

Issue: Group III Written Notice with Termination (unsatisfactory performance and unprofessional conduct); Hearing Date: 07/24/15; Decision Issued: 08/26/15; Agency: VCCS; AHO: Jane E. Schroeder, Esq.; Case No. 10625; Outcome: Full Relief; **Administrative Review**: EDR Ruling Request received 09/10/15; EDR Ruling No. 2016-4231 issued 10/15/15; Outcome: Remanded to AHO; Remand Decision issued 12/15/15; Outcome: Original decision affirmed; **Administrative Review**: DHRM Ruling Request received 09/10/15; DHRM Ruling issued 01/08/16; Outcome: AHO's decision affirmed; Fee Addendum issued 01/11/16 awarding \$9,306.20; Additional Addendum issued 03/21/16.

# COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management*

*Office of Employment Dispute Resolution*

## DECISION OF THE HEARING OFFICER

In the matter of Case # 10625

Case Heard: July 24, 2015

Decision Issued: August 26, 2015

### PROCEDURAL HISTORY

The Grievant was employed by the Agency as a senior budget analyst. On May 19, 2015, the Agency issued a Group III Written Notice to the Grievant for unsatisfactory performance and unprofessional conduct. The Grievant was terminated. The Grievant filed a Dismissal Grievance on May 21, 2015. The relief requested by the Grievant was: the withdrawal of the Group III Written Notice; reinstatement of employment under the same terms and conditions and pay grade; compensation of all back pay, leave time, loss of health and retirement/pension benefits, dating back to May 19, 2015; expunging of the Group III Written Notice associated with the termination; and attorney's fees and costs. The Grievant sought further relief, including compensatory damages, no further harassment and acts of retaliation, and expunging of previous Written Notices, all of which were beyond the scope of the hearing officer's powers of relief for this grievance.

The case was heard on July 24, 2015, beginning at 9:00 a.m., and concluding at 10:45 p.m. The Grievant appeared and was represented by an attorney. Two Agency advocates appeared for the Agency. Grievant's Exhibits 1-20 were entered into evidence without objection. Agency's Exhibits 1-14 were entered into evidence without objection, excluding the Agency's Position Statement which was accepted as argument, not evidence. During the hearing, the Hearing Officer requested an Organizational Chart for the Agency. This was provided by the Agency and entered into evidence without objection as Hearing Officer's Exhibit One. Three witnesses for the Agency and three witnesses for the Grievant testified. Due to the late hour of the testimony of the last witness, the parties agreed to submit written closing statements by August 4, 2015. The hearing was recorded on a digital recorder and stored on two compact disks.

### APPEARANCES

Grievant

Attorney for the Grievant

Two Agency Advocates

Witnesses for Agency:

Budget Director

Director of International Programs  
Assistant Budget Director

Witnesses for Grievant:

Grievant  
Grants Accountant 1  
Grants Accountant 2

### **ISSUE**

Whether the Group III Written Notice Issued to the Grievant on May 19, 2015 and subsequent termination should be sustained, modified or revoked.

### **BURDEN OF PROOF**

In disciplinary actions, the agency must present its evidence first and the burden of proof is on the Agency to show by a preponderance of the evidence that its action against the Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not (Grievance Procedure Manual). This case is a disciplinary action. The burden of proof is on the agency. In this case, the agency must prove that it is more likely than not that the Grievant engaged in unsatisfactory performance and unprofessional conduct. The agency must prove that issuing a Group III Written Notice and termination of the Grievant was warranted and appropriate.

### **FINDINGS OF FACT**

1. The Grievant worked at the Agency as a senior budget analyst for grants and contracts since October, 2012. He was hired for the position by the former Budget Director for whom the Grievant had been working several months as a consultant. While working for the former Budget Director, the Grievant had a Contributor rating on his Performance Evaluation, and was later given a letter of recommendation. The former Budget Director retired at end of 2013.<sup>1</sup>
2. The Budget Director was the supervisor for the Grievant starting in January, 2014, for the next 14 months, ending on March 25, 2015, when the newly-hired Assistant Budget Director took over as the supervisor for the Grievant. The Budget Director and the Assistant Budget Director testified that they did not have experience with dealing with grants and were not CPAs.<sup>2</sup>
3. The Budget Director testified that she initially had a good working relationship with the Grievant, and that the Grievant was a good manager of the three staff members of whom he was the manager.<sup>3</sup> The Grievant testified that he would go into the Budget Director's office each

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<sup>1</sup> Grievant Exhibit 1, p. 2, Testimony of Grievant

<sup>2</sup> Testimony of Budget Director and Assistant Budget Director

<sup>3</sup> Testimony of Budget Director

morning to discuss issue and see if she had anything she wanted done.<sup>4</sup>

4. On July 1, 2014, there was an altercation between the Grievant and the Controller. The Controller shouted at the Grievant and approached him and shouted in his face. The Grievant remained calm and returned to his office. The next day, he went into the Controller's office to discuss the incident. The Controller asked him to leave. The Controller resigned shortly thereafter. The Grievant testified that the Controller and the Budget Director were friends.<sup>5</sup>

