

DECISION OF HEARING OFFICER

In the matter of

Case Number: 11632

Hearing Date: February 11, 2021

Decision Issued: March 3, 2021

SUMMARY OF DECISION

The Agency (University) had found Grievant violated the rules of conduct due to (i) unsatisfactory performance, (ii) failure to follow instructions and/or policy, and other misconduct. The Agency then issued Grievant a Written Notice with removal. The Hearing Officer found Grievant committed Group II and Group III offenses and that the agency's discipline was consistent with policy and law and reasonable. Accordingly, the Hearing Officer upheld the discipline.

HISTORY

Grievant timely grieved the group notice by submitting the Grievance Form A to the Office of Equal Employment Dispute Resolution ("EEDR"). In her Form A, Grievant denies the university's allegations.

EDR appointed the undersigned as the Hearing Officer in this matter effective November 23, 2020. The Hearing Officer held a pre-hearing conference ("PHC") by telephone on December 3, 2020.¹ Thereafter, by order issued December 3, 2020, the Hearing Officer scheduled the grievance hearing for January 15, 2021, using a virtual platform from 9:00 a.m. to 3:00 p.m.² This order also noted other rulings made and matters discussed during the PHC.

Subsequent to the initial PHC, Grievant requested the Hearing Officer issue orders for the production of documents and witnesses. University's advocate timely requested a subsequent PHC to address Grievant's requests. The advocate contended that the university required clarity on the document requests. University advocate also asked for a continuance of the hearing date. The reasons provided for this request were (i) Grievant was requesting numerous records; (ii) the university required adequate time to assemble the documents for production; (iii) campus was closing for several weeks due to the imminent holidays; (iv) the effects of the pandemic necessitated many employees to work remotely which decreased staff availability to process the Grievant's document request and the ability to provide documents to the Grievant prior to the January 15, 2021 hearing date.

The Hearing Officer held a second PHC on December 21, 2020.³ Concerns regarding the request for documents and witnesses were discussed, as well as the motion for a continuance. After carefully considering the parties' comments, the Hearing Officer found good cause to grant the

¹ This was the first date the parties indicated they had mutual availability to participate in the PHC.

² The parties agreed to the scheduling and hearing platform.

³ The Hearing Officer made attempts to schedule the second PHC prior to December 21, 2020; however, the parties' first mutual availability was not until the December 21 date.

continuance. This determination was based on the Hearing Officer shut-down of the university for several weeks prior to the scheduled hearing, the ongoing pandemic, employees required to work remotely resulting in decreased staff to process the production of documents. Hence the Hearing Officer rescheduled the hearing for February 11, 2021. Grievant had no objection and the parties agreed to the rescheduled date. In addition based on the discussions during the PHC about the requests for documents, the Hearing Officer issued two orders pertaining to the documents; an order for the production documents which instructed the university to provide the specific documents outlined in that order to Grievant; and (ii) an order for the production of documents directing the University Foundation to produce certain documents to Grievant.⁴ Concerning Grievant's request for witness orders, the university did not object. Accordingly, the Hearing Officer issued two witness orders directing two employees of the university to appear to testify at the hearing. Additionally, the Hearing Officer issued two witness orders directing employees of the University Foundation to appear to testify. The orders mentioned here, which the Hearing Officer issued on December 21, 2020, are incorporated by reference.

On the date of the hearing and prior to commencing it, the parties were given an opportunity to present matters of concern to the Hearing Officer.

Also, during the hearing, the Hearing Officer admitted, without objection, the Agency's Exhibits 1 through 5. In addition, the Hearing Officer admitted, without objection, Grievant's Exhibit which contain pages 41 pages.

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

During the proceeding, the Agency was represented by its advocate. Grievant represented herself.

APPEARANCES

Advocate for Agency
Witnesses for the Agency (4 witnesses)
Grievant
Witnesses for Grievant (2)⁵

ISSUE

⁴ University Foundation is a separate entity from the University. The Foundation has been established to aid the University. The University Foundation did not produce the documents for Grievant. Counsel for the Foundation responded to the order for the production of the documents in writing to Grievant stating that the Foundation had no responsibility to provide the documents. The Hearing Officer allowed Grievant to proffer what she believed those documents would show and considered those proffers in her deliberation. Moreover, Grievant acknowledged that she had received at least one of the documents she requested from the Foundation as it was included as one to the exhibits of the university. This particular exhibit as well as others from the university had been made available for Grievant one week prior to the hearing which was the date the parties had been ordered to exchange their exhibits.

