual before?

Further, regardless of the responses to these questions, the fact remains that Grievant had never performed the task/successfully performed the task before. She had not received training regarding it. Before being placed on the plan, Grievant had been provided 8 months to work on just one phase of the assignment. Yet, during the 3-month performance period, Grievant was given less than 3 months to complete the entire 1099 task.

What is more, the evidence shows that the completed 1099 assignment was due on January 31, 2012. And the evidence reflects that it was impossible for Grievant to complete it as she was on sick leave and short term disability from January 9, 2012, to March 26, 2012.

As shown in the above discussions, the Hearing Officer's findings and determinations regarding the 1099 assignment are all supported by the record evidence and she will not disturb them.

### **3. The Travel Log**

Third, the Agency contends the Hearing Officer misunderstood the facts regarding the travel reimbursement log ("log"). The Agency relies on the testimony of Grievant's supervisor to support this claim. In effect, the Agency disagrees with the Hearing Officer's findings of fact regarding the log. In her decision, the Hearing Officer found Grievant had maintained the log as required by the plan; however, the supervisor erroneously reported on the reevaluation that Grievant had not.

The Hearing Officer is cognizant of the supervisor's testimony asserting that either Grievant did not maintain a log or any log maintained by Grievant failed to meet the requirements of the 3-month performance plan. Specifically, the supervisor testified that the log should have provided her with the number of travel reimbursement vouchers at an Accounts

Payable (“AP”) technician’s desk on any given day and the number of vouchers that had been processed by an AP technician on any given day.

The Hearing Officer is also mindful of the testimony of Grievant. In her testimony, Grievant contended she maintained the log on the J drive, and it was provided to her supervisor. Further, Grievant testified that she attached emails to the log. Grievant represented that these emails provided the information the supervisor sought concerning each AP technician’s travel reimbursement vouchers.

In addition, the Hearing Officer also has considered other evidence. Of particular note is certain language of the 3-month performance plan that was drafted by Grievant’s supervisor. That language required Grievant to maintain a travel reimbursement log which provided the following information:

1. The number of travel reimbursements received daily in the office;
2. The number of travel reimbursements completed; and
3. The number of reimbursements outstanding.

*See* A Exh. 2, p.4.

A review of the log presented as evidence by the Grievant indicates the above-referenced information was provided by Grievant on the log she maintained for the period November 28, 2011, to January 6, 2012.<sup>17</sup> Further, as mentioned above, Grievant testified that she attached emails to the log which provided her supervisor with the additional information the supervisor desired about each AP technician’s vouchers.

The Hearing Officer notes that she had an opportunity to observe the witnesses and their demeanor. After doing so and considering the evidence mentioned, the Hearing Officer finds her determination that Grievant maintained a travel reimbursement log is supported by the evidence of record. Thus, the Hearing Officer finds no reason to reconsider or reopen her findings regarding this matter.

#### **4. Challenging the 3-month performance plan/additional claim**

The Hearing Officer finds no merit to the Agency’s claim that Grievant did not grieve the contents of the plan or that Grievant is time barred from doing so. Grievant challenged her termination based on the 3-month/90-day performance plan. *See* HO Exh. 22, pp. 6,8 (Form A and attachment). The Grievant’s contention that the plan was defective was therefore included in that challenge.<sup>18</sup> Moreover, Grievant’s argument that the 3-month plan is defective does not constitute her adding another claim after filing her grievance. Thus, the Hearing Officer finds it

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<sup>17</sup> *See* G Exh. 11 for Grievant’s travel log. Also, the Hearing notes that January 6, 2012, was Grievant’s last day of work until March 26, 2012, as she was on sick leave and/or short term disability from January 9, 2012, to March 25, 2012.

<sup>18</sup> The Hearing Officer reached this same conclusion in her order issued May 21, 2012, at pp. 2-3. *See* HO Exh. 12.

was proper to consider the substance of the plan. In doing so the Hearing Officer determined that based on the evidence of record the plan was fatally flawed because it was unreasonable, fundamentally unfair, and/or lacked measurable goals.<sup>19</sup>

The Hearing Officer finds no reason to reconsider/reopen her finding with respect to the substance of the plan.

**B. Grievant's assertion that back pay and benefits are due; Agency's request for modified reinstatement language.**

In the July 16, 2012 decision, the Hearing Officer found the Agency could not sustain its burden and reversed the Agency's termination. She then ordered the Agency to reinstate Grievant to her former position. The Hearing Officer affirms her finding that the Agency cannot show the termination was appropriate. The Agency now asks the Hearing Officer to relax her reinstatement order and permit returning Grievant to a similar position. Regarding back pay and benefits Grievant contends she should receive this relief also.

After careful review and deliberation of the above requests, the Hearing Officer finds the relief requested by the Agency regarding modifying the reinstatement language is appropriate. The Hearing Officer will therefore amend the reinstatement order by instructing the Agency to return Grievant to her former position or if the position is filled, to an equivalent position. *See* Va. Code § 2.2-3005.1(A). The Hearing Officer also finds that appropriate relief in this case also includes back pay and restoration of appropriate benefits. *See* GPM § 5.9(a) 3,4.