5. After the incident with the Controller, the working relationship between the Budget Director and the Grievant changed. She no longer responded to emails that he sent. She was critical of his work. On October 13, 2014, the Budget Director, in the Annual Performance Evaluation for the Grievant, gave the Grievant a "Below Contributor" rating. By January 2014, the Budget Director admitted informing the Grievant that she was angry about an email he sent. In February, 2015, she said she had a heated discussion with the Grievant regarding a report he submitted. She later said she was getting frustrated because his management report included FY15 data and the FY16 was projected based on FY15.<sup>6</sup>

6. On August 4, 2014, the Grievant was issued a Group I Written Notice for Violation of Policy, Work Place Violence and Disruptive Behavior, citing the incident with the Controller. On August 11, 2014, the Budget Director issued the Grievant a Group II Written Notice for Disruptive Behavior and Insubordination. On April 2, 2015, the Budget Director, who was no longer the supervisor for the Grievant, issued the Grievant a Group I Written Notice for Unsatisfactory Work Performance.<sup>7</sup>

7. The United States Department of State offers grants to assist students from foreign countries to study at community colleges in the United States. The Director of International Programs at the Agency oversees these grants for all 13 community colleges throughout the country that are recipients of these grants.<sup>8</sup> The Director testified that he is in charge of the development of the grants. The implementation of the grants is done by his program with the assistance of the finance department.

8. One of the duties of the Grievant was to periodically prepare a Federal Financial Report (FFR) regarding these grants. On July 29, 2014, the Grievant submitted an FFR to the U.S. Department of State regarding the State Department Grant. One section of the report, "Recipient Share:" shows the following:

i.	Total recipient share required	442,726.00
j.	Recipient share of expenditures	253,322.24
k.	Remaining recipient share to be provided (line i minus j)	189,403.76

The Director reviewed the FFR and the Grievant, as part of his duties, certified that the information was accurate.

9. On April 13, 2015, the Grants Officer at the U.S. Department of State sent an email to the Grievant and the Director of Grants and Special Programs with a cc: the Director of International

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<sup>4</sup> Testimony of Grievant

<sup>5</sup> Testimony of Grievant, Agency Exhibit 12, pages 1-3

<sup>6</sup> Testimony of Grievant, Agency Exhibit 12.2, page 2; Grievant Exhibit 16, page 232-235

<sup>7</sup> Grievant Exhibit 20, page 343; Grievant Exhibit 18, page 295; Grievant Exhibit 9 page 149

<sup>8</sup> Agency Exhibit 6, pages 4-9.

Programs stating that the reported amount of the cost share expended was not in proportion to the amount of federal share expended. The Grant award amount would be reduced if the cost share was not revised. In other words, verification was needed for the amount on line k. above (Recipient share is generally referred to as the cost share).<sup>9</sup>

10. The information needed to verify line k., the cost share amount, was information that needed to be provided by the Director of International Programs. The Grievant had requested the information from the Director on many occasions. Emails verified that the Grievant and his staff had informed the Budget Director of this cost share verification issue several times, starting in 2013. The Grievant had one of his employees, Grants Accountant 1, assigned to work with the Director of International Programs to get the verification of the cost share amount. Grants Accountant 1 and Grants Accountant 2 and even the Director of International Programs himself testified that the Director did not provide the information needed for the cost share.<sup>10</sup>

11. Once the email was received from the Department of State, the Director arranged to meet with the Grievant and the Grants Accountant 1. The Director of International Program provided the cost share amount within a week. The FFR was revised and submitted to the Department of State on April 21, 2015. The Grant award amount was not reduced.<sup>11</sup>

12. Following the submission of the revised FFR, the Director of International Programs wrote a formal complaint against the Grievant and submitted it to the Budget Director. It included many accusations regarding the Grievant's handling of the revision process. The Budget Director testified that she discussed the complaint with the Assistant Budget Director, but did not review it with the Grievant to hear his side of the story.<sup>12</sup>

13. The Assistant Budget Director, the supervisor of the Grievant, did not review the complaint with the Grievant. Instead, on May 4, 2015, the Assistant Budget Director gave to Grievant a Notification of Intent to Issue a Group III Written Notice with termination for unsatisfactory performance and unprofessional conduct. In the Notification, the Assistant Budget Director cites the content of the complaint as a basis for the Written Notice and the termination.<sup>13</sup>

14. On May 13, 2014, the Grievant submitted a response to the Notice of Intent to Issue a Group III Written Notice, and a response to the complaint.<sup>14</sup>

15. On May 19, 2015, the Assistant Budget Director issued a Group III Written Notice to the Grievant. He was terminated. The Group III Written Notice, Section II Offense section, the issuer is instructed to "Briefly describe the offense and give an explanation of the evidence. (Additional documentation may be attached." The Assistant Budget Director wrote: "Notice is issued for unsatisfactory performance and unprofessional conduct. Please see attached letter of intent to issue notice." Under Section IV – Circumstances considered, the Assistant Budget Director wrote, "The employees (sic) response does not provide any circumstances that would

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<sup>9</sup> Agency Exhibit 3, page 108.

