

Issue: Administrative Review of Hearing Officer's Decision in Case No. 9793;  
Ruling Date: September 21, 2012; Ruling No. 2013-3390, 2013-3402;  
Agency: College of William & Mary; Outcome: Hearing Decision In  
Compliance.



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

**ADMINISTRATIVE REVIEW**

In the matter of the College of William and Mary  
Ruling Numbers 2013-3390 and 2013-3402  
September 21, 2012

The agency and the grievant have requested that the Office of Employment Dispute Resolution (EDR) at the Virginia Department of Human Resource Management (DHRM) administratively review the hearing officer's decision in Case Number 9831. For the reasons set forth below, EDR finds no reason to disturb the hearing officer's determination in this matter.

FACTS

The relevant facts and determinations as set forth in the original hearing decision in case Number 9831 are as follows:<sup>1</sup>

1. Until her termination on or about April 6, 2012, Grievant had been the manager of the Accounts Payable Department ("AP") of the Agency. Grievant's immediate supervisor, prior to her termination, was the Agency's Assistant Director of Financial Operations ("Agency Witness"). Agency Witness had supervised Grievant for 3 years prior to her termination.
2. On or about November 4, 2011, Grievant received her annual performance evaluation which rated Grievant's performance as unsatisfactory for the period November 2010, to October 2011.
3. Under Agency policy with the title "Performance Planning and Evaluation Policy for Operational Employee," when an employee receives an unsatisfactory job performance, the employee must be re-evaluated three (3) months after their unsatisfactory evaluation. The Performance Planning and Evaluation Policy ("agency policy/policy") became effective on February 1, 2011. No versions of this policy preceded the February 1, 2011 one.

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<sup>1</sup> Decision of Hearing Officer in Case No. 9831 ("Hearing Decision"), issued July 16, 2012, at 3-23. (Footnotes and references to exhibits, witness testimony, and calendars from the Hearing Decision have been omitted here.)

4. Three months after Grievant received her November 4, 2011 unsatisfactory job performance was February 4, 2012. Barring no tolling of the 3 month period, Grievant's re-evaluation should have been performed after February 4, 2012.
5. Grievant received a performance improvement plan on November 18, 2012, from her supervisor. It was to be utilized as the basis of Grievant's re-evaluation. At the time Grievant received the plan, she met with her supervisor and the plan was reviewed. This meeting lasted 1.5 hours.

**A. THREE MONTH PERFORMANCE IMPROVEMENT PLAN**

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

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

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

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

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

Performance Standard: Employee meets expectations when employee:

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

Goals and Timetables: Employee must begin work on projects independently, without relying on extensive direct supervisory involvement. Employee must contribute to work not specifically assigned but within scope of normal job responsibilities, including policy interpretation and development to ensure clarity of rules and application of procedures by AP staff and customers. Employee must create written guidelines aimed at the future dissemination of information, both within AP and throughout the campus community, which will improve departmental efficiency. Employee, when faced with minor changes in work situations, should not delay action until further supervisory direction is received. Employee must take independent action as appropriate and update her supervisor. Employee must demonstrate flexibility and adaptability to unique request from the campus community.

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

Performance Standard: Employee meets expectations when employee:

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

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

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

Performance Standard: Employee meets, expectations when employee:

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

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

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

Performance Standard: Employee meets expectations when employee:

- (i) provide AP staff with organized training opportunities, enabling AP staff to utilize available resources;

- (ii) utilizes training opportunities to enhance employee's own knowledge;
- (iii) understands that the employee's own development is not solely the responsibility of the agency management; and
- (iv) understands that providing and taking advantage of training and professional development is a requirement of employee's position.

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

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

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

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

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

Performance Standard: Employee meets expectations when employee:

- (i) oversees a pre-audit of travel reimbursements that occurs within 5 days of receipt in AP;
- (ii) oversees timely notification to departments of documentation issues with travel reimbursements during the pre-audit process;
- (iii) monitors travel reimbursements weekly to ensure AP technicians are pre-auditing timely; and

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

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

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

Performance Standard: Employee meets expectations when employee:

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

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

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

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

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

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

Performance Standard: Employee meets expectations when employee:

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

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

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

Performance Standard: Employee meets expectations when employee:

- (i) does not react negatively or defensively;



- (ii) works collaboratively with others; and
- (iii) respectfully and professionally addresses concerns with supervisory guidance.