**III. Decision**

Accordingly, having considered the arguments made by the parties in their requests for reconsideration/reopening, the Hearing Officer finds the evidence of record shows the following:

1. the Agency's policy dictates that Grievant should have been reevaluated after the 3-month performance plan period ended pursuant to Policy § VIII C1 and not before;
2. the 1099 assignment set forth in the performance plan was unreasonable. Moreover the plan coupled with Grievant's supervisor's actions/inactions displayed inconsistent expectations of Grievant with

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<sup>19</sup> The defectiveness of the plan as discussed above is one reason to reverse the Agency's action. Also, the Hearing Officer finds that it is important to note that she has found that the Agency's actions violated its own policy as the Agency penalized Grievant due to her short term disability. This is so because Grievant was on short term disability for 24 consecutive days during the 3-month performance period. But the Agency did not permit Grievant to continue working on the objectives under the plan upon Grievant's return to work on March 26, 2012. Instead, Grievant was reevaluated while on disability leave and immediately terminated upon her return to work. The Agency's failure to follow its own policy was also sufficient reason by itself to reverse Grievant's termination. *See* Policy § VIII E. (A Exh. 9A, p. 9).

respect to the 1099 assignment;

3. Grievant maintained a travel reimbursement log and the supervisor erroneously concluded when Grievant was reevaluated that Grievant failed to maintain one;

4. Grievant timely raised the issue of whether the plan was defective;

5. the Plan was fatally flawed as it was unreasonable (a violation of Agency policy under Policy § VIII C2b) and fundamentally unfair;

6. Grievant's termination was not appropriate and reinstatement as indicated in the order below is required;

7. Grievant is entitled to back pay minus any interim earnings;

8. Grievant is entitled to all appropriate back benefits.

Moreover, the Hearing Officer affirms her ruling of July 16, 2012, that the Agency failed to meet its burden. Hence, the Agency is ordered to reinstate Grievant to her former position or, if occupied, to an equivalent position. In addition, the Agency is ordered to pay Grievant full back pay, minus any interim earnings, and to appropriately restore benefits and seniority.

### **APPEAL RIGHTS**

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 request for reconsideration 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 the final decision, a party may appeal on the ground 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 EDR before filing a notice of appeal.

ENTERED this 14<sup>th</sup> day of August, 2012

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Ternon Galloway Lee, Hearing Officer

POLICY RULING OF THE DEPARTMENT OF  
HUMAN RESOURCE MANAGEMENT

In the Matter of  
The College of William and Mary

October 11, 2012

The College of William and Mary has requested an administrative review of the hearing officer's decision in Case No. 9831. For the reasons stated below, the Department of Human Resource Management (DHRM) will not interfere with the application of this decision. The agency head of DHRM, Ms. Sara R. Wilson, has directed that I conduct this administrative review.

The Hearing Officer entered the summary of this case as follows:

The Agency had found Grievant failed to complete her 3-month performance plan. It therefore terminated Grievant. The Hearing Officer has found the 3-month performance plan was unreasonable and fundamentally unfair to Grievant; the Agency could not meet its burden; and the Agency violated its own policy and penalized Grievant for being on short-term disability leave during a portion of the 3-month performance plan. The Hearing Officer therefore vacated the termination, ordered a re-evaluation period and subsequent re-evaluation.

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The Hearing Officer identified the issues of this case as follows:

Was the termination warranted and appropriate under the circumstances?  
Specifically,

- (i) Should the Agency have given Grievant additional time to complete the 90-day plan ("3-month plan") due to the time frame being interrupted by Grievant's short-term disability;
- (ii) Was the 90-day plan completed by Grievant;
- (iii) Was the 90-day plan defective in that it was not substantive and there were no means employed by the Agency to determine whether Grievant completed it;
- (iv) Did any meeting(s) take place to address Grievant's performance status during the 90 day period; and
- (v) Was the 90-day plan a pretext to management's predetermined

decision to terminate Grievant?

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The relevant facts of this case are as follows:

After reviewing all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. Until her termination on or about April 6, 2012, Grievant had been the manager of the Accounts Payable Department (“AP”) of the Agency. Grievant’s immediate supervisor, prior to her termination, was the Agency’s Assistant Director of Financial Operations (“Agency Witness”). Agency Witness had supervised Grievant for 3 years prior to her termination. (Testimony of Agency Witness).
2. On or about November 4, 2011, Grievant received her annual performance evaluation which rated Grievant’s performance as unsatisfactory for the period November 2010, to October 2011. (Testimony of Agency Witness; G Exh. 20 email dated November 9, 2011 referencing appealing “my Evaluation for October 2011”).
3. Under Agency policy with the title “Performance Planning and Evaluation Policy for Operational Employee,” when an employee receives an unsatisfactory job performance, the employee must be re-evaluated three (3) months after their unsatisfactory evaluation. The Performance Planning and Evaluation Policy (“agency policy/policy”) became effective on February 1, 2011. No versions of this policy preceded the February 1, 2011 one. (A Exh. 9A, p. 7).
4. Three months after Grievant received her November 4, 2011 unsatisfactory job performance was February 4, 2012. Barring no tolling of the 3-month period, Grievant’s re-evaluation should have been performed after February 4, 2012. (Referencing calendars for November 2011, through February 2012; Exh. 9A, p. 7; A Exh. 9A).
5. Grievant received a performance improvement plan on November 18, 2012, from her supervisor. It was to be utilized as the basis of Grievant’s re-evaluation. At the time Grievant received the plan, she met with her supervisor and the plan was reviewed. This meeting lasted 1.5 hours. (Testimony of Agency Witness).

**A. THREE MONTH PERFORMANCE IMPROVEMENT PLAN**

6. The performance improvement plan listed five (5) job responsibilities/competencies on which Grievant would be re-evaluated. (A Exh. 2). Each area of responsibility or competency was assigned a percentage which purportedly reflected the weight that would be given to the respective responsibility/competency. (A Exh. 9A, p. 4, §VI(B)). The 5 competencies listed in the performance plan and the weight assigned to each are below:

<u>Responsibility/Competency area</u>	<u>Percentage</u>
Job Knowledge and professional development	40%
Leadership skills/People development	20%
Problem-solving and decision-making	20%
Relationship building and communication skill	15%
Other assignments	5%

(A Exh. 2, pp. 1-5).