⁵ The individuals employed by the Foundation did not appear for the hearing. Grievant elected to proceed in their absence. She was also allowed to proffer what she believed their testimony would be. The Hearing Officer did consider the proffers in her deliberations.

Was the written notice with removal warranted and appropriate under the circumstances?

BURDEN OF PROOF

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

FINDINGS OF FACT

After reviewing all the evidence presented and determining the credibility of the witnesses, the Hearing Officer makes the following findings of fact:

1. The agency is a state university (University/Agency). By letter dated November 17, 2015, University offered Grievant employment, effective January 10, 2016, as Station Manager; that is, manager of the university’s radio station.

On December 4, 2015, Grievant accepted the offer by signing and dating at the bottom of the November 17, 2015 letter the following statement:

I accept this offer of employment effective, January 10, 2016. I agree to abide by all University and Commonwealth of Virginia policies and procedures.

<u>[Grievant’s Signature]</u>	12/4/2015
Signature	Date

(A Exh. 2, following blue sheet, p. 6).

2. Management terminated Grievant’s employment on October 9, 2020. Management alleged that on March 23, 2020, University management discovered Grievant had committed multiple offenses: failing to follow instructions and/or policy, failing to perform her job satisfactory, and other misconduct. (*Id.* , pp. 1 – 5).

University’s Process for Hiring an Employee

Full-time Employee

3. University’s process for hiring a fulltime employee and placing the individual on payroll involves multiple steps.

First, to initiate action regarding University personnel, the manager of a respective department desiring to hire new staff must make such a request by completing the HR-1 form.⁶

⁶ The complete name of this form is HR-1 Form -Department Request for Personnel Action. (A Exh. 3, following blue sheet, p. 1).

Once the manager completes this form and signs it, she is also required to obtain on the HR-1 form the signature of her superior, the provost or vice-president. This signature indicates the manager's superior is aware of and endorses the request for the new hire. The completed HR-1 form is then forwarded to University's budget office for processing and then to Human Resource Department (HR) for approval of the request. The completed HR-1 form is required for filling full and part-time positions with University. (Testimony of HR Business Partner; A Exh.3, following blue sheet, pp. 1-2).

Once the HR-1 form reaches HR, a draft statement describing the job position to be advertised is typed by HR staff and forwarded for editing to the manager of the department requesting the new hire. Upon the job description being finalized, HR advertises the position for the number of days requested by the department manager seeking the new employee. At the conclusion of the advertisement period, HR prints the applications received for the job position. A screening committee establishes the qualifications for the position, minimum and desired. Committee screens the applicants using the applications. During this process, a point system is employed. Candidates meeting most of the minimum and desired qualifications are the ones that receive the most points and selected for interviews. The requesting department creates the interview questions. (Testimony of HR Business Partner).

Before any candidates are interviewed, the requesting department is required to submit certain documents to HR. They include the interview schedule and the interview questions constructed, which HR pre-approves before any interview occurs. In addition, the department must submit to HR a disclosure statement which reveals any relationship the department has with a candidate. Further, the department must provide HR with the screen worksheet used to determine the points each candidate received. Once HR receives these documents (assuming they are appropriate), HR authorizes the requesting department to conduct the interviews. (*Id.*).

As soon as the interviews have occurred, the requesting department or hiring committee determines the candidate selected for the job. The department is required to assemble a hiring package for each candidate interviewed and provide them to HR along with a completed HR-1 form for the candidate selected to fill the position. At this point, the HR-1 form submitted actually requests that the university hires the selected candidate. (*Id.*).

This is the case because University policy requires the completion of a HR-1 form by a department manager seeking any personnel action. There is one exception, no HR-1 form is required for a department manager to obtain an independent contractor. Another process discussed below is obligatory. (Testimony of HR Business Partner).

Following its receipt of the HR-1 form for the selected candidate, HR performs a compensation analysis to determine the salary that will be offered to the candidate. HR then sends an offer letter to the candidate and schedules his/her orientation. Prior to HR conducting this analysis, the manager in the department requesting the new hire is not authorized to inform a candidate of the salary for the position. This is the case because stating to a candidate what the salary will be constitutes the university making an offer of employment to the candidate and exposing the university to being liable for paying a salary that it has not yet approved. An offer of employment, per University policy is only to be made after a salary for the position has been

approved by HR. Further, HR makes the offer, not the department's manager requesting the new hire. Also, the manager is not clothed with the authority to inform a candidate of the candidate's start date of employment without HR approval. (Testimony of HR Business Partner; A Exh.3, following blue sheet, p. 2).