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

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

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

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

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

Performance Standards: Employee meets expectations when employee:

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

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

departmental goals. Employee must develop and maintain a positive, collaborative professional outlook.

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

Performance Standards: Employee meets expectations when employee:

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

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

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

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

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

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

Performance standards: Employee meets expectations when employee:

- (i) prints, reviews and analyzes the reports necessary to produce accurate 1099-MISC reports;
- (ii) prints and mails all 1099-M ISC forms by the published IRS deadline;

- (iii) submits IRS compliant file using IRS BIRB by the published IRS deadline;
- (iv) handles all 1099-MISC inquiries from vendors; and
- (v) understands 1099-MIS C to be a core responsibility of this position.

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

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

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

### **1. Meetings**

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

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

13. The December 1, 2011 meeting concerned the Reves Center Project. The meeting was held during which time Grievant timely presented her supervisor with the completed Reves Center project.
14. The December 2, 2011 meeting was cancelled by Grievant due to it conflicting with another work place meeting/activity.

15. A meeting was also scheduled for December 8, 2012. The agenda for that meeting lists performance evaluation progress as one of the topics to be discussed at the meeting.
16. The January 6, 2012 meeting was not held because Grievant's supervisor called in sick.
17. Grievant rescheduled the January 6, 2012 meeting for January 9, 2012; however, on January 9, 2012; Grievant was out on sick leave. Grievant remained on sick leave for January 10 and 11, 2012. Thereafter Grievant was on short-term disability leave until March 26, 2012.
18. Informal meetings were held between Grievant and her supervisor during the 3-month performance plan period.

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

19. On or about December 13, 2011, Grievant's supervisor received a complaint about the lengthy time it took for a reimbursement relocation voucher to be processed by AP. The voucher had been received by AP on or about October 31, 2011, and processed on December 13, 2011. The complainer asserted that upon AP's initial finding of an error with his voucher, Grievant -as the AP manager- should have reviewed his entire voucher to prevent it from being returned to him several times for piecemeal corrections that prolonged processing the voucher.
20. No other complaints regarding moving relocation vouchers were made during the 3-month performance period. On or about December 14, 2011, Grievant met with a dean of the Agency regarding this dean's relocation reimbursement voucher. Grievant did a good job handling and processing this dean's voucher.
21. Grievant and her supervisor exchanged a series of emails from December 2, 2011, to December 4, 2011, regarding the accusation that invoices from the Agency's athletic department were not being charged by AP as requested. Grievant's supervisor deemed Grievant's emails as nonresponsive to the supervisor's request.
22. Grievant has invited Agency employees to visit the AP office so she can discuss the proper way to complete vouchers.

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

23. **Reves Center Assignment** - Grievant was out of the office on Monday, November 28, 2011. At 11:27 a.m. on that day, Grievant's supervisor

forwarded Grievant an email acknowledging Grievant was not in the office on November 28, 2011, and instructing Grievant to complete an assignment known as the Reves Center project. The supervisor set Wednesday, November 30, 2011, as the due date for the project's completion. Grievant had no prior experience performing such a project. The project was not identified on Grievant's 3-month performance plan.

24. Grievant timely completed the Reves Center project, set up a meeting with the supervisor regarding the project as instructed, and attended the scheduled meeting.
25. **CAPP Assignment** – On Monday, November 28, 2011, at 11:38 a.m., Grievant's supervisor assigned Grievant another task – the CAPP Assignment. The acronym CAPP represents Commonwealth Accounting Policy and Procedures. Usually changes to the CAPP are published in the fall, normally on or about October 1 of a calendar year. 2011 CAPP changes were published about the first week of November 2011.