## **7. RESPONSIBILITY/COMPETENCY- “KNOWLEDGE AND PROFESSIONAL DEVELOPMENT”**

The performance evaluation reflects that under the competency category “Knowledge and Professional Development,” three goals were listed. Each of these goals along with their performance standards and timetables as reflected in the performance plan is listed below:

**Goal 1:** Increase proficiency in basic knowledge of policies and procedures, including providing and interpreting information for customers.

Performance Standard: Employee meets expectations when employee:

- (i) leads research and interpretation of policies and procedures, independent of direct supervisor;
- (ii) provides accurate, problem-solving information to customers;
- (iii) establishes additional departmental guidelines and prepares written documentation to address the department’s needs;
- (iv) produces written documentation establishing guidelines that is [sic] complete, clear, and correct before submitting to supervisor for review and approval; and
- (v) when unable to find answers to supervisor’s assignments through employee’s only initiative, proactively asks supervisor questions to help guide employee and save time.

Goals and Timetables: Employee must begin work on projects independently, without relying on extensive direct supervisory involvement. Employee must contribute to work not specifically assigned but within scope of normal job responsibilities, including policy interpretation and development to ensure clarity of rules and application of procedures by

AP staff and customers. Employee must create written guidelines aimed at the future dissemination of information, both within AP and throughout the campus community, which will improve departmental efficiency. Employee, when faced with minor changes in work situations, should not delay action until further supervisory direction is received. Employee must take independent action as appropriate and update her supervisor. Employee must demonstrate flexibility and adaptability to unique request from the campus community.

**Goal 2:** Assigned projects, deadlines and completeness of work.

Performance Standard: Employee meets expectations when employee:

- (i) meets project deadlines;
- (ii) produces quality work that is complete and thorough;
- (iii) understands the requirements of the assignment; and
- (iv) submits work that meets management's expectation of a management level employee.

Goals and Timetables: Employee must work on the project list assigned by supervisor. At the end of each week, employee must present a written outline to supervisor providing a status update on each project. Employee may have to adjust her schedule to ensure completion of all tasks by the established due dates.

**Goal 3:** Employee provides accurate, complete and clear information to the department.

Performance Standard: Employee meets expectations when employee:

- (i) recognizes that certain inquiries from departments require further examination and research before answers can be provided;
- (ii) exhibits initiative to research the root of the problem before denying payment to a department;
- (iii) changes approach by providing improved customer service;
- (iv) utilizes all resources available, including FOCUS network, to research potential solutions to issues;
- (v) seeks supervisor's guidance if unable to find the answer and unsure on how to proceed; and
- (vi) understands that problem-solving is a requirement of someone at employee's management level.



Goals and Timetables: Employee must exhibit initiative by researching the root of the problem to find solutions. After conducting research, and if unsure how to proceed, employee must discuss the problem with supervisor. This discussion must include the results of employee's research and together supervisor and employee will decide what guidance to offer the customer. Employee must document all exceptions made to departmental policy and the reasoning behind decisions.

**Goal 4:** Department training and professional development opportunities.

Performance Standard: Employee meets expectations when employee:

- (i) provide AP staff with organized training opportunities, enabling AP staff to utilize available resources;
- (ii) utilizes training opportunities to enhance employee's own knowledge;
- (iii) understands that the employee's own development is not solely the responsibility of the agency management; and
- (iv) understands that providing and taking advantage of training and professional development is a requirement of employee's position.

Goals and Timetables: Employee must identify AP technicians' knowledge gaps and work with each AP technician to ensure a full understanding of policies and procedures. Employee must document, in writing, training goals for the department. Employee must select training methods. Employee must schedule a time to meet with supervisor during the first month of this evaluation period to present a written training proposal that outlines training needs, identified training opportunities, and a timeline for the training of employee and AP technicians.

The weight assigned to this responsibility/competency was 40%.

(A Exh. 2, pp. 1-2).

## **8. RESPONSIBILITIES/COMPETENCY– LEADERSHIP SKILLS/PEOPLE DEVELOPMENT**

The performance evaluation reflects that under the second competency category “Leadership Skills/People Development,” two goals were listed. Each of these goals along with their performance standards and timetables is listed below:

**Goal 1:** Workload management and managerial oversight of Accounts Payable production.

Performance Standard: Employee meets expectations when employee:

(i) oversees a pre-audit of travel reimbursements that occurs within 5 days of receipt in AP;

(ii) oversees timely notification to departments of documentation issues with travel reimbursements during the pre-audit process;

(iii) monitors travel reimbursements weekly to ensure AP technicians are pre-auditing timely; and

(iv) monitors travel reimbursements weekly to ensure AP technicians are processing timely and within two weeks of receipt in AP.

Goals and Timetables: Employee must maintain a travel reimbursement log in the J drive. Employee must schedule a meeting with supervisor at the end of each week to review the travel reimbursement log. Employee must work with AP technicians and require overtime if needed to ensure work is completed within the allotted time.

**Goal 2:** Accept responsibility for conduct, work, and actions.

Performance Standard: Employee meets expectations when employee:

(i) accepts responsibility for work performed and does not shift the responsibility;

(ii) becomes accountable and does not shift responsibility to other departments, AP technicians, supervisor, or management when issues arise;

(iii) demonstrates a high level of supervisory effectiveness;

(iv) demonstrates uniformity of message between supervisor directions and information, and we provide AP technicians or others; and

(v) understands that accepting responsibility is a requirement of employee as a manager.