The above enumerated process for hiring university staff typically requires about 60 day to be accomplished. (Testimony of HR Business Partner).

If HR's offer of employment is accepted, the new hire must complete other requirements. For one, the new hire must take part in an orientation. The schedule for the orientation is provided in the offer of employment letter from HR. It is during this orientation that ethical conduct of employees and other employment related matters are addressed. In addition the new hire must undergo a background check to assure the individual hired does not have a felony criminal record and to foster campus safety. Further, the new hire must complete a form I-9 in accordance with the Immigration Reform and Control Act of 1986 (IRCA). This is a federal requirement the university must follow to assure that any new hire is eligible to be hired in the country. (Testimony of HR Business Partner;(A Exh. 2, following blue sheet, p. 6).

Pursuant to the IRCA, if an employer of a new hire fails to cause the I-9 to be completed, the employer may be assessed monetary fines, face criminal prosecution and/or debarment. *See* IRCA.

Part-time Employee

4. For any employee the university hires on a part-time or hourly basis, the process for hiring is similar to the one mentioned above in Statement of Fact #3. The manager requesting the part-time employee must complete the appropriate HR-1 forms. Also, such an employee must be approved for hire by HR. In addition, as mentioned above, the temporary employee would be required to participate in orientation. Further, a background check is required. The part time position may or may not be advertised. (Testimony of HR Business Partner).

UNIVERSITY'S APPROVED METHOD OF PAYING EMPLOYEES

5. All state employees whether part time or full time are required to be paid by direct deposit to the employee's financial institution account. If an employee does not maintain such an account, the employee may be paid by prepaid credit card or via debit card. Payment by personal check is prohibited.⁷ (Testimony of Payroll Manager; A Exh. 3, following blue sheet, p. 5 - Grievant's letter offering her employment, paragraph 1 notes as a condition of employment she would be paid by direct deposit; A Exh. 4, following green sheet, p. 8, stating "[n]ew state employees generally are required to participate in direct deposit."

6. Management is not allowed to compensate an individual to work while the individual is awaiting proper approval to be hired by University. (Testimony of Grant Director).

⁷ Work study students may be paid by checks from the Agency. However, even work study students are not permitted to receive payment by a personal check either. (Testimony of Payroll Manager).

7. Moreover, the ethics of procurement precludes an employee's manager from paying her subordinate employee with the manager's personal funds. (Testimony of VP of Finance and Comptroller).

UNIVERSITY'S PROCESS FOR CONTRACTING WITH INDEPENDENT CONTRACTORS AND ACQUIRING WORKERS FROM TEMPORARY AGENCIES

8. As University has adopted policies for hiring full and part-time employees and compensating them, it has done the same for hiring or contracting with independent contractors (the IC hiring process). The process for obtaining the services of an IC is noted here.

The department desiring an independent contractor (IC) first submits a request to hire an IC to the university's procurement department. In this request, the department's manager is obliged to provide information regarding the type of IC the department seeks. Management in procurement department then reviews the request. Assuming the procurement department approves the request, a purchase order or contract for the IC is issued.

9. The approved method of paying an IC or consultant is the IC or consultant would submit an invoice related to the purchase order or contract and the university finance department would pay the appropriate individual or entity by check or by issuance of a credit card. The university would only issue payment after it is confirmed that a contract or purchase order exists with the IC. (Testimony of Associate Director of Procurement Dept.)

10. If a department manager seeks to fill a vacancy in her department by using a temporary agency, University has employed procedures for hiring an employee through a temporary agency also. In such a case, the department manager is required to proceed through the procurement department to obtain approval of this employment. In addition, University would conduct a background check of the potential employee from the temporary agency. (Testimony of Human Resource (HR) Business Partner).

11. University has no procurement policy that would permit a manager of a department to pay an employee, or employee working on campus through a temporary agency, or IC with a personal check. (Testimony of Associate Director of Procurement Dept.)

GRANT POLICY

12. University has received funds through a Title III Grant (Grant). Some of the grant's funds have been allocated for personnel working for the university's radio station. Specifically, a percentage of grant funds had been approved to pay for the supplemental/administrative support position for the radio station's activities. In fact, a portion of Former Support Tech's salary was paid from grant funds. (Testimony of Grant Director).

13. Grant administrator is a director with the university. She manages the Grant. As the grant's administrator, Grant Director is responsible for making sure that the grant funds are used

appropriately. (Testimony of Grant Director).

14. The proper way to compensate an employee with grant funds is through the HR- 1 form process. That is, a department manager seeking to have an employee's wages paid by using grant funds, must first submit the request for approval on the HR-1 form. To pay from grant funds without using this process would constitute an inappropriate use of grant funds. (Testimony of Grant Director).