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

The parties concede updating the campus community on CAPP changes fell within Grievant's job description; but, historically, Grievant's supervisor had performed this task and had never informed Grievant she expected Grievant to complete it.

Prior to Grievant receiving the CAPP assignment from her supervisor, she and her staff had advised the various departments of the Agency of the 2011 CAPP changes upon their being published.

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

of the 1099 process and becoming capable of producing the 1099s by January 31, 2012, for vendors paid in calendar year 2011.

27. Benchmarks were set for Grievant to become familiar with the testing and to complete testing of the 1099 process. Those benchmarks were April 2011, August 2011, and October 2011. Grievant's supervisor rated Grievant unsatisfactory in this area on her 2010-2011 performance evaluation.
28. The 1099 assignment comprised the "Other Assignment" competency in Grievant's 3-month performance plan. According to this plan, during the first month of the 3-month performance plan Grievant was to "work on testing the 1099 processes to prepare for actual 1099s running in PROD." According to the performance plan, the entire 1099 project (testing, production of the 1099s, and mailing them) was to be completed by January 31, 2012. The performance plan also specified that during January 2012, Grievant was required to run the actual 1099s process, review its accuracy, place documentation on the J drive, and inform supervisor of progress on a weekly basis during the month of January. Grievant was also required to communicate with her supervisor and ask any questions during the actual 1099s run. The production phase of the 1099 project takes about a month.
29. By December 15, 2011, Grievant had worked on the 1099 project for several weeks. However, she had difficulty running the program and was in need of training to process the 1099s.
30. By email dated December 7, 2011, Grievant informed her supervisor that the accounts payable staff was in need of 1099 training. She then requested 1099 training. 1099 training had previously been scheduled for April 2011, but it did not take place because Grievant's supervisor failed to attend the scheduled training session.
31. Grievant was on either sick leave or short term disability leave from January 9, 2012, to March 26, 2012.
32. On January 11, 2012, Grievant's supervisor reassigned the 1099 assignment to another team within the Financial Operations' Department.

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

33. Grievant's supervisor instituted a new policy on November 18, 2012, regarding the AP department answering telephone calls. The policy was instituted to address concerns that many telephone calls from customers to the AP department were not being answered. The new policy required the

AP department to answer all telephone calls. The supervisor informed Grievant of the new policy on November 18, 2011, and directed Grievant to inform her subordinates - AP technicians - of the new policy. The supervisor suggested to Grievant that when Grievant communicate the new policy to her subordinates that she inform them that some of the technicians were doing a good job answering the telephones.

34. Prior to the supervisor instituting the above noted policy, she had informed the technicians by email that they were not required to answer all telephone calls. This directive was provided with situations in mind when technicians were involved in tasks that required their full concentration such as processing vouchers. The supervisor did not intend for AP staff to ignore all telephone calls or answer calls only one time during their shift. The supervisor perceived that the latter was occurring. Thus, she instituted the new policy on November 18, 2011, regarding the AP staff answering telephone calls.
35. After receiving the instruction from her supervisor, on November 18, 2011, Grievant met with her subordinates and communicated the new policy regarding answering telephone calls. The subordinates had an opportunity to raise their concerns during the meeting. The supervisor was not in attendance at the meeting. Subsequent to the meeting on November 18, 2011, Grievant sent an email to her subordinates informing them of the policy change. Grievant's email to the technicians stated the following:

Ladies,

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

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

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

Thanks,  
[Grievant]  
Accounts Payable Manager

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

**C. GRIEVANT'S TERMINATION**

37. Grievant's last day of work before being terminated was January 6, 2012. Grievant was on sick leave from January 9, 2012, to January 11, 2012. Grievant was placed on short term disability leave from January 12, 2012, to March 26, 2012.
38. While Grievant was on short term disability leave, Grievant's supervisor re-evaluated Grievant on or about January 17, 2012, under the 3-month performance plan. Management, including Grievant's supervisor, met on January 20, 2012 and decided to terminate Grievant. Management waited until Grievant returned to work from her short term disability leave on March 26, 2012, to execute the termination which became effective on or about April 6, 2012.
39. Grievant's supervisor represented that she re-evaluated Grievant under the performance plan by referring to daily notes she kept on Grievant's performance to determine progress. The Agency did not provide those notes as evidence at the hearing, nor did it offer a reason for not supplying them.