<sup>10</sup> Testimony of Director, Grants Accountants 1 and 2, Grievant

<sup>11</sup> Agency Exhibit 7, pages 8 and 12

<sup>12</sup> Agency Exhibit 5, pages 2-3, Testimony of Budget Director

<sup>13</sup> Agency Exhibit 3, pages 1-42

<sup>14</sup> Grievant Exhibit 5, pages 39-73, Grievant Exhibit 6, page 75-90

mitigate this action.”<sup>15</sup>

16. The four-page letter of intent and forty-page attachments includes discussions of the following issues: the **PIP** given to the Grievant by the Budget Director, lack of **communication** by the Grievant to the Budget Director and Assistant Budget Director, the Grievant’s role in the revision of the **State Department grant**, a **cost share health report**, and **remarks** made by the Grievant to the Director about the Budget Director.<sup>16</sup>

17. **PIP**

In October, 2014, the Budget Director told the Grievant to prepare a Performance Improvement Program (PIP). The Grievant sent the Budget Director a proposed plan in November. In January, the Budget Director revised the plan. The Budget Director testified that she did not know when she gave the Grievant the PIP, but thought it was late January or early February. The PIP itself was undated. The PIP included a column for an achievement timeline for each Area of Improvement and the last column titled, “Update on Measures Met”. Nine of the twenty-four expectations had February 16, 2015 as Achievement Date. The entries in the last column are undated, so it is not clear when the Budget Director evaluated the progress of the Grievant on meeting the Expectations in each Area of Improvement. Improvement was noted in some areas and not in others.<sup>17</sup>

In the Notice of Intent, the Assistant Budget Director wrote, “In you last performance appraisal, you were presented with a Performance Improvement Plan (PIP) by [Budget Director] in which you were asked to improve on your managerial skills with regards to two area in particular: a) communication and b) analytics. You have failed to demonstrate any significant improvement in either of these areas.” In fact, the Grievant was not presented a PIP at the performance appraisal in October, 2014. The PIP was given to the Grievant in late January or early February. There was no evidence presented that the Assistant Budget Director ever reviewed the PIP with the Grievant.<sup>18</sup>

18. **Communication**

In the Notice of Intent, the Assistant Budget Director wrote, “You do not communicate with me or [Budget Director] to keep us informed of issues affecting the department. As a new employee to [Agency] and your supervisor, I asked you on multiple occasions to keep me completely involved and informed so I could get up to speed quickly. I have asked you to “just cc: me on everything.” which you have not. There were several issues that arose, none of which were brought to my attention by you, rather I was notified by outside clients and other employees...I wasn’t contacted about [the State Department Grant] issue, despite having asked you to keep me informed of all issues relating to grants.”

There are numerous examples throughout the exhibits that show email communications with cc: Budget Director or Assistant Budget Director. The Assistant Budget Director admitted that the Grievant did discuss the issue regarding the State Department Grant. The Grievant

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<sup>15</sup> Grievant Exhibit 2, page 22

<sup>16</sup> Agency Exhibit 3, pages 1-44

<sup>17</sup> Agency Exhibit 5, pages 21-24, Testimony of Budget Director

<sup>18</sup> Agency Exhibit 3, page 1, Testimony of Assistant Budget Director

testified that he went to see the Assistant Budget Director on April 13, 2015, the same day he received the notice from the State Department. He brought her a copy of the email notice and discussed the issue with her. He told her that he and Grants Accountant 1 would be meeting with the Director to get the cost share data that was needed to correct the problem.<sup>19</sup>

#### **19. State Department Grant**

In the Notice of Intent, the Assistant Budget Director wrote, “You had initially underperformed your duties by failing to catch the underreported cost share expense information during the initial FFR submitted on April 30, 2014 and again on the revised report on July 29, 2014. When asked about the cause, you deflected all responsibility towards [Director], though your oversight was obvious.”

In the FFRs submitted in 2014, line k. Remaining recipient share to be provided (line i minus j) was accurately reported as \$189,403.76 by the Grievant. No one who testified disputed that the reports were accurate. The remaining recipient share, also known as cost share, was costs that the Agency had to show were incurred for the grant. These costs included costs from this Agency as well as other community colleges throughout the United States that shared this grant. The Director of International Programs at this Agency was responsible for providing the data for the cost share amount for all the community colleges involved to the Grievant and his employees so that the remaining \$189,403.76 could be shown to have been spent appropriately. The Director of International Programs testified that he approved the last FFR before it was submitted in July, 2014. He was aware that he needed to provide the cost share data. He did not act to do so until April, 2015 when the State Department threatened to retract the grant money.<sup>20</sup>

When the Grievant and the Grants Accountant 1 met with the Director of International Programs in April 2015 to get the cost share data, the Director of International Programs wanted to include amounts in the personnel budget, not amounts actually spent. The Grievant refused, saying that the amounts were proposed budget amounts, and would not pass any future audits. The Director of International Programs then went to the Budget Director who approved the budget amounts for the cost share data. The Grievant expressed concern that this would put the college at risk if audited.<sup>21</sup>

#### **20. Cost Share Health Report**

In the Notice of Intent, the Assistant Budget Director wrote, “Lastly, your reporting output is rudimentary and shows no analytics. Several attempts to build a cost share health report from a list of grants contained zero equations/functions and showed no value added.”