15. Pursuant to University policy, even if a HR-1 form request has been submitted for the funding of an employee's wages, grant money cannot be used to replace the funding of that employee's wages from another source. Such would constitute supplanting. Supplanting is not an appropriate use of grant funds. (Testimony of Grant Director).

16. The grant department has no authority to complete and endorse HR-1 forms for the University's Foundation. This is the case because the Foundation is an entity separate from the University. (Testimony of Grant Director).

EVENTS LEADING UP TO GRIEVANT'S TERMINATION

17. On December 13, 2019, Grievant sent an email to Support Tech regarding a Traffic/Program Specialist position in the radio station department. The email reads as follows:

Hi [Support Tech],

Thanks for the consideration.

We would need someone temporarily until the position posts for advertising and a candidate is selected. The temporary position could begin as soon as January 2, 2020 and run through March 1, 2020. It may take a while to get it posted since we are going on Christmas break for about two weeks.

The salary is \$38,100 per year and I have attached the Employee Work Profile for the position. Below is the link for the software we currently are using and there is a demo. The current staff member's last day is next Tuesday although she has resigned effective 1/9/20. Therefore, we will need someone ASAP.

<https://www.nat-soft.com/>.

Thank you.

Best regards,

[Grievant]

[Grievant]
General Manager
WNSB
[address]
757 [xxx-xxxx]
[Grievant's email address]

(A Exh. 3 at 1).

18. As referenced in the email above, Grievant informed Support Tech that the salary for the position mentioned in the email would be \$38,100.00. However, as of December 13, 2019, HR had not approved the salary for this position. (Testimony of (Human Resource Business Partner)

Moreover, considering the process for hiring a new employee for the university takes about 60 days, it was not realistic for Grievant to inform Support Tech in the Dec. 13, 2019 email that Support Tech could begin work on Jan. 2, 2020. (Human Resource Business Partner).

19. On January 15, 2020, Grievant sent Support Tech another email which reads as follows;

Good morning [Support Tech], yes we are still on point. Your start date would be February 3, 2020 as a temporary full-time Program Specialist/Traffic Coordinator who will be responsible for the attached duties. By March, no later than April, the position will be advertised and you are welcomed to apply.

Please let me know if you have any questions.

Best regards,

[Grievant]

(A Exh. 3 at 15).

20. Grievant attached the Employee Work Profile (EWP) or job description to the email sent on January 15, 2020. (A Exh. 3 at 15). It is against Agency policy to provide a EWP to an individual not yet employed by the University. (Testimony of HR Business Partner).

21. Grievant's email sent on January 15, 2020, that stated Support Tech would be starting on February 3, 2020, constituted an offer of employment. However, as of January 15, 2020, HR had not approved an offer of employment for Support Tech. Neither had the university approved Support Tech on February 3, 2020, to work in any capacity, full time or part time. (Testimony of HR Business Partner).

22. On January 22, 2020, Grievant sent Support Tech another email. This email inquired if Support Tech could attend a procurement training seminar being held on January 28 and 30, 2020. At the time of this email Support Tech had not been hired by the university. Also, under University

policy, only employees of the university were eligible to participate in the training. (A Exh. 3 following yellow sheet, pp. 1-2; Testimony of Associate Director of Procurement Dept.).

23. Grievant attempted to register Support Tech to take part in the procurement training even though Support Tech was not yet an employee of the university and was not reasonably expected to be one by the training days. (*Id.*; Testimony of Associate Director of Procurement Dept.; Testimony of HR Business Partner).

24. Grievant, replaced Former Support Tech with Support Tech on or about February 3, 2020. (Testimony of Grant Director). Grievant's hiring of Support Tech was not conditioned upon Support Tech completing the I-9 Form, undergoing a criminal background check, and participating in an orientation. None of the forementioned was accomplished for Support Tech's February 3, 2020- hire. Moreover, no budget analysis had been conducted to determine Support Tech's salary and none had been determined. Accordingly, HR did not authorize Support Tech's hiring on February 2, 2020. (*Id.*).

25. Support Tech did not suspect that Grievant had unofficially hired Support Tech on February 3, 2020,. Support Tech's past experience with applying for jobs and being hired was with non-government employers. In this sector she had experienced more simplified procedures during the hiring process which were to some extent similar to the ones used by Grievant. (Testimony of Support Tech).

