



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12114, 12125, 12126

Hearing Date: July 11, 2024

Decision Issued: September 6, 2024

PROCEDURAL HISTORY

On November 1, 2023, Grievant received a "Below Contributor" rating on her annual performance evaluation. On January 30, 2024, Grievant was issued a Group II Written Notice of disciplinary action for failure to follow instructions or policy. Grievant was removed from employment effective March 6, 2024, following an unsatisfactory three-month re-evaluation period.

On December 1, 2023, Grievant timely filed a grievance to challenge the Agency's assignment of a "Below Contributor" rating on Grievant's annual performance evaluation. On February 1, 2024, Grievant timely filed a grievance to challenge her receipt of the Group II Written Notice of disciplinary action. On March 25, 2024, Grievant timely filed a grievance to challenge the Agency's dismissal of Grievant following the three-month re-evaluation period. On April 15, 2024, the Office of Employment Dispute Resolution qualified in part and consolidated Grievant's grievances for hearing.¹ On April 22, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On July 11, 2024, a hearing was held at the College's main campus.

APPEARANCES

Grievant
Grievant's Counsel
College's Counsel

¹ See EDR Qualification and Consolidation Ruling Nos. 2024-5656, 5679, 5683 (April 15, 2024).

College Party Designee
Witnesses

ISSUES

1. Whether the College's evaluation of Grievant's performance was arbitrary or capricious?
2. Whether the College's re-evaluation of Grievant's performance was arbitrary or capricious?
3. Whether the College complied with State policy (DHRM Policy 1.40) to remove Grievant from employment?
4. Whether Grievant engaged in the behavior described in the Group II Written Notice of disciplinary action and whether the behavior constituted misconduct?
5. Whether the College's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g. properly characterized as a Group I, II or III offense)?
6. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the College to show by a preponderance of the evidence that its evaluation and re-evaluation of Grievant's performance were not arbitrary or capricious and that it complied with State policy to remove Grievant. The burden of proof is on the College to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses and any evidence of mitigating circumstances related to discipline. Grievance Procedure Manual ("GPM") § 5.8. 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 the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Prior to her dismissal, Grievant was the Coordinator of Events and Conferences for a College within the Virginia Community College System (College or Agency). Grievant had been in that position since August of 2021. During her employment with the

College, Grievant primarily worked at a Facility that was off-site from the College's main campus.

The Facility was owned by an Education Foundation created to support the College. The Facility included a retail store and event space.

On or about May 24, 2023, Supervisor heard feedback from community members regarding issues related to Wedding Event-1 which had been hosted at the Facility during the prior week. Around that time, Supervisor also received a message from the groom asking to meet with Supervisor regarding Wedding Event-1. Before meeting with the couple, Supervisor advised Grievant that she had heard concerns about Wedding Event-1 and received Grievant's perspective on the event. On May 26, 2023, Supervisor met with the couple who had rented the Facility for Wedding Event-1.² Supervisor sent an email to Grievant that same day making her aware of the concerns the couple had shared, providing instructions with respect to payment related to Wedding Event-1, and providing Supervisor's suggestions going forward. With respect to improvements moving forward, Supervisor noted the following:

I think there were misunderstandings on both sides of this issue. Obviously, with alcohol involved, tensions run higher. On our side, it would be better to ensure payment is made beforehand, but if not, we must be very cautious of mentioning anything with regard to payment to anyone other than the individuals who have signed the contract as that could be considered slander/liable. We should probably work with campus housekeeping or another entity to ensure that the venue is cleaned before and after every event.³

The evidence suggested that Grievant acknowledged that she had not ensured that payment was received in advance of Wedding Event-1 and had been overheard mentioning to the bride that money was still owed. Grievant also admitted that, at the request of the third-party disc jockey hired by the couple, Grievant presented the disc jockey's contract to the bride for signature on the day of Wedding Event-1.⁴

The couple who had rented the Facility for Wedding Event-1 also had advised Supervisor that their family and friends had posted or intended to post bad reviews of the Facility on "Google." Around this same time, Supervisor became aware of other bad reviews for the Facility related to a holiday party held at the Facility in December 2022.

When Supervisor was reviewing the shared Facility calendar to try to find a date to host Fundraising Event-1 at the Facility, Supervisor noticed that Grievant was no longer posting Facility employee schedules and hours on a shareable calendar that could be viewed by Supervisor and that had been part of an improvement plan that Grievant received in March of 2022.⁵ Supervisor testified that she asked Grievant to start posting Facility staff hours and events on the Facility's shared calendar again and Grievant

² Hearing Recording at 34:17-44:20.

³ Agency Ex. at 495-496.

⁴ Agency Ex. at 104-119.