In early April, 2015 the Budget Director wanted the Grievant to prepare a cost share report. She told the Assistant Budget Director to ask the Grievant for this report. She specifically told the Assistant Budget Director to not help the Grievant with the task. The Assistant Budget Director sent an email at 12:11 p.m. on April 2, 2015 to the Grievant, stating, “For a meeting tomorrow, [Budget Director] needs to get the current cost share numbers (I say current, but she needs them for this FY as well as what we have planned for next year.) Is this something you

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<sup>19</sup> Grievant Exhibit 5, pages 43-74, Testimony of Assistant Budget Director, Testimony of Grievant

<sup>20</sup> Agency Exhibit 7, page 1, Testimony of all witnesses

<sup>21</sup> Grievant Exhibit 5, page 67, Testimony of Grievant

have or can pull together? The meeting will be in the afternoon...Please advise.” The Grievant responded with a report at 7:04 p.m. that same day. The Assistant Budget Director forwarded the Grievant’s report to the Budget Director five days later on April 7, 2015 at 5:28 p.m. The Budget Director then responded to the Grievant the next morning at 7:14 a.m. saying that the report was insufficient. The Budget Director then met with the Assistant Budget Director and wrote all over the Grievant’s report to show the revisions that she wanted in the report. The Budget Director told the Assistant Budget Director, “Do not do the Grievant’s work for him.” Neither person shared the requested revisions with the Grievant. The Grievant sent a revised report the next day.<sup>22</sup>

#### 21. **Remarks**

In the Notice of Intent, the Assistant Budget Director wrote, “You made unprofessional and disparaging comments regarding the Budget Director[] to [Director of International Programs]. Remarks included “Now [Budget Director] has entered into the picture,” “[Budget Director] is making a big deal about this,” and suggesting that [Budget Director]’s use of the phrase “inadvertent oversight” to [State Department Grants Director] in an email documenting the reasons for the revision was somehow responsible for the State Department’s request for additional clarification....You also told me that there was a contentious relationship between [Director of International Programs] and [State Department Grants Director], which you claimed, was the main reason of the recall”

The Assistant Budget Director admitted in her testimony that the basis for the unprofessional conduct charge against the Grievant was the assertions made by the Director of International Programs in the complaint he sent to the Budget Director. She also admitted that she did not have any knowledge of the type of relationship between the Director of International Programs and the State Department Grants Director. The Grievant admitted that he said that the Budget Director will make a big deal of this because of an impending grievance hearing between the Budget Director and the Grievant. He denied that any remarks were made to disparage the Budget Director. He also denied saying that there was a contentious relationship between the Director of International Programs and the State Department Grants Director.<sup>23</sup>

### **APPLICABLE LAW AND OPINION**

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provisions for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee=s ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid government interest in and responsibility to its employees and workplace. Murray v. Stokes, 237 Va. 653,656 (1989).

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<sup>22</sup> Agency Exhibit 3, page 28, Agency Exhibit 11.3, pages 1-2, Testimony of Budget Director, Ass’t Budget Director, Grievant

<sup>23</sup> Testimony of Ass’t Budget Director, Testimony of Grievant, Grievant Exhibit 6, page 78



The Department of Human Resource Management has produced a Policies and Procedures Manual which include:

**Policy Number 1.60: Standards of Conduct.**

**Standards of Conduct** provides a set of rules governing the professional conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

Section B.2.c. provides that Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.

In the present case, the Grievant was issued a Group III Written Notice for unsatisfactory performance and unprofessional conduct. The Grievant was terminated. The Grievant filed Dismissal Grievance Form, and a hearing was scheduled and conducted to determine whether the Group III Written Notice and the termination should be sustained, modified or revoked.

In the Rules for Conducting Grievance Hearings, Section VI., Scope of Relief, B. Disciplinary Actions, section A Framework for Determining Whether Discipline was Warranted and Appropriate<sup>24</sup> states as follows:

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with the law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).<sup>24</sup>

Using this framework, this Hearing Officer will analyze this case.

**(i) Whether the employee engaged in the behavior described in the Written Notice**

No behaviors were described in the Written Notice. All the behaviors described were in the attached 44-page letter of intent to issue notice.

**PIP**

The letter cites the Grievant's lack of progress on the PIP. None of the twenty-four areas listed in the PIP were cited as not achieved. It is not clear on the PIP when progress was made by

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<sup>24</sup>Rules for Conducting Grievance Hearings, VI.B1., Effective Date 7/1/2012.

what date. Due to the inadequacy of the PIP itself and the lack of specificity of the letter of intent, I find that the Agency has not shown that the Grievant had lack of progress on the PIP.