Support Tech understanding was that she was being hired as an employee to fulfill the job of Former Support Tech, who had been employed with the university but (per Grievant's email) had resigned. After reading the emails from Grievant dated December 13, 2019 and January 15, 2020, Support Tech came to the conclusion that the position was for an employee not an independent contractor. Support Tech arrived at this conclusion in part because at least one of Grievant's emails used the term "need to apply." Support Tech associated this terminology with employment, not as an individual providing services to the university as an independent contractor. Further Support Tech had been provided an EWP of the position by Grievant. When Support Tech accepted the position offered by Grievant, Support Tech believed she was an employee and that that employment could lead to a full-time position per Grievant's email. Support Tech had no interest in being an IC and did not apply to be one. (Testimony of Support Tech; (A Exh. 3 at 1).

26. Support Tech started working for Grievant in the radio station February 3, 2020. In an attempt to get paid, on February 12, 2020, Support Tech presented herself to the office of Grant Director with several documents. She arrived there at the direction of Grievant. Support Tech informed director's staff that Support Tech had been working but had not received compensation for her work. Support Tech delivered to Grant Director's staff that day in the office an HR-1 form requesting payment for work performed in the radio station department. Support Tech also delivered two other items: a package advertising the position of Former Support Tech; and an HR-1 form requesting that Former Support Tech be formally separated from her job. (Testimony of Grant Director).

27. Grant Director did not process two of the document requests. Specifically, Grant Director did not process the HR-1 form asking that Support Tech be paid with grant funds. Grant Director

determined that certain conditions had not been met and she was unable to process the HR-1 form request for wages. For one, no HR-1 separation form for Former Support Tech had been completed. Thus, Former Support Tech had not been officially separated from the job and the grant. Further, there was no HR-1 form completed illustrating that Grievant had been selected as the new hire to replace Former Support Tech. Hence, the paperwork showing Support Tech had been hired for the position and consequently ripe to be paid was incomplete. (Testimony of Grant Director).

In addition, the grant director determined there were errors in the paperwork pertaining to the request to advertise Former Support Tech's position. Accordingly, Grant Director returned this paperwork to Grievant for correction. (Testimony of Grant Director).

28. Support Tech worked practically the entire month of February 2020 for the Agency in Grievant's department. As previously stated, Grievant believed she was working as an employee of the agency. By February 28, 2020, Support Tech had not been paid for any of her work. On several occasions she submitted vouchers to be paid. Finance department or payroll during the month of February 2020 had given Support Tech various reasons as to why her vouchers had not been processed. On February 28, 2020, Support Tech became upset at work about having not been paid any wages for a month. (Testimony of Support Tech; Grievant's proffer regarding Foundation Witness 1).

29. Grievant was aware of Support Tech being upset. She and Support Tech discussed the matter. Then on February 28, 2020, Grievant wrote Support Tech a personal check for \$1,000.00 to pay Support Tech for her work. On this check, Grievant wrote "loan" in the memo column. Regardless, Support Tech understood she was being paid for work performed. (Testimony of Support Tech) .

30. No taxes were withheld from the \$1000.00 check. The agency is required to withhold income, Medicare, and social security taxes from an employee's wages and to timely report earnings and submit taxes withheld. An employer failing to do so subjects itself to penalties and other liabilities for nonadherence to this policy. (Testimony of Payroll Manager; A Exh. 3, following pink sheet, p. 4; G Exh. P. 21; A Exh. 4, following blue sheet).

31. By March 2020, Support Tech received about two checks for work she had performed for the university's radio station. Grievant paid Support Tech with funds from University Foundation. Grievant was not authorized to pay Support Tech from Foundation funds. Due to the COVID-19 Pandemic locking down the state and nation, Support Tech did not work again until University officially hired Support Tech as a full time employee on September 10, 2020. (Testimonies of Support Tech and Grant Director; A Exh. 2, following green sheet, p. 4).

32. By letter dated September 4, 2020, University offered Support Tech full-time employment, effective September 10, 2020. September 10, 2020, was Support Tech's official start date as an employee of University. It was also her date of orientation. (Testimony of HR Business Partner; A Exh. 3, following blue sheet, pp. 5-11).

33. Once hired in September 2020, Grievant soon completed an I-9 form, provided Direct

Deposit information, completed Orientation, and underwent a background check. (Testimony of Support Tech).

34. Orientation, among other things, addressed ethical behavior in the workplace. One ethical principle discussed was the prohibition on loaning an employee's credential to others. During the time Support Tech worked for Grievant in the radio station, Grievant loaned her credentials to Support Tech to enable Support Tech to get around campus. At the time, Support Tech was not aware that this was a violation of University Policy. (Testimony of Support Tech).