⁵ Hearing Recording at 44:15-52:10 and see Agency Ex. at 575-578.

agreed to do so. When Supervisor noticed that staff hours and events still were not on the Facility's shared calendar, on August 2, 2023, Supervisor sent an email to Grievant asking Grievant to add the schedules to the shared calendar or send Supervisor an email each week.⁶ Grievant replied that she did not realize Supervisor had wanted Grievant to continue to put the Part-Time Employee's schedule on the shared calendar since Grievant was now supervising the Part-Time Employee and responsible for approving her time.⁷ Supervisor responded by email that "it would be helpful to know when either you or [Part-Time Employee] is working since I am not able to be at the [Facility] with you all in person. You are [Part-Time Employee's] direct supervisor, but I still need to know how the [Facility] is covered whether by you or any of our part-time employees."⁸ Grievant then replied that

[m]y schedule has not changed. I work Tuesday-Saturday and take Sunday and Monday off. If I take Saturday off (with coverage), I work on Monday. As with any exempt position, I often field phone calls/emails outside of normal business hours as needed. I am always available to ensure the success of the [Facility]. I understand the importance of ensuring the [Facility] is fully staffed and I will be happy to provide you with [Part-Time Employee's] schedule. At least one of us is always present during the regular [Facility] hours and events. Has there been a specific incident or concern that I am not aware of? If so, please let me know so it can be addressed.⁹

Supervisor responded by email to Grievant that: [t]here is no specific incident that you need to be aware of. I asked you when you started working to put your schedule and part-times schedule on the calendar and you have stopped doing that. Now, I'm asking you again to start putting the days and hours that you work on the calendar. Is there a particular reason that you stopped doing that?" Grievant replied:

I am sorry that there is so much confusion regarding this situation. I don't recall having a conversation in reference to employee hours with the exception of our meeting March of 2022. In response to the Employee Performance Plan I was given, I did state that I would put our part-time employee hours on the calendar created for the [Facility] by [Educational Foundation Executive Director]. My understanding is that was for the purposes of coverage and timesheet approval. I stopped doing that in the end of January 2023 when I was given the responsibility as the supervisor to approve their time. I have added our schedules to the August calendar.¹⁰

On August 11, 2023, Supervisor sent another email to Grievant regarding the posting of her schedule on the shared calendar:

Thank you for putting that you work Tuesday through Saturday on the calendar. I would like you to add your actual hours each day. For example,

⁶ Hearing Recording at 44:15-51:51.

⁷ Agency Ex. at 532.

⁸ Agency Ex. at 532.

⁹ Agency Ex. at 531-532.

¹⁰ Agency Ex. at 531.

Tuesday through Friday, 10 am – 6 pm, and Saturday, 9 am – 11 pm, with a one-hour lunch each day, would be a 40-hour week. Or some variation of a 40-hour-per-week schedule. If changes are needed, you may send those to me for approval.¹¹

Grievant replied to Supervisor that . . . “Sorry again for the confusion. I thought you were asking for my weekly schedule. I was unaware that exempt employees are required to report hours? If I am required to report hours, should it be entered through the HR Management system like other employees?”¹²

On August 17, 2023, Grievant sent an email to Supervisor regarding Grievant’s schedule, writing:

Per your request below are my actual worked hours this week (excluding off-site phone calls/texts/emails) which I have not been informed need to be logged to this point. However, should you desire that I keep a log of tasks that I have performed outside normal/scheduled business hours, I would be happy to do that. I have derived from your previous emails that you desire I take a daily lunch. However, I am unclear as to how we can make this happen because we often do not have coverage to allow for a break. I am shocked that you would perceive that I would be working less than 40 hours a week. The facility could not operate as understaffed as we are if I worked less than 40 hours a week. For example, tomorrow [a part-time employee] is scheduled to be off. I will be here from 10:00 AM until after the end of the event (The event starts at 4:00 PM). I will at a minimum be working 8 hours tomorrow without a lunch break and I have no way to determine how long this event will last. After the conclusion of tomorrow’s event, I will have to break down, clean, and set up for the large event occurring on Saturday. . . . Is the format that I listed in this email an acceptable way to report my hours? . . . ¹³

Supervisor replied to Grievant by email that same day:

There is no need for you to send me a log of tasks that you perform outside of your normal schedule as you are salary and those tasks may or may not count toward your actual hours. There was no Friday event listed on the shared calendar, so obviously there is no reason for me to know that you worked until 9:15 that evening. [Part-Time Employee] is listed as working from 12-6, so you should have been able to take a lunch earlier in the day.

This is an acceptable way for you to report your hours, but I also want to see them on the shared calendar. If you need help making a schedule that will allow you to take a lunch break when required, I can help you. We could also arrange for someone to come down and cover for you to take a lunch,

¹¹ Agency Ex. at 530.

¹² Agency Ex. at 530.