Several months are needed to prepare and post a job opening. Grievant's supervisor posted a job opening for Grievant's job on March 28, 2012, two days after Grievant was notified of her termination.

**D. OTHER**

40. Grievant and Grievant's supervisor have a serious communication problem. Grievant considers her supervisor disrespectful of Grievant as AP manager. Grievant's manager deems Grievant disrespectful of her as a supervisor.
41. By e-mail dated February 16, 2012 Grievant supervisor expressed she desired to find a way to terminate grievant.
42. Grievant maintained a travel log from November 28, 2011, to January 5, 2012. The travel was in the Agency's possession at all times.
43. The Agency was closed from December 24 to January 2, 2012, for Christmas break.



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

44. In accordance with the Restructured Higher Education, Financial and Administrative Operations Act, Chapter 4.10, Title 23 of the Code of Virginia and the Management Agreement effective July 1, 2006, the agency has adopted the Performance Planning and Evaluation Policy for Operational Employee.
45. Sections VIII(C), (E) of the Performance Planning and Evaluation Policy for Operational and Employees addresses performance evaluations. These sections of the policy provide in pertinent part the following:
  - C. Unsatisfactory Performance.
    1. Employees who receive an overall performance rating of Unsatisfactory Performer are not eligible for any salary increase (see "Compensation Policy") and must have their performance reevaluated three (3) months after their unsatisfactory evaluation. Failure to improve performance to a satisfactory level typically results in termination. (See (5), below.) [sic]
    2. Within ten (10) business days of the unsatisfactory evaluation, the supervisor must develop a performance improvement plan and meet with the employee.
      - a. The Performance Planning and Evaluation Form should be used for this purpose.
      - b. The plan should include performance objectives that can reasonably be met within the 3 month period and also may include appropriate opportunities for employee development.
      - c. The employee shall receive a copy the [sic] performance improvement plan.
    3. The employee should be re-evaluated approximately 2 weeks before the end of the 3 month period.

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

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

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

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

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

#### REEVALUATION

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

#### Re-evaluation Plan:

Within 10 workdays of the evaluation meeting during which the employee received the annual rating, the employee's supervisor must develop a performance re-evaluation plan that sets forth performance measures for the following three (3) months, and have it approved by the reviewer.

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

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

Three month reevaluation:

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

If performance does not improve:

If the employee receives a re-evaluation rating of “Below Contributor, ” the supervisor shall demote, reassign, or terminate the employee by the end of the three-month reevaluation.

Demote, or reassign:

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

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

Reduce Duties:

As an alternative, the agency may allow the employee who is unable to achieve satisfactory performance during the re-evaluation to remain in his or her position and reduce the

employee's duties. Such a reduction should occur following and based on the reevaluation and must be accompanied by a concurrent salary reduction of at least 5%. (See policy 3.05, Compensation).

Terminate:

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

Disciplinary action:

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

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On March 26, 2012, the Agency terminated Grievant for failure to complete her 90 day performance plan.<sup>2</sup>

On April 3, 2012, Grievant timely filed a grievance to challenge the Agency's action. The Grievant was dissatisfied with the outcome and requested a hearing. On May 9, 2012, the Department of Employment Dispute Resolution ("EDR") assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference ("PHC") was held on May 16, 2012, and subsequently a scheduling order was issued. The hearing was held on June 14, 2012.<sup>3</sup>

In a July 16, 2012 hearing decision, the hearing officer vacated the agency's termination and fully reinstated the grievant to her former position.<sup>4</sup> The hearing officer granted the grievant's request and the agency's request for reconsideration and issued a reconsideration decision on August 14, 2012.<sup>5</sup> In her reconsideration decision, the hearing officer ordered the agency to reinstate the grievant to her former position, or if occupied, to an equivalent position.<sup>6</sup>

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<sup>2</sup> Hearing Decision at 1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 32.