35. Support Tech has never worked for University as an IC or independent consultant. (Testimony of Associate Director of Procurement Dept.; Testimony of Support Tech indicating she never pursued work at the agency as an IC).

36. Support Tech has never been hired by University as a temporary employee. (Testimony of Associate Director of Procurement Dept.)

OTHER

37. Payroll manager has been in her position with the agency for over six years (Testimony of Payroll Manager).

38. Human Resource Business Partner is employed in the HR department of the university. She assists HR in recruitment and hiring of employees for the university, among other things. She has been employed in this position since July 2019. (Testimony of Human Resource Partner).

39. HR Business Partner is not aware of radio station department using an IC and paying the IC with University Foundation funds. (Testimony of HR Business Partner).

40. Audits conducted of the radio station were not in-depth. Audits looked at sample transactions only. From that sampling the auditor did not find any problems.

41. Support Tech deposited \$500.00 in Grievant's bank account on March 17, 2020. (Testimony of Support Tech; G Exh. at 21-23).

42. University Foundation is a separate entity from the University. The Foundation has been established to aid the University.

43. On October 9, 2020, University management issued Grievant a Written Notice with removal which stated Grievant committed Group II and III offenses. (A Exh. 2).

44. Grievant's most recent evaluation rating Grievant as an extraordinary contributor. (G Exh. 12-21).

DETERMINATIONS AND OPINION

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

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

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

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.⁸

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

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

On October 9, 2020, management issued Grievant a Written Notice with termination. The notice cited Group II and III offenses. The Hearing Officer examines the evidence to determine if the Agency has met its burden.

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

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

⁸ Grievance Procedural Manual §5.8

A. Did the Grievant engage in the conduct? If so, was the behavior misconduct?

1. The university alleges that Grievant failed to follow policies and procedures.

a. Hiring Procedures

The Hearing Officer finds, the agency contends Grievant failed to follow procedures the university has established for hiring full-time, part-time, or hourly employees.

The evidence shows those procedures require the manager of a department desiring to hire staff to first complete an HR-1 form making a formal request to the university to employ staff. This form must be signed by the manager and her superior, submitted to the budgeting department for review and then to HR for review and approval of the request. Further, the manager requesting the hire must provide a finalized job description for the position, indicate how long the position is to be advertised (for part time employment this step may be eliminated), and allow time for the advertisement. Once the advertisement period has ended, all applications received for the position are printed by HR. A screening sheet established to vet the candidates based on information in their applications is then used to determine which candidates hold the most qualifications for the posted job. The candidate with the most qualifications is then selected for an interview. Interview questions are constructed by the interview committee or department manager seeking to hire. They are then submitted to HR for review prior to the interview being scheduled. The interview is then scheduled and takes place. Once a candidate is selected, the manager seeking to hire, must submit an HR-1 form requesting to hire the selected candidate. HR, not the manager seeking to hire staff, makes the offer to hire the selected candidate and indicates in that offer the salary that will be paid. University policy also requires the new hire to participate in orientation on or about the employee's start date, undergo a background check, and complete a I-9 federal form.

The evidence clearly shows that Grievant had been a general department manager for over four (4) years by February 2, 2020, and she knew or reasonably should have known the university's hiring procedures. Yet Grievant failed to follow those procedures on February 2, 2020, when she hired Support Tech. Accordingly, the hire was unauthorized and Grievant violated the university's hiring procedures.

Grievant argues that University's hiring procedures were inapplicable because Support Tech was an independent contractor (IC) and not a university employee. The Hearing Officer finds this argument is not persuasive.

Without a doubt, the evidence illustrates that Grievant hired Support Tech, albeit without authority, as an employee. The facts considered together substantiate this finding. As previously discussed, a HR-1 form must be submitted for an employee to begin to be paid wages by the university. HR-1 is not required for an IC to receive compensation. The evidence demonstrates that 10 days after Grievant hired Support Tech, Grievant directed Support Tech to deliver a request on a HR-1 form asking that Support Tech be paid using the university's Title III grant funds. Support Tech delivered this form to the director of the Title III Grant funds. But Grant Director

rejected the request and returned it to Support Tech because Support Tech was not authorized to work for the university. The fact that Grievant directed Support Tech to deliver the HR-1 so that Support Tech could receive wages indicates Grievant hired Support Tech as an employee and not IC. In addition, Grievant's December 13, 2019 email to Support Tech (then a prospective employee) referenced "the specific salary for the position," phraseology the Hearing Officer finds is normally associated with employment. In addition, Grievant provided Support Tech with an Employee Work Profile. Further, Support Tech testified credibly that her understanding from the email and conferring with Grievant was that the position referenced in the email was for part time employment with University with the possibility of the position becoming full-time.