### **Communication**

The letter of intent also cited the lack of communication between the Grievant and the Assistant Budget Director. While there may have been some problems with communication, the examples cited by the Assistant Budget Director in her testimony regarding the State Department grant did not hold up when compared to the evidence, such as email communication. Due to lack of credibility of the Assistant Budget Director and the written evidence to the contrary, the Agency has not shown that there was lack of communication between the Grievant and the Assistant Budget Director.

### **State Department Grant**

Regarding the State Department grant, the Grievant was accused of failing to catch the cost share problem with in the FFR and then deflecting the blame on the Director of International Programs. The Grievant did not fail to catch the cost share problem. The evidence showed that he knew of the problem, and for two years had tried to get the information from the Director of International Program. The evidence showed that the Budget Director had been made aware of this problem. The evidence showed that the blame was correctly placed on the shoulders of the Director of International Programs, who did not provide the information needed until April, 2015, when the State Department threatened to remove the funds. The Agency has not proven that the Grievant failed to catch the cost share problem or improperly blamed the Director of International Programs.

### **Cost Share Health Report**

The letter of intent cites the Grievant for not preparing an adequate cost share health report. The evidence showed that the Grievant did prepare a cost share health report and later a revised report. The evidence did not support the Assistant Budget Director's assertion that the report was inadequate. The direction given to the Grievant to prepare a report was very vague. The Assistant Budget Director then did not share with the Grievant the specific changes the Budget Director wanted on the report. The Grievant cannot be faulted for his report not following a format that he was not given. The Agency has not proven that the Grievant was responsible for not preparing an adequate cost share health report.

### **Remarks**

The letter of intent cites the Grievant for making unprofessional and disparaging comments regarding the Budget Director to the Director of International Programs. The Grievant admitted saying that the that he said that the Budget Director will make a big deal of this because of an impending grievance hearing between the Budget Director and the Grievant. He denied that any remarks were made to disparage the Budget Director. He also denied saying that there was a contentious relationship between the Director of International Programs and the State Department Grants Director.

### **(ii) Whether the behavior constituted misconduct**

The only behavior described in the Written Notice that I find the Grievant engaged in was the remarks he made regarding the Budget Director. I do not find that the remarks made by the

Grievant were disparaging remarks. The remarks do not rise to the level of unprofessional conduct. I do not find that the remarks constitute misconduct.

**(iii) Whether the disciplinary action taken by the agency was consistent with the law and policy** This Hearing Officer finds it troubling that the Group III Written Notice and Termination were issued by a probationary employee who had been at the Agency for five weeks. She had no experience in Grants was not a CPA, and based her evidence on hearsay that she did no independent investigation to verify. Even if all the allegations were true, and I find that they are not, there is still nothing that rising to the level of misconduct of a severe nature that would warrant termination. This Hearing Officer finds that the Agency=s disciplinary action of a Group III Written Notice and Termination is not consistent with law and policy.

### **Mitigating Circumstances**

According to the Rules for Conducting Grievance Hearings, AA hearing officer must give deference to the agency=s consideration and assessment of any mitigating and aggravating circumstances. A hearing officer may mitigate the agency=s discipline only if, under the record evidence, the agency=s discipline exceeds the limits of reasonableness.<sup>25</sup> The Grievant was given a Group III Written Notice and was terminated. This Hearing Officer finds that the agency=s discipline of imposing a Group III Written Notice and termination exceeded the limits of reasonableness.

The Grievant has three active previous Written Notices (two Group I's and one Group II) . However, the Agency did not cite these previous Written Notices, on the Group III Written Notice under Section IV - Circumstances considered. Therefore this Hearing Officer will not consider the previous Written Notices as aggravating circumstances to support the disciplinary action in this case. The Agency showed no consideration and assessment of mitigating circumstances.

### **DECISION**

The Agency has not sustained its burden of proof for the Group III Written Notice issued on May 19, 2015 to the Grievant. That Group III Written Notice is hereby revoked. The Grievant's termination is revoked. The Agency is directed to reinstate the Grievant to his former or equivalent position, to give the Grievant back pay, leave time, health and retirement benefits, minus any unemployment benefits, dating back to May 19, 2015.

### **ATTORNEY'S FEES**

The Grievant is entitled to attorney's fees. Counsel for the Grievant shall ensure that the Hearing Officer receives within 15 days of the issuance of this decision, Counsel's petition for reasonable attorney's fees, either electronically or by U.S. Mail. The fees petition shall include an affidavit

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<sup>25</sup> Rules for Conducting Grievance Hearings, p. 17

itemizing services rendered, the time billed for each service, and the attorney's customary hourly rate not to exceed the amounts provided on EDR's website. (A separate maximum amount is established for attorneys located in Northern Virginia.) A copy of the fees petition must be provided to the Agency at the time it is submitted to the Hearing Officer. The Agency may contest the fees petition by providing a written rebuttal to the Hearing Officer.