¹³ Agency Ex. at 526-527.

but I cannot do that if I don't know what is scheduled, what you are scheduled, and who else might be there. Thus, the request for you to start putting your and [part-time employee's] schedule on the calendar again.¹⁴

After multiple email exchanges and several days, Grievant began putting the Facility staff hours and events on the Facility's shared calendar as instructed.¹⁵

On September 7, 2023, Supervisor received an email from a College employee who had rented the Facility for Baby Shower-1. The employee wrote:

I truly hate having to send this email, but I have had a situation arise that I believe you should be made aware of. I was originally planning to have my baby shower at the [Facility] on October 14th. Mom and I met with [Grievant] several weeks ago to look at the venue and discuss pricing. In previous emails, she stated she had booked us for October 21st and would go over details when we toured the venue. Once we toured and discussed details, we decided to go ahead and fill out our contract. However, October 21st was no longer available, and she had booked another event that day. We worked on finding an alternative date for the shower. She stated that she had an event planned for the evening of October 14th, but if I was willing to change the time of my shower and could be out no later than 5PM, we could make it work. I agreed because my heart was truly set on the [Facility]. [Grievant] adjusted the price to \$300 from \$350 and would allow me to come Friday evening to decorate since I was accommodating the date and time change. She also offered decorations at an additional cost if I wanted, Last week I texted [Grievant] to ask a couple of questions regarding the shower. I did not hear back from her, so I emailed her yesterday with the same questions. She responded to my email yesterday afternoon and explained that we would no longer be able to come on Friday, which was not a big deal, and stated that she could no longer provide the balloon arch nor guarantee that the tables and chairs would be set up by 11AM on Saturday morning. As stated before, my heart was set on the [Facility] because of its beauty and history. I asked if I could bring family and friends in on Saturday morning to assist with the set-up, and if I could have a discount on the venue since the original price included the set-up of tables and chairs. At this point I was fine without the additional decorations and was more than willing to come early to assist with setting things up to help her since she has the [Regional Event-1] on Friday evening. [Grievant] responded "no" and told me she would do everything she could to have things set up by 11AM on Saturday morning. I was truly afraid that we would get there at 11AM on Saturday and things would not be set up. There were too many inconsistencies in trying to book the venue, concerns about set-up, and lack of ability to offer additional decorations that were already discussed and purchased for her to use. We have decided to utilize a different venue, and I have let her know. My concern is that I am not the only person this has

¹⁴ Agency Ex. at 526.

¹⁵ Hearing Recording at 44:15-51:51.

happened with. The lack of organization and professionalism is a true concern.

I would like to say that [another College campus event coordinator] worked with me today to secure [a College campus event site] for the baby shower. Within an hour [the other College campus event coordinator] sent the appropriate documents needed to secure the area and is working with me to make sure everything is ready for that day.

Please know that I truly appreciate you, your employees, and all that you do for the college and our community. I apologize for the complaint. I just wanted you to be aware of the situation.¹⁶

Because of Supervisor's concerns with Grievant's performance, Supervisor met with Grievant on August 31, 2023, and September 8, 2023 to discuss Grievant's performance and put Grievant on a performance improvement plan. The discussion extended over a few meetings and Supervisor provided Grievant with a Notice of Improvement Needed/Substandard Performance, including a Performance Improvement Plan that was dated September 8, 2023, and signed by Grievant on September 14, 2023.¹⁷ The Performance Improvement Plan set forth specific standards of performance, examples of where standards had not been met, and plans for improving performance.

On October 12, 2023, Grievance submitted a grievance alleging that Supervisor had violated DHRM Policy 2.35, Civility in the Workplace by engaging in bullying behaviors. Grievant also alleged that Supervisor violated DHRM Policy 2.10, Hiring.

On November 1, 2023, Grievant received her Annual Performance Evaluation¹⁸ which gave Grievant an overall rating of Below Contributor as follows:

Core Responsibilities - Rating Earned	Core Responsibilities - Comments on Results Achieved
B. Below Contributor	25% Planning – See Attached ¹⁹ Develop and execute a business plan for maximizing the use of facilities and services to generate additional income Increase outside revenue for the [Facility] Prepare and calculate monthly reports in a timely manner – BC Establish and maintain client/customer relations – BC Design, negotiate, and draft contracts – BC

¹⁶ Agency Ex. at 551.

¹⁷ Agency Ex. at 477-482.

¹⁸ Agency Ex. at 16-21.

¹⁹ The Annual Performance Evaluation included an attached Word document titled "[Grievant] – 2023 Classified Evaluation – Attached Documentation."

C. Below Contributor	35% Coordination – See Attached ²⁰ Direct and coordinate services and activities to support the smooth business operations of the [Facility] – BC Assures set-up, media, and food requests happen. – C Create, implement and enforce policies and procedures for the use of facilities and services – BC Supervisor put together Standard Operating Procedure in September 2023 for implementation
D. Below Contributor	15% - Scheduling – See Attached ²¹ Works with end users to resolve conflicts – BC Create, implement and enforce guidelines for prioritizing events. Acts as chief scheduler for all meeting and function space – BC.
E. Contributor	20% Oversee [Facility] and daily business operations; Supervise [Facility] employees and scheduling; Manage inventory and sales; Build relationships with local artisans and craftspeople to support the arts in the region with a goal of becoming self-