Therefore, Grievant's argument that Support Tech was an IC is not convincing.

That said, even if the Hearing Officer determined Support Tech was an IC (for argument sake), the evidence shows Grievant also failed to follow university policy regarding contracting with an IC. Specifically, University policy requires the manager of a department seeking services from an IC to submit a request to the university's procurement department to obtain the services of an IC. The evidence demonstrates that Grievant never submitted such a request or received approval from the procurement department to retain Support Tech's services as an IC. Neither did Grievant obtain approval from the procurement department to hire Support Tech as a part time worker from a temporary agency. Further, and most notably, Support Tech never understood Grievant's communications with Support Tech to indicate Support Tech would be providing services as an IC.

Aggravating Factors

The Hearing Officer notes here several aggravating factors. For this reason, the Hearing Officer finds Grievant's failure to follow the hiring policies a serious violation tantamount to a group III offense. When Support Tech was hired by Grievant on February 3, 2020, she had not received an offer letter from HR. Further, she did not participate in orientation and agree to certain terms of employment. Moreover, Support Tech did not complete a federally mandated form the I-9. Hence, the university did not know if she was legally eligible to work for the university. Just as concerning, no background check was completed to determine if Support Tech posed a danger to the university community. Grievant had been a department manager. As such Grievant was aware of the procedure for hiring as she had undergone the process when she was hired. Yet, Grievant circumvented the process. In doing so Grievant jeopardized the safety of the community, caused the university to be non-compliant with federal law, and exposed the university to liability.

Hence, the Hearing Officer finds Grievant committed a serious violation of University policy regarding hiring employees and or retaining the services of an IC, a group III offense. *See* Standards of Conduct Policy 1.60, p. 9

b. Procedures for Paying Employees

In addition, University alleges that Grievant violated policy by paying an employee with her personal funds.

The evidence shows that University's and state's required method of paying the Commonwealth of Virginia state employees is either by direct deposit or a prepaid credit card wherein the university deposit funds in the account of the employee at a financial institution or deposits the wages on a prepaid credit card. The evidence demonstrates that on February 28, 2020, Grievant paid Support Tech by writing Support Tech a check for \$1000.00 from Grievant's personal checking account.

Grievant argues that she was not paying Support Tech wages, but rather, loaned Support Tech \$1000.00 because Support Tech check had been delayed. The evidence shows that Support Tech was upset because she had worked for a month, from February 2, 2020, to February 28, 2020, and not received payment for her work. The evidence indicates that this significant issue occurred because Grievant hired Support Tech without authority and without following proper procedures. Support Tech testified credibly that the \$1000.00 check given to her by Grievant was for the work Support Tech had done for the university. Accordingly, Hearing Officer finds the \$1000.00 check was for wages and against the established policy that employees are to be paid by the state agency by direct deposit or by placing funds on a prepaid credit card.

Having made this finding, the Hearing Officer is cognizant of Grievant's evidence showing that on March 17, 2020, Support Tech deposited \$500.00 in Support Tech's banking account. Even so, the Hearing Officer affirms her finding that Grievant paid Support Tech wages from Grievant's personal checking account.

In addition, even if for the sake of argument, Grievant's \$1000.00 check was a loan, the evidence demonstrates that loaning Grievant's subordinate money was unethical. This is the case because Support Tech would become subservient to her manager and not University, her employer, which would create a conflict of interest.

Moreover, in paying Support Tech, Grievant failed to withhold state and federal taxes as required by applicable laws. This breach in procedure and law had serious implications for the university since income taxes not withheld by an employer becomes the liability of the employer, in this case, University. Further, Support Tech could have had grounds to file a complaint against the university because taxes were not withheld. Moreover, the university was not in a position to report the wages to the Social Security Administration. Consequently, Support Tech's retirement and disability benefits calculated by the SSA may be adversely affected.

The Hearing Officer finds this procedural violation serious in nature and also tantamount to a Group III offense.

c. Procedures for Using Foundation Funds

Furthermore, the University contends that Grievant failed to use foundation funds consistent with policy.

Specifically, BOV Policy # 13 University-Related Foundations provides in pertinent part the following:

Employing University Employee. No salaries, consulting fees, loans, or perquisites shall be paid to a University employee by the Foundation without the prior written approval of the rector and University President.

(A Exh. 4, p. 8).