Goals and Timetables: Employee must communicate with AP technicians in a manner that supports management efforts. Employee must recognize the influence that employee yields within the AP unit, and must use this influence to build the confidence and consensus needed to accomplish management goals. Employee must schedule a meeting with supervisor at the end of each week to discuss any concerns employee may have about direction provided by management. This will provide employee the opportunity to voice concerns regarding management's directions. Unless a concern is voiced, management will understand that employee concurs with management's decisions and that employee is effectively implementing management's directions. Employee must accept responsibility for employee's actions, policy determinations, communications with

the AP unit, and communications with customers.

The weight assigned to this responsibility/competency was 20%.

(A Exh. 2, pp. 2-3).

## **9. RESPONSIBILITY/COMPETENCY - PROBLEM-SOLVING AND DECISION-MAKING**

The performance evaluation reflects that under the third competency category, “Problem-solving and Decision-making,” two goals were listed. Each of these goals along with their performance standards and timetables is listed below:

**Goal 1:** Increase the accuracy of guidance provided to the campus community.

Performance Standard: Employee meets expectations when employee:

- (i) provides quality customer service;
- (ii) contributes to work/projects not directly assigned but within the scope of normal job responsibilities instead of passing responsibility to other individuals or departments;
- (iii) takes independent action, as appropriate; and
- (iv) demonstrates flexibility/adaptability to individual or unique requests and provides accurate guidance to customers.

Goals and Timetables: When confronted with questions from customers that are outside the normal sphere of written policy, employee must perform a comprehensive analysis of the situation before responding to customer about whether the expenditure is appropriate and payable. Employee must utilize available resources to research issues before responding to the customer. Where employee is unsure how to proceed, employee must schedule a meeting with supervisor to discuss employee’s research and determine how to proceed. Whenever and each time any expenditure is disallowed, the employee must place a phone call to the customer to provide findings and explain the decision-ensuring that the customer fully understands the rationale behind the decision.

**Goal 2:** Decrease actions that preclude employee from finding positive ways to resolve issues and conflict.

Performance Standard: Employee meets expectations when employee:

- (i) does not react negatively or defensively;
- (ii) works collaboratively with others; and

(iii) respectfully and professionally addresses concerns with supervisory guidance.

Goals and Timetables: Employee must consider and understand the opinions of others before responding to communications. Employee must exercise a positive approach to differences of opinion, both within the department and with customers, minimizing negative and challenging responses.

The weight assigned to this responsibility/competency was 20%.

(A Exh. 2, p. 3).

## **10. RESPONSIBILITIES/COMPETENCY- RELATIONSHIPBUILDING AND COMMUNICATIONS**

The performance evaluation reflects that under the fourth competency category “Relationship Building and Communications,” two goals were listed. Each of these goals along with their performance standards and timetables is listed below:

**Goal 1:** Maintain open communication with other staff members.

Performance Standards: Employee meets expectations when employee:

- (i) is routinely polite;
- (ii) exercises a positive tone during conversations;
- (iii) takes pride in and responsibility for work;
- (iv) does not react negatively or defensively in response to professional constructive criticism; and
- (v) recognizes management’s right and responsibility to assign workload as management believes necessary to accomplish the mission of the University and department.

Goals and Timetables: Employee’s written and verbal communications must be positive and polite. Employee must cooperate with supervisor which will be demonstrated by employee’s (a) willingness to utilize supervisor as a resource during employee’s day-to-day activities, (b) respect for supervisor’s decisions, and (c) cooperative promotion of departmental goals. Employee must develop and maintain a positive, collaborative professional outlook.

**Goal 2:** Improve the quality of communications across campus and within the financial operations department.

Performance Standards: Employee meets expectations when employee:

- (i) answers the phone when a customer or coworker calls;
- (ii) uses a positive tone during conversations;
- (iii) treats customers and coworkers politely, respectfully, and works collaboratively;
- (iv) offers assistance to customers when issues arise; and
- (v) seeks and finds solutions to customers' and coworkers' problems.

Goals and Timetables: Employee managerial communications must inspire customer satisfaction and aid in relationship building. Employee's conduct must not give rise to justified consumer complaints.

The weight assigned to this responsibility/competency was 15%.

(A Exh. 2, p. 4).

## 11. RESPONSIBILITY/COMPETENCY- OTHER ASSIGNMENTS

The performance evaluation reflects that under the fifth competency category "Other Assignments," one goal was listed. This goal along with its performance standards and timetables is listed below:

**Goal 1:** IRS publications and tax reporting as it relates to accounts payable.

Performance standards: Employee meets expectations when employee:

- (i) prints, reviews and analyzes the reports necessary to produce accurate 1099-MISC reports;
- (ii) prints and mails all 1099-MISC forms by the published IRS deadline;
- (iii) submits IRS compliant file using IRS BIRB by the published IRS deadline;
- (iv) handles all 1099-MISC inquiries from vendors; and
- (v) understands 1099-MISC to be a core responsibility of this position.

Goals and Timetables: Within the first month, employee must work on testing 1099 processes to prepare for actual 1099 run and PROD. Employee must work with supervisor to review her understanding of the process and ask any pertinent questions.

Employee must run the actual 1099 process, review its accuracy, place documentation on the J drive, and inform supervisor of progress on a weekly basis during the month of January. Employee must communicate with supervisor and ask any questions during the actual 1099 run. Accuracy of 1099 information will be determined based on supervisory review. The deadline to complete this project and mail the 1099s is January 31.

The weight assigned to this responsibility/competency was 5%.

(A Exh. 2, p. 4).

## **B. CONCERNING MEETINGS, COMMUNICATIONS, EMAILS, ETC.**

### **1. Meetings**

12. Grievant was not on notice that she was required to schedule meetings for the weeks of November 7, 2011, and November 14, 2011, as she had not received the 3-month performance plan. Grievant scheduled meetings with her supervisor for the following dates:

December 1, 2011;  
December 2, 2011;  
January 6, 2012; and  
January 9, 2012  
(G Exh. 19).

13. The December 1, 2011 meeting concerned the Reves Center Project. The meeting was held during which time Grievant timely presented her supervisor with the completed Reves Center project. (G Exh. 19; Testimony of Grievant).

14. The December 2, 2011 meeting was cancelled by Grievant due to it conflicting with another work place meeting/activity. (Testimony of Agency Witness).

15. A meeting was also scheduled for December 8, 2012. The agenda for that meeting lists performance evaluation progress as one of the topics to be discussed at the meeting. (Testimonies of Agency Witness; HO Exh. 26, pp. 9 and 11).

16. The January 6, 2012 meeting was not held because Grievant's supervisor called in sick. (Testimony of Agency's Witness).

17. Grievant rescheduled the January 6, 2012 meeting for January 9, 2012; however, on January 9, 2012, Grievant was out on sick leave. Grievant remained on sick leave for January 10 and 11, 2012. Thereafter Grievant was on short-term disability leave until March 26, 2012. (Testimonies of Agency Witness and Grievant; G Exh. 2).

18. Informal meetings were held between Grievant and her supervisor during the 3-month performance plan period. (Testimony of Grievant).

## 2. Relocation reimbursement vouchers/Complaint; Emails

19. On or about December 13, 2011, Grievant's supervisor received a complaint about the lengthy time it took for a reimbursement relocation voucher to be processed by AP. The voucher had been received by AP on or about October 31, 2011, and processed on December 13, 2011. The complainer asserted that upon AP's initial finding of an error with his voucher, Grievant -as the AP manager- should have reviewed his entire voucher to prevent it from being returned to him several times for piecemeal corrections that prolonged processing the voucher. (G Exh. 9B; Testimony of Agency Witness).

20. No other complaints regarding moving relocation vouchers were made during the 3-month performance period. On or about December 14, 2011, Grievant met with a dean of the Agency regarding this dean's relocation reimbursement voucher. Grievant did a good job handling and processing this dean's voucher. (Testimonies of Agency Witness and Grievant).

21. Grievant and her supervisor exchanged a series of emails from December 2, 2011, to December 4, 2011, regarding the accusation that invoices from the Agency's athletic department were not being charged by AP as requested. Grievant's supervisor deemed Grievant's emails as nonresponsive to the supervisor's request. (Testimony of Agency Witness; A Exh. 4).

22. Grievant has invited Agency employees to visit the AP office so she can discuss the proper way to complete vouchers. (G Exh. 9A); Testimony of Grievant).

## 3. Reves Center, CAPP, and 1099

23. **Reves Center Assignment** - Grievant was out of the office on Monday, November 28, 2011. At 11:27 a.m. on that day, Grievant's supervisor forwarded Grievant an email acknowledging Grievant was not in the office on November 28, 2011, and instructing Grievant to complete an assignment known as the Reves Center project. The supervisor set Wednesday, November 30, 2011, as the due date for the project's completion. Grievant had no prior experience performing such a project. The project was not identified on Grievant's 3-month performance plan. (Testimony of Grievant; G Exh. 16; A Exh. 2).

24. Grievant timely completed the Reves Center project, set up a meeting with the supervisor regarding the project as instructed, and attended the scheduled meeting. (Testimony of Grievant; G Exh. 16, p. 2).

25. **CAPP Assignment** – On Monday, November 28, 2011, at 11:38 a.m., Grievant's supervisor assigned Grievant another task – the CAPP Assignment. The acronym CAPP represents Commonwealth Accounting Policy and Procedures. Usually changes to the CAPP are published in the fall, normally on or about October 1 of a calendar year. 2011 CAPP changes were published about the first week of November 2011. (Testimonies of

Agency Witness and Grievant; G Exh. 15, p.8).

The supervisor's November 28, 2011 email requested Grievant review the CAPP changes and advise the supervisor of the changes by noon on November 29, 2011. The supervisor received the changes from Grievant on or about November 30, 2011. Emails followed between Grievant and her supervisor from December 4, 2011, to December 6, 2011. On or about December 4, 2011, Grievant's supervisor instructed Grievant for the first time to (i) prepare a document for the college community which provides a comprehensive list of the 2011 CAPP changes and (ii) place the document on the Department of Financial Operations/AP's website and link the document to the Agency's digest.

The parties concede updating the campus community on CAPP changes fell within Grievant's job description; but, historically, Grievant's supervisor had performed this task and had never informed Grievant she expected Grievant to complete it. (G Exh. 15, p.6; Testimony of Grievant).

Prior to Grievant receiving the CAPP assignment from her supervisor, she and her staff had advised the various departments of the Agency of the 2011 CAPP changes upon their being published. (G Exh. 15, pp. 4-6).

26. **1099 Assignment** - The Department of Financial Operations which includes AP is responsible for issuing 1099s to vendors who have provided services to the Agency. The 1099 MISC and tax reporting form summarizes payments made to a vendor during a tax year. Every vendor receives the 1099 miscellaneous form. A lot of work is entailed in preparing the 1099. In February 2011 Grievant was assigned the task of becoming thoroughly familiar with the 1099 process by completing testing of the 1099 process and becoming capable of producing the 1099s by January 31, 2012, for vendors paid in calendar year 2011. (Testimony of Agency Witness).

27. Benchmarks were set for Grievant to become familiar with the testing and to complete testing of the 1099 process. Those benchmarks were April 2011, August 2011, and October 2011. Grievant's supervisor rated Grievant unsatisfactory in this area on her 2010-2011 performance evaluation. (Testimony of Agency Witness).

28. The 1099 assignment comprised the "Other Assignment" competency in Grievant's 3-month performance plan. According to this plan, during the first month of the 3-month performance plan Grievant was to "work on testing the 1099 processes to prepare for actual 1099s running in PROD." (A Exh. 2, p. 4). According to the performance plan, the entire 1099 project (testing, production of the 1099s, and mailing them) was to be completed by January 31, 2012. (A Exh. 2, p. 4). The performance plan also specified that during January 2012, Grievant was required to run the actual 1099s process, review its accuracy, place documentation on the J drive, and inform supervisor of progress on a weekly basis during the month of January. Grievant was also required to communicate with her supervisor and ask any questions during the actual 1099s run. (Agency Exh. 2, p. 4). The production phase of the 1099 project takes about a month.



(Testimony of Agency Witness).

29. By December 15, 2011, Grievant had worked on the 1099 project for several weeks. However, she had difficulty running the program and was in need of training to process the 1099s. (Testimony of Grievant; A Exh. 7C).

30. By email dated December 7, 2011, Grievant informed her supervisor that the accounts payable staff was in need of 1099 training. She then requested 1099 training. 1099 training had previously been scheduled for April 2011, but it did not take place because Grievant's supervisor failed to attend the scheduled training session. (Testimony of Grievant; G Exh. 10).

31. Grievant was on either sick leave or short term disability leave from January 9, 2012, to March 26, 2012. (Testimonies of Agency Witness and Grievant; G Exh. 2; A Exh. Calendar).

32. On January 11, 2012, Grievant's supervisor reassigned the 1099 assignment to another team within the Financial Operations' Department. (Testimony of Agency Witness; A Exh. 7A).

#### **4. Communications – Answering Telephones**

33. Grievant's supervisor instituted a new policy on November 18, 2012, regarding the AP department answering telephone calls. The policy was instituted to address concerns that many telephone calls from customers to the AP department were not being answered. The new policy required the AP department to answer all telephone calls. The supervisor informed Grievant of the new policy on November 18, 2011, and directed Grievant to inform her subordinates - AP technicians - of the new policy. The supervisor suggested to Grievant that when Grievant communicate the new policy to her subordinates that she inform them that some of the technicians were doing a good job answering the telephones. (Testimony of Agency Witness).

34. Prior to the supervisor instituting the above noted policy, she had informed the technicians by email that they were not required to answer all telephone calls. This directive was provided with situations in mind when technicians were involved in tasks that required their full concentration such as processing vouchers. The supervisor did not intend for AP staff to ignore all telephone calls or answer calls only one time during their shift. The supervisor perceived that the latter was occurring. Thus, she instituted the new policy on November 18, 2011, regarding the AP staff answering telephone calls. (Testimony of Agency Witness; A Exh. 3).

35. After receiving the instruction from her supervisor, on November 18, 2011, Grievant met with her subordinates and communicated the new policy regarding answering telephone calls. The subordinates had an opportunity to raise their concerns during the meeting. The supervisor was not in attendance at the meeting. Subsequent to the meeting on November 18, 2011, Grievant sent an email to her subordinates informing

them of the policy change. Grievant's email to the technicians stated the following:

Ladies,

[Supervisor] and I met today to discuss several concerns with AP department. As a result, two new rules have been established:

- 1) it is now mandated that the AP staff answers all phone calls, including calls from the front desk.
- 2) please submit, to my attention, a daily count of travel vouchers received in the mail.

If there are any questions/concerns, please feel free to advise.

Thanks,

[Grievant]  
Accounts Payable Manager

(A Exh. 3, pp. 3-4).

36. Grievant's supervisor was disappointed with the style and approach Grievant employed to communicate the new policy regarding AP staff answering telephone calls. About 10 days later, three of Grievant's subordinates emailed Grievant about concerns they had with the new policy. Grievant's supervisor was copied on the emails.

(A Exh. 3, p. 2).

### **C. GRIEVANT'S TERMINATION**

37. Grievant's last day of work before being terminated was January 6, 2012. Grievant was on sick leave from January 9, 2012, to January 11, 2012. Grievant was placed on short term disability leave from January 12, 2012, to March 26, 2012. (Testimonies of Grievant and Agency Witness; G Exhs. 2-3).

38. While Grievant was on short term disability leave, Grievant's supervisor re-evaluated Grievant on or about January 17, 2012, under the 3-month performance plan. (Testimony of Agency Witness). Management, including Grievant's supervisor, met on January 20, 2012 and decided to terminate Grievant. Management waited until Grievant returned to work from her short term disability leave on March 26, 2012, to execute the termination which became effective on or about April 6, 2012. (Testimony of Agency Witness; G Exh. 4; A Exh. 8).

39. Grievant's supervisor represented that she re-evaluated Grievant under the performance plan by referring to daily notes she kept on Grievant's performance to

determine progress. The Agency did not provide those notes as evidence at the hearing, nor did it offer a reason for not supplying them. (Testimony of Agency Witness).

Several months are needed to prepare and post a job opening. Grievant's supervisor posted a job opening for Grievant's job on March 28, 2012, two days after Grievant was notified of her termination. (Testimony of Grievant; G Exh. 5). (Testimony of Grievant; Testimony of Agency Witness).