### **APPEAL RIGHTS**

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

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Department of Human Resource Management  
101 North 14<sup>th</sup> St., 12<sup>th</sup> Floor  
Richmond, VA 23219

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

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

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

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

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

You may request a judicial review if you believe the decision is contradictory to law.

You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>26</sup>

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

August 26, 2015

*Jane E. Schroeder*  
Jane E. Schroeder, Hearing Officer

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<sup>26</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.

# COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management*

*Office of Employment Dispute Resolution*

## DECISION OF THE HEARING OFFICER UPON REMAND

In the matter of the Virginia Community College System

Ruling Number 2016-4231

Hearing Officer Decision upon Remand

Issued December 15, 2015

The Virginia Community College System (“College”) requested that the Office of Employment Dispute Resolution (“EDR”) at the Department of Human Resource Management (“DHRM”) administratively review the hearing decision in Case Number 10625. The hearing decision was remanded to the hearing officer for further consideration.

The issues to be considered upon remand include:

1. **Federal Financial Report**

- a. **Whether the grievant engaged in misconduct in his handling of the Federal Financial Report (FFR) in July 2014, including charges that the grievant mishandled the submission of the FFR in July 2014, including failing to advise his supervisor(s) of his intent to submit an incomplete or inaccurate FFR, submitting an incomplete or inaccurate FFR, failing to advise his supervisor(s) that the report was incomplete or inaccurate prior to April 2015, and/or asking for his supervisors’ assistance in obtaining additional information from the program administrator.**

Upon Reconsideration:

The testimony of the witness was that the FFR was accurate. The numbers in each column were accurate and complete. The only incomplete aspect was the cost share number to update line k, which was to be supplied by the Director of International Studies. I saw no evidence that led me to believe the grievant mishandled the submission of the FFR in July, 2014. The issue regarding the alleged failure of the Grievant to advise his supervisor(s) that the report was incomplete prior to April 2015 was not addressed in the Group III Written Notice and was therefore not a question before this Hearing Officer. It was not alleged in the Written Notice and there was no evidence presented in the hearing that the Grievant was expected to ask for his supervisors’ assistance in obtaining additional information from the Director of International Studies prior to April, 2015.

- b. **With respect to the hearing officer’s finding that the grievant and his staff had**

**advised the Budget Director of the problems with the cost share information starting in 2013 (Hearing Decision at 4), what information the hearing officer relies up to reach this finding.**

Upon Reconsideration:

The Hearing Officer admits an error in Paragraph 10 of her decision. The third sentence lists, "Budget Director" when it should read, "Director". Otherwise the paragraph is correct. All of the facts listed in this paragraph were substantiated by the testimony of the Director, the Grants Accountants 1 and 2 and the Grievant. The emails from 2013 are in Grievant Exhibit 6, page 90.

- c. **Even in the event that the grievant had advised the Budget Director of his difficulties in obtaining the information, whether the Budget Director was aware of the grievant's intent to submit an incomplete FFR or if the grievant sought assistance in obtaining the necessary information. The hearing officer is therefore direct to reconsider her findings regarding the Budget Director's alleged knowledge and to identify the record basis for such findings.**

Upon Reconsideration:

As stated previously, the FFR was accurate and complete, except for the information that was to be supplied by the Director of International Studies. That Director signed off on the FFR before its submission in July, 2015. What the Budget Director was aware of regarding the FFR prior to its submission was not an issue before the Hearing Officer and the Budget Director did not testify regarding this issue.(Testimony of Budget Director).

## **2. Communication**

**Whether the grievant failed to communicate in the manner expected by the College, specifically: the nature of the instruction given to the grievant by his supervisors; other specific examples of non-communication cited by the College in its documentation (such as the three examples included with the Notice of Intent); and the grievant's role in including his supervisors in the communication (that is, whether the supervisor's inclusion in email communications was the result of the grievant's action or action by someone else.**

Upon Reconsideration:

The Assistant Budget Director, who issued the Group III Written Notice, testified that the instruction that she gave the Grievant while she was his supervisor was to cc her on the emails. She admitted, when she thought there were emails that she was not getting, she did not counsel him or give him a performance review, but, instead, terminated his employment five weeks after she became his supervisor. (Testimony of Assistant Budget Director).

The first example included in the Notice of Intent was a series of emails between the Grants Accountant 1, a Grant Analyst, and the Assistant Director of Grants Development. The last of the emails in the series was cc'd by the Assistant Director of Grants Development to the Budget Director and the Assistant Budget Director. None

were the emails was initiated by the Grievant. (Agency Exhibit 3, pages 30-34).

The second example in the Notice of Intent was a series of emails following the email from the Department of State on April 13, 2015, requiring the documentation for the cost share amounts. The first email, from the Budget Director to the Grievant and the answer from the Grievant both had cc: Assistant Budget Director. The last email shown is an email dated April 16, 2015 from the Assistant Budget Director to the Grievant. In that email, the Assistant Budget Director asks the Grievant to explain more fully the cost share issue and requests to be invited to future meetings with the Director of International Studies. The testimony of the Assistant Budget Director and the Grievant was that the Grievant did meet with the Assistant Budget Director in person shortly after the April 13<sup>th</sup> email from the Department of State. (Agency Exhibit 3, pages 38-40).