Grievant has admitted that she used foundation funds to pay Support Tech for her work at the radio station. As noted previously, the evidence shows this worker was an employee, although hired without permission, of the university. Accordingly, prior to Grievant using foundation funds to pay Support Tech, policy required Grievant to obtain prior written approval. Grievant failed to do so in violation of policy.

The Hearing Officer, for reasons already noted here, gives no weight to Grievant's argument that Support Tech was an IC and therefore Grievant was allowed to pay Support Tech with Foundation funds.

Grievant claims that Support Tech was providing services for the university as an IC. And therefore, Grievant had the authority to pay Support Tech using foundation funds. Evidence fails to establish this claim. As previously noted Support Tech was working as an employee of the university. Policy dictated that Grievant receive prior written approval. She did not and thus violated policy, a Group II offense. In addition, Grievant paid Support Tech wages from the foundation via check. This violated the university's policy requiring direct deposit.

2. The Agency also alleges that Grievant engaged in other misconduct.

The evidence demonstrates the Grievant engaged in unethical conduct.

Support Tech testified that when she was hired by Grievant from February 3, 2020, until the closure in March 2020 of many state agencies due to the COVID-19 pandemic. Support Tech testified that she began to feel like she was on campus illegally during that time. The reason given by Support Tech was that as she made her way around campus to complete tasks, other employees inquired of her why she had no identification badge or credentials in her possession. In addition, the evidence shows she had difficulty parking on campus because she had not been issued a parking decal. Support Tech testified credibly that at times Grievant loaned Support Tech Grievant's credentials so Support Tech could make her rounds on campus. Support Tech testified that it was not until she was hired on September 10, 2020, and participated in orientation that she became aware that an employee loaning his/her credentials to another was considered unethical and prohibited. This testimony was not refuted, by Grievant. Hearing Officer finds Grievant loaning her credentials to Support Tech unethical. Grievant knew better as she had participated in orientation when she was hired in 2015. Moreover she was a department's general manager. One can reasonably infer from her having that position, she knew better. Furthermore, as a manager Grievant's subordinates looked up to her as a leader and as such may have been persuaded to modeled her inappropriate behavior.

Unethical conduct constitutes a Group III offense. Hearing Officer finds Grievant engaged

in such.

3. Other violations

The university also alleges that Grievant's work performance was poor. Specifically, the university contends that Grievant's subordinates had threatened to quit if Grievant continued to be manager of the radio station. In addition, the university alleged that Grievant failed to complete certain tasks which caused the university to lose several grants. Having considered all the evidence, the hearing Officer finds the evidence insufficient to support these allegations.

B. Was the Discipline Consistent with Policy and Law?

According to the standards of conduct, failing to comply with policy is a group II offense. Moreover a serious violation of policy as well as unethical behavior are Group III offenses. Group III offenses normally warrant termination with a first offense. The evidence is sufficient to show both group II and group III offenses. Hence Grievant's discipline is consistent with policy and law.

II. Mitigation.

Under statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution ["EDR"]."⁹ EDR's *Rules for Conducting Grievance Hearings* provides that "a hearing officer is not a super-personnel officer" therefore, "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."¹⁰ More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

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

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

⁹ Va. Code § 2.2-3005 and (c)(6)

¹⁰ *Rules for Conducting Grievance Hearings* VI(A)

The Hearing Officer has found that Grievant engaged in the conduct described in the group notice regarding failing to follow policy, serious failure, and unethical behavior. And further, the Agency's discipline was consistent with policy and law.

Next, the Hearing Officer considers whether the university disciplined Grievant unreasonably.

Hearing Officer has considered Grievant's most recent evaluation rating Grievant as an extraordinary contributor. Hearing Officer also has considered that Grievant had worked for the university over four (4) years at the time of her termination and that audits of the radio station did not reveal any problems.

Further the Hearing Officer is cognizant of Grievant's claim of retaliation. After considering this allegation of Grievant, the Hearing Officer has determined it has not been substantiated.

After careful consideration of all the evidence whether specifically mentioned or not, the Hearing Officer finds the Agency's discipline reasonable.

DECISION

Hence, for the reasons stated here, the Hearing Officer upholds the university's discipline.

APPEAL RIGHTS

You may request an administrative review by EDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be received by EDR within 15 calendar days of the date the decision was issued.

Please address your request to:

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

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

You must also provide a copy of your appeal to the other party 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.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance

procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

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.^[1]

[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].

Entered this 3rd day of March, 2021.

Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate/Agency Representative
Grievant
EDR's Director of Hearings

^[1] Agencies must request and receive prior approval from EEDR before filing a notice of appeal.