<sup>5</sup> See Reconsideration Decision of Hearing Officer ("Reconsideration Decision"), Case No. 9831, issued August 14, 2012.

<sup>6</sup> Reconsideration Decision at 6.

In addition, the hearing officer ordered the agency to pay the grievant full back pay minus any interim earnings, and to restore the grievant's benefits and seniority.<sup>7</sup> Both parties now seek administrative review from EDR.

### DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and “[r]ender final decisions ... on all matters related to procedural compliance with the grievance procedure.”<sup>8</sup> If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of a party; the sole remedy is that the action be correctly taken.<sup>9</sup>

#### *Grievant's Request for Reconsideration for Back Pay and Reinstatement of Benefits and Agency's Request for Reconsideration to Reinstate Grievant to Similar Position*

The agency challenges the hearing officer's consideration of the grievant's request for reconsideration regarding back pay and reinstatement of benefits. Specifically, the agency asserts that the hearing officer should not have granted the grievant's request for reconsideration because it alleges: 1) the hearing officer found no entitlement to back pay, and hence, an award of back pay cannot be authorized; 2) the agency already compensated the grievant for her accrued leave; and 3) the omission of the relief on the grievant's Grievance Form A was not an error that should be corrected upon administrative review. The agency cites to Section 5.9 of the *Rules for Conducting Grievance Hearings* (the “Rules”) to suggest that the hearing officer should only consider the relief requested in the written grievance.

As a general rule, full back pay (less interim earnings) should be awarded when an employee is reinstated after prevailing at hearing.<sup>10</sup> Moreover, the *Rules* provide that “the hearing officer is not limited to the specific relief requested by the employee on the Form A.”<sup>11</sup> Thus, we cannot find that the hearing officer erred by granting relief not expressly referenced on the Form A in this case. Simply because the grievant is eligible for back pay, however, does not automatically entitle her to full back pay for the entirety of the reinstatement period.<sup>12</sup> Under the *Grievance Procedure Manual* (the “Manual”), the hearing officer may award full, partial, or no back pay.<sup>13</sup> For example, in some cases an agency may be able to show, by a preponderance of the evidence, that the grievant would not have been employed by the agency for all or part of the reinstatement period, regardless of any agency action such as termination. In such cases, an award of full back pay may constitute an inappropriate windfall to the grievant and an inappropriate punitive action against the agency. The amount of back pay, if any, to be awarded

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<sup>7</sup> *Id.*

<sup>8</sup> Va. Code § 2.2-1202.1(2), (3), and (5).

<sup>9</sup> See *Grievance Procedure Manual* § 6.4(3).

<sup>10</sup> EDR Ruling No. 2009-2342.

<sup>11</sup> *Rules for Conducting Grievance Hearings* § VI(A).

<sup>12</sup> See EDR Ruling No. 2009-2342.

<sup>13</sup> *Grievance Procedure Manual* § 5.9(a).

in such a situation is within the hearing officer's discretion, taking into consideration these general principles as applied to the particular facts and circumstances of the case.

In her reconsideration decision, the hearing officer held the "appropriate relief in this case also includes back pay and restoration of appropriate benefits" pursuant to Section 5.9(a) 3 and 4 of the *Manual*.<sup>14</sup> Accordingly, EDR does not find the hearing officer abused her authority or discretion in ordering this relief upon reconsideration. However, to the extent the agency argues the grievant was already paid for her accrued annual leave at her separation from employment and/or that the agency should not be required to restore the grievant's sick leave that had accrued as of her termination, it appears that the hearing officer made an attempt to make the grievant whole from the time of her termination. As such, the agency must determine what back pay and corresponding benefits should be due to the grievant. If the grievant challenges the agency's determination, then the grievant may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of the hearing officer's final decision to grant the grievant back pay and "appropriate back benefits."<sup>15</sup>

The agency also challenges whether the hearing officer's instruction to reinstate the grievant to her former position failed to comport with the *Manual* and requests that if the agency is required to reinstate the grievant, then it may be authorized to reinstate her to an objectively similar position. In her reconsideration decision, the hearing officer amended her reinstatement order and instructed the agency to return the grievant to her former position, or if the position is filled, to an equivalent position pursuant to Va. Code § 2.2-3005.1(A).<sup>16</sup> As such, this particular issue is now moot and need not be addressed in this ruling.