The third example included in the Notice of Intent was an email from the Assistant Director of Grants Development to the Budget Director and Assistant Budget Director in answer to an email from the Grants Accountant I. The Grievant did not initiate either email. (Agency Exhibit 3, page 41).

One other specific example of non-communication cited by the College in its documentation and in the testimony of the Budget Director is an email from Assistant Director of the Office of Grants Development to a professor at the college regarding a grant payment. However, nowhere in the email is the Grievant named as an ineffective communicator. The non-communication cited in the email could have referred to the Grievant or his supervisors. (Agency Exhibit 11, pp. 1-2, Testimony of Budget Director).

I find that none of the specific examples on non-communication cited by the agency substantiate that the grievant failed to communicate in the manner expected by the College.

There were examples in the emails cited above of the supervisor's inclusion in email communications was the result of the grievant's action and some were the result of action by someone else. Other examples of emails that were the result of grievant's actions as well as others are included further in Agency Exhibit 3. (Agency Exhibit 3, pages 49-62). The many examples of emails in the five weeks that the Assistant Budget Director was the supervisor of the Grievant do not prove that grievant failed to communicate in the manner expected by the College.

### **3. Consider a Lower Level of Discipline**

**Whether any of the conduct proved by the College was sufficient to sustain a lower level of discipline, such as a Group I or II Written Notice. In particular, whether the grievant's alleged failure to provide a cost share health report satisfactory to his supervisors was adequate to establish poor performance warranting a Group I or Group II Written Notice. The hearing officer's analysis should include discussion of whether it was necessary for his supervisors to provide specific instruction regarding the report's content, or whether the contents of such a report should have already been known by someone working in the grievant's position with his knowledge and experience.**



Upon Reconsideration:

In the Hearing Officer's Decision, the Hearing Officer analyzed the case using the framework for determining whether discipline was warranted and appropriate outlined the Rules for Conducting Grievance Hearings. The first section of the analysis is whether the employee engaged in the behavior described in the Written Notice. In regards to the Cost Share Health Report, the Hearing Officer found that the Agency had not proven that the Grievant was responsible for preparing an inadequate cost share health report.

At noon on April 2, 2015, the Assistant Budget Director sent an email asking the Grievant for "current cost sharing numbers" for the Budget Director for a meeting the next day. The Grievant responded to the Assistant Budget Director at 7:00 pm that same day with a report for the cost share. The Assistant Budget Director did not forward that email to the Budget Director until five days later on April 7, 2015. The next day the Budget Director met with the Assistant Budget Director and reviewed the report. The Budget Director then wrote all over the report and discussed how the report should be revised. The proposed revisions were never shared with the Grievant. Instead, the Budget Director instructed the Grievant by email to revise the report. The Budget Director specially told the Assistant Budget Director not to help the Grievant with the task.

A cost share report could have many components. Given the vague instructions asking for current cost sharing number, I do not find that the specific content and format that the Budget Director expected should have already been known by someone working in the grievant's position with his knowledge and experience.

It is clear from the proposed revisions that the Budget Director wanted that she had a specific type of report in mind. In this case, it was necessary for the Grievant's supervisors to provide specific instruction regarding the report's content. The fact that the proposed revisions were not shared with the Grievant lead this Hearing Officer to conclude that the Budget Director and Assistant Budget Director were setting up the Grievant to fail.

I concluded in my original decision and again upon reconsideration that the Grievant did not fail to prepare an adequate cost share health report. The Agency's evidence did not show that there was misconduct by the Grievant. Therefore, no lower level of discipline is deemed appropriate for the Grievant regarding this issue.

**4. Whether the College presented evidence demonstrating poor performance by the grievant at a Group I or Group II level with respect to any other conduct charged in the Notice of Intent and Written Notice.**

Upon Reconsideration:

The Agency's evidence as to the other conduct charged in the Notice of Intent was insufficient to demonstrate poor performance by the Grievant. The Assistant Budget Director based much of her evidence on hearsay that she did not verify. In my decision, I found that the allegations of poor performance did not rise to the level of misconduct. Therefore a lower level of discipline would not be appropriate.

**DECISION UPON REMAND**

Upon reconsideration, I find that the Agency has not sustained its burden of proof for the Group III Written Notice issued on May 19, 2015 to the Grievant. That Group III Written Notice is revoked. The Agency has not sustained the burden of proof to show that a lesser form of discipline is appropriate. The Grievant's termination is revoked. The Agency is directed to reinstate the Grievant to his former or equivalent position, to give the Grievant back pay, leave time, health and retirement benefits, minus any unemployment benefits, dating back to May 19, 2015.

### **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 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 DHRM, the hearing officer has issued a revised decision.