#### **D. OTHER**

40. Grievant and Grievant's supervisor have a serious communication problem. Grievant considers her supervisor disrespectful of Grievant as AP manager. Grievant's manager deems Grievant disrespectful of her as a supervisor. (Testimonies of Grievant and Grievant's supervisor).

41. By e-mail dated February 16, 2012 Grievant supervisor expressed she desired to find a way to terminate grievant. (G Exh. Space 21, pp. 2-3).

42. Grievant maintained a travel log from November 28, 2011, to January 5, 2012. The travel was in the Agency's possession at all times. (Testimony of Grievant; G Exh. 11).

43. The Agency was closed from December 24 to January 2, 2012, for Christmas break. (Testimony of Agency Witness).

#### **E. AGENCY PERFORMANCE PLAN AND EVALUATION POLICY**

44. In accordance with the Restructured Higher Education, Financial and Administrative Operations Act, Chapter 4.10, Title 23 of the Code of Virginia and the Management Agreement effective July 1, 2006, the agency has adopted the Performance Planning and Evaluation Policy for Operational Employee. (A Exh. 9A).

45. Sections VIII(C), (E) of the Performance Planning and Evaluation Policy for Operational and Employees addresses performance evaluations. These sections of the policy provide in pertinent part the following:

##### **C. Unsatisfactory Performance.**

1. Employees who receive an overall performance rating of Unsatisfactory Performer are not eligible for any salary increase (see "Compensation Policy") and must have their performance reevaluated three (3) months after their unsatisfactory evaluation. Failure to improve performance to a satisfactory level typically results in termination. (See (5), below.) [sic]
2. Within ten (10) business days of the unsatisfactory evaluation, the supervisor must develop a performance improvement plan and meet with

the employee.

- a. The Performance Planning and Evaluation Form should be used for this purpose.
  - b. The plan should include performance objectives that can reasonably be met within the 3 month period and also may include appropriate opportunities for employee development.
  - c. The employee shall receive a copy the [sic] performance improvement plan.
3. The employee should be re-evaluated approximately 2 weeks before the end of the 3 month period.
- a. Re-evaluations are considered official forms and are retained along with the original performance evaluation in the employee's personnel file.
  - b. The employee shall receive a copy of the re-evaluation form.
4. If the employee receives a rating of fair performer or higher,
- a. the employee will continue in his or her position and
  - b. the supervisor will prepare a Performance Plan for the new performance year.
5. Employees who do not meet the objectives of the performance improvement plan and a [sic] rated as an Unsatisfactory Performer typically will be terminated at the end of the 3-month re-evaluation period. In unusual cases, the College may exercise its discretion to demote or transfer an employee to another position rather than terminate.

**NOTE:** The re-evaluation process does not prevent the supervisor from taking disciplinary action based on the employee's poor performance or unsatisfactory behavior as outlined in the disciplinary process. See State Policy 1.60.

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- E. Consideration of Leave in Performance Decisions: the fact that an employee has taken any of the following types of leave cannot have a negative impact on the employee's overall performance rating, or any salary increase: Workers' Compensation, military, Family and Medical Leave, or Short- term Disability and Long term Disability Working status under the Virginia Sickness and Disability

Program (VSDP).

(A Exh. 9A, pp. 7-9).

## **F. DHRM POLICY REGARDING PERFORMANCE PLANNING AND EVALUATIONS**

46. Policy Number 1.40 of the Department of Human Resource Management addresses performance planning and evaluations. Regarding re-evaluations this policy provides the following:

### **REEVALUATION**

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

#### **Re-evaluation Plan:**

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.

- (i) Even if the employee is in the process of appealing his or her evaluation, the performance plan must be developed.
- (ii) The supervisor should develop an entire performance plan, including, “Employee Development.”
- (iii) 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 reevaluation purposes. The form should clearly indicate that it is a reevaluation.
- (iv) the supervisor must discuss with the employees specific recommendations for meeting the minimum performance measures contained in the reevaluation plan during the reevaluation period.
- (v) The employee’s reviewer, and then the employee, should review and sign the performance re-evaluation plan.
- (vi) If the employee transfers to another position during the re-evaluation period, the reevaluation process will be terminated.

Note: regardless of the employees move to another position during

this reevaluation period, the employee will not be eligible for a performance increase.

Three-month reevaluation:

The employee must be reevaluated within approximately 2 weeks prior to the end of the three-month period. If an employee is absent for more than 14 consecutive days during the three (3) month reevaluation. The period will be extended by the total number of days of absence including the first 14 days.

If performance does not improve:

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-month reevaluation.

Demote, or reassign:

An employee whose performance during the reevaluation period is documented as not improving, may be demoted within the three (3) month period to a position in a lower pay band or reassigned to another position in the same pay band that has lower-level duties if the agency identifies another position that is more suitable for the employee's performance level. A demotion or reassignment to another position will end the re-evaluation period.

When an employee is moved to another position with lower duties due to unsatisfactory performance during, or at the end of the reevaluation period, the action is considered a Performance Demotion and the agency must reduce the employee's salary at least 5%. (See Policy 3.05).

Reduce Duties:

As an alternative, the agency may allow the employee who is unable to achieve satisfactory performance during the reevaluation to remain in his or her position and reduce the employee's duties. Such a reduction should occur following and based on the reevaluation and must be accompanied by a concurrent salary reduction of at least 5%. (See policy 3.05, Compensation).

Terminate:

If the agency determines that there are no alternatives to demote,

reassign, or reduce the employees' of [sic] duties, termination based on the unsatisfactory reevaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3) month reevaluation.

Disciplinary action:

The re-evaluation process does not prevent the agency from taking disciplinary action based on the employee's poor performance or other reasons stipulated in Policy 1.60 Standards of Conduct, or issuing additional Improvement Needed/Substandard Performance Forms.

(A Exh. 9B, pp. 12-13).

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Concerning the re-evaluation plan the Hearing Officer stated the following:

Accordingly, for all the reasons above, the Hearing officer finds the performance plan is fatally flawed as it is unreasonable and fundamentally unfair to Grievant. In addition the Hearing Officer finds the unreasonableness of the plan is further corroborated because Grievant was provided the plan 14 days after the 3-month period commenced. Further, she was on short term disability leave for 24 days during the 3- month period (over 25% of the 3-month performance period). In addition, the Hearing Officer notes that while policy does not require the Agency consider holidays, the Agency was closed for 10 days during the Christmas holiday. This period fell during the 3-month performance period.

Concerning the re-evaluation plan and the original performance plan, the Hearing Officer stated the following:

Moreover, the Hearing Officer notes that during the hearing, Grievant's supervisor stated that she rated Grievant's performance in each area based on daily notes she kept of Grievant's performance. The Agency did not introduce any such notes as evidence. Nor did it provide an explanation as to why the notes were not available to present as evidence at the hearing. Accordingly, the Hearing Officer does not find the supervisor's testimony that Grievance performance ratings were based on day to day supervisory documentation persuasive.

In her DECISION, the hearing Officer stated the following:

The Hearing Officer has considered all the evidence of record whether specifically mentioned or not here. For the reasons stated above, the Hearing Officer finds the Agency failed to meet its burden and show that the termination was warranted and appropriate. Accordingly, the Hearing Officer vacates the termination for these reasons:

1. The performance plan was not reasonable,
2. The performance plan was fundamentally unfair;
3. Substantively, the plan lacked measurable goals and as noted herein was too broad;
4. The plan reported erroneous information; and
5. Findings were unsubstantiated.

Moreover, the Hearing Officer vacates the termination because the Agency contrary to its own policy penalized Grievant for her short term disability leave by re-evaluating Grievant while she was on short term disability leave and not affording her the opportunity to continue working on her performance upon her return from the leave.

Accordingly, the Agency is ordered to reinstate the Grievant to her former position.

### **DISCUSSION**

Hearing officers are authorized to make findings of fact as to the material issues in the case and to determine the grievance based on the evidence. By statute, as related to policy, the DHRM has the authority to determine whether the hearing officer's decision is consistent with policy as promulgated by DHRM or the agency in which the grievance is filed. The challenge must cite a particular mandate or provision in policy. This Department's authority regarding policy issues, however, is limited to directing the hearing officer to revise the decision to conform to the specific provision or mandate in policy. This Department has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence unless that assessment results in a decision that is in violation of policy and procedure.

In its appeal to the DHRM, the Agency alleges the following:

- (1). The Decision was Inconsistent with State Policy Regarding Grievances: Scope of the Hearing;
- (2). The Decision was Inconsistent with State Policy Regarding Grievances: Form of Relief; and,
- (3). The Decision was Inconsistent with Agency Policy Concerning Performance

Concerning items 1 and 2 above, the challenged issues are related to State Policy regarding the authority and scope of the hearing officer in the grievance procedure and the relief granted under that procedure. We are aware that EDR has issued a ruling that adequately addresses those issues. Therefore, those issues warrant no further consideration. Thus, this ruling will address only item number 3.

Regarding item number 3, the College of William and Mary correctly presents that the 2005 General Assembly passed the Restructured Higher Education Financial and Administrative Operations Act which provides for certain of the Commonwealth's public institutions of higher



education the opportunity for greater financial and administrative autonomy. As a result, the College has adopted a Performance Management Plan, which, with some exceptions, in large part duplicates DHRM Policy Number 1.40.

The DHRM Policy 1.40 provides guidance to agencies in re-evaluating employees who fail their performance evaluations. However, the College of William and Mary's policy makes several omissions. Whereas DHRM Policy 1.40 states that if an employee is absent for more than 14 consecutive days during the 90-day re-evaluation period, the re-evaluation period is extended by an equivalent period of time. On that point, the College's policy is silent. However, §VIII. E., - Consideration of Leave in Performance Decisions-of the College's policy states, "The fact that an employee has taken any of the following types of leave cannot have a negative impact on the employee's overall performance rating or any salary increase: Worker's Compensation, military, Family and Medical Leave, or Short-term Disability and Long-term Disability-Working status under the Virginia Sickness and Disability Program (VSDP).

According to the evidence as set forth in the hearing decision, the grievant was absent on Short-term Disability for 24 days out of the 3-month re-evaluation period. In addition, the College was closed for two weeks during Christmas. Thus, the grievant did not have the full complement of time to meet the expectations as listed in the re-evaluation plan. Even though the College was not obligated under its policy to extend the re-evaluation period equal to the time lost of 14 days or greater, as a matter of fairness and equity it appears that should have been a consideration. Rather, documentation supports that the College had decided to terminate the grievant's employment while she was on Short-term disability.

Moreover, the hearing officer determined that the original evaluation was somewhat unfair, the expectations in the re-evaluation plan hardly were achievable, and the grievant was not given proper credit for those tasks she did complete. The hearing officer, based on the assessment of the evidence, directed that the grievant be re-instated and re-evaluated. Absent a finding of inconsistency with policy, the DHRM has no authority to rule on the merits of a case or to review the hearing officer's assessment of the evidence. Therefore, we will not interfere with the application of this decision.

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