### *Scope of the Grievance*

Citing to Section 2.4 of the *Manual*, the agency alleges that the hearing officer expanded the scope of the administrative hearing beyond the issue raised by the grievant in her April 3, 2012 grievance by including additional claims in her hearing decision (i.e. the merits of the grievant's performance improvement plan) that were neither raised by the grievant, nor could they have been, as they were time-barred. Specifically, the agency asserts that the grievant was time-barred from raising a performance improvement plan challenge because the agency issued it on November 18, 2011, and the grievant would have had to file a grievance challenging that action by December 18, 2011, which she did not. As such, the agency challenges whether the hearing officer can "be permitted to append to a grievance issues that a grievance does not choose to bring, nor include claims that a grievance is not allowed to raise."

The *Manual* states, "[o]nce the grievance is initiated, additional claims may not be added."<sup>17</sup> EDR has interpreted this language as preventing grievants from challenging new or different management actions in a grievance once initiated.<sup>18</sup> The management action the

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<sup>14</sup> Reconsideration Decision at 6.

<sup>15</sup> *Grievance Procedure Manual* § 7.3(c).

<sup>16</sup> Reconsideration Decision at 6.

<sup>17</sup> *Grievance Procedure Manual* § 2.4.

<sup>18</sup> See, e.g., EDR Ruling Nos. 2007-1561 & 2007-1587; EDR Ruling No. 2007-1457; EDR Ruling No. 2007-1444.

grievant challenged in her April 3, 2012 grievance was the agency's termination, which the agency alleges was *because of* the grievant's inability to meet the objectives of her 90 day performance improvement plan from November 4, 2011 through February 4, 2012. Therefore, whether she met or could meet the objectives of her performance improvement plan are naturally underlying considerations of this termination claim and clearly within the scope of the hearing officer's consideration in this case. It appears that the hearing officer would not have been able to render a final decision without considering such evidence. As such, we do not find the five underlying issues addressed by the hearing officer in her decision as a case of acting upon additional claims, but rather outlines how the hearing officer considered the evidence in rendering a final decision about whether the agency's termination was warranted under the circumstances.

### *Factual Findings/Deference*

The agency alleges that the hearing decision "is rife with examples of the Hearing Officer's failure to respect the 'exclusive right' of the Agency to manage its affairs" and instead reflects the hearing officer's "substitution of her judgment for that of the Agency." For example, the agency states that the hearing officer "demonstrated a vast indifference to the goals and priorities of the Agency" with regards to testing and producing the Form 1099 task as well as her "dismissal of the [agency's] performance improvement plan" as unreasonable. As such, the agency challenges that the hearing officer "demonstrated a critical misunderstanding of the evidence presented at the hearing."

Hearing officers are authorized to make "findings of fact as to the material issues in the case"<sup>19</sup> and to determine the grievance based "on the material issues and grounds in the record for those findings."<sup>20</sup> Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Here, the agency essentially argues that the hearing officer should have given deference to the agency's explanation of how it conducted the grievant's performance improvement plan and should have found its explanation to be more credible than the grievant's testimony at hearing. However, the determination of witness credibility is left entirely to the hearing officer as the finder of fact. It is the job of the hearing officer, as she expressly states she did here,<sup>21</sup> to consider the credibility of witness testimony and to weigh the evidence under the totality of the circumstances and make factual findings. EDR has repeatedly held that it will not substitute its judgment for that of the hearing officer where the facts are in dispute and the record contains evidence that supports the version of facts adopted by the hearing officer, as is the case here.<sup>22</sup> EDR declines to depart from that long-standing precedent.

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<sup>19</sup> Va. Code § 2.2-3005.1(C).

<sup>20</sup> *Grievance Procedure Manual* § 5.9.