#### **Judicial Review of Final Hearing Decision**

Within thirty days of a final decision, a party may appeal on the grounds that the determination is 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 Director before filing a notice of appeal.

December 15, 2015

*Jane E. Schroeder*  
Jane E. Schroeder, Hearing Officer

# COMMONWEALTH OF VIRGINIA

*Department of Human Resource Management*

*Office of Employment Dispute Resolution*

## **ADDENDUM TO DECISION OF THE HEARING OFFICER**

In the matter of

Case # 10625

Case Heard: July 24, 2015

Original Decision Issued: August 26, 2015

Administrative Review Decision Issued October 15, 2015

Decision of Hearing Officer Upon Remand Issued: December 15, 2015

DHRM Administrative Review Issued: January 8, 2016

### **APPLICABLE LAW**

The Virginia Personnel Act, VA Code ' 2.2-2900 et. seq., establishes the procedures and policies applicable to employment in Virginia It includes provisions for a grievance procedure. Under the grievance procedure, a hearing officer may order appropriate remedies in a decision after a hearing. In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorney's fees, unless special circumstances would make as award unjust. The agency from which the grievance arises shall bear the costs for the grievant's attorney's fees that the hearing officer may award.

### **FINDINGS AND DISCUSSION**

In this case, the Agency did not sustain its burden of proof for the Group III Written Notice issued on May 19, 2015 to the Grievant. The Group III Written Notice was revoked. The Grievant's termination was revoked. The Agency was directed to reinstate the Grievant to his former or equivalent position, to give the Grievant back pay, leave time, health and retirement benefits, minus any unemployment benefits, dating back to May 19, 2015. The hearing officer finds that the Grievant substantially prevailed on the merits of the grievance, and that the Grievant is entitled to recover attorney's fees. The hearing officer further finds that there are no special circumstances that would make an award of attorney's fees unjust.

Grievant's attorney submitted to the hearing officer a petition for attorney's fees on

September 3, 2015. Attached was an affidavit delineating the attorney's fees for 58.9 hours of attorney time, which I find is reasonable for this case.

### **ATTORNEY'S FEES AWARD**

The Grievant is awarded attorney's fees for 58.9 hours at \$158.00 per hour for a total of \$9,306.20.

### **APPEAL RIGHTS**

Within 10 calendar days of the issuance of this fees addendum, either party may petition EDR for a decision solely addressing whether the fees addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once EDR issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §VII(B) of the Rules and §7.3(a) of the Grievance Procedure Manual. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

January 11, 2016

*Jane E. Schroeder*

Jane E. Schroeder, Hearing Officer

Cc: Agency Contact  
Agency Advocate  
Grievant by Counsel  
EDR

**COMMONWEALTH OF VIRGINIA**  
*Department of Human Resource Management*  
*Office of Employment Dispute Resolution*

**ADDENDUM TO DECISION OF THE HEARING OFFICER**

In the matter of

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DHRM Administrative Review Issued: January 8, 2016

Addendum re: Attorney's Fees Issued: January 11, 2016

**DISCUSSION**

In the December 15, 2015 Decision of the Hearing Officer, the Agency was directed to reinstate the Grievant to his former or equivalent position, to give the Grievant back pay, leave time, health and retirement benefits, minus any unemployment benefits, dating back to May 19, 2015. In February 2016, the hearing officer received an email from [] the Agency, asking whether the intent of the decision was to reinstate the Grievant with no option to waive health coverage. The hearing officer responded that the intent of the decision was to give the Grievant the right to reinstate his health coverage, with the option to waive coverage. In a follow-up email on March 10, 2016, [] the Agency indicated that DHRM has requested a revised "letter" or the Grievant would continue to be charged for full health premiums. After consultation with EDR regarding procedure, the hearing officer agreed to prepare this addendum.

**CLARIFICATION OF THE DECEMBER, 2015 DECISION**

In the order for relief in the December, 2015 Decision, the Grievant was granted, *inter alia*, reinstatement of health benefits dating back to May 19, 2015. The intent of the order was to allow the grievant:

1. To reinstate the health benefits retroactively, or
2. The option to waive health coverage throughout the termination period, and/or
3. The option to waive coverage entirely, and not be able to pick up coverage again until open enrollment.

THEREFORE, the Grievant has the option to reinstate his health coverage retroactively to May 19, 2015, or the option to waive health coverage dating back to May 19, 2015, and the further option to waive coverage entirely until the next open enrollment period.

**APPEAL RIGHTS**

Within 10 calendar days of the issuance of this addendum, either party may petition EDR for a decision solely addressing whether the addendum complies with the Grievance Procedure Manual and the Rules for Conducting Grievance Hearings. Once EDR issues a ruling on the propriety of the addendum, and if ordered by EDR, the hearing officer has issued a revised addendum, the original decision becomes “final.” The addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

March 21, 2016

*Jane E. Schroeder*

Jane E. Schroeder, Hearing Officer

Cc: Agency Contact  
Agency Advocate  
Grievant’s Counsel  
Grievant  
EDR