<sup>21</sup> Reconsideration Decision at 2-4. *See also* Hearing Decision at 24-25.

<sup>22</sup> *See, e.g.*, EDR Ruling No. 2012-3186.



In considering all of the evidence, the hearing officer found, in short, that the expectations laid out by the agency for the grievant in her three month performance improvement plan were unreasonable and unattainable, especially in light of the agency's Performance Planning and Evaluation Policy for Operational Employees which states that "[t]he fact that an employee has taken [short-term disability] leave cannot have a negative impact on the employee's overall performance rating."<sup>23</sup> As noted in the Reconsideration Decision, the hearing officer emphasized that the grievant was on short-term disability from January 9, 2012 through March 26, 2012, and hence, it was impossible for her to successfully perform some of the tasks outlined in the 90 day performance improvement plan.<sup>24</sup> Moreover, the hearing officer found that "it was unreasonable to expect Grievant to complete both testing and production of the 1099s during the time allotted during the 3 month performance period,"<sup>25</sup> especially because "the supervisor presented inconsistent expectations of Grievant with regard to the assignment."<sup>26</sup> The hearing officer elaborated that the performance plan was unreasonable "because the supervisor failed to communicate in the plan her expectations regarding the 1099 assignment" to the grievant.<sup>27</sup> In addition, the hearing officer found that the grievant's supervisor evaluated the grievant three weeks before the three-month period concluded and before the 1099 assignment was even due.<sup>28</sup>

Although agency determinations with regard to evaluating employee performance are due a degree of deference, this is not a case where the hearing officer has failed to give the appropriate level of deference or otherwise intruded upon the "exclusive right" of the agency to manage its affairs. Rather, under the facts, the hearing officer has essentially determined that the agency's re-evaluation of the grievant's performance<sup>29</sup> and her resulting termination were arbitrary and capricious. Even setting aside the hearing officer's other bases for making her determinations, which are supported by the record, the apparent negative impact that the grievant's period of disability leave had on the evaluation alone would justify the result in this case. The hearing officer's consideration of that issue can lead to no other outcome regardless of the level of deference being granted.<sup>30</sup> In short, the hearing officer has not abused her discretion in making these record-supported findings, and EDR is unable to interfere in the decision on this basis.

### *Inconsistency with Agency Policy*

The agency alleges that the hearing officer "rejected the Agency's interpretation of its own policy on the basis of her own sensibility of what the policy should provide" and "offered

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<sup>23</sup> See Agency Exhibit 9A, *William & Mary's Performance Planning and Evaluation Policy for Operational Employees*, page 9.

<sup>24</sup> Reconsideration Decision at 3.

<sup>25</sup> Reconsideration Decision at 2.

<sup>26</sup> Reconsideration Decision at 3. See also Hearing Decision at 24-25.

<sup>27</sup> Hearing Decision at 25.

<sup>28</sup> *Id.* at 25-26.

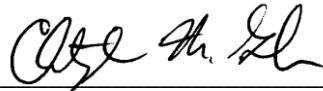
<sup>29</sup> Hearing Decision at 32.

<sup>30</sup> Whether the hearing officer's consideration of this issue is consistent with agency policy is a matter for DHRM to address. See *infra*.

no deference to the Agency's interpretation or its policy, its goals and expectations of the Grievance, and the importance it attached to certain tasks." EDR has no authority to assess whether the hearing officer correctly interpreted the agency's "Performance Planning and Evaluation Policy for Operational Employees" in rendering her decision. The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy. The DHRM Director has the authority to interpret all policies affecting state employees, and to assure that hearing decisions are consistent with state and agency policy. It appears the agency has raised this challenge in a separate request for administrative review to the DHRM Director and is awaiting DHRM's final decision.

### CONCLUSION AND APPEAL RIGHTS

Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.<sup>31</sup> Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.<sup>32</sup> Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.<sup>33</sup>



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<sup>31</sup> *Grievance Procedure Manual* § 7.2(d).

<sup>32</sup> Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).

<sup>33</sup> *Id.*; see also *Virginia Dep't of State Police v. Barton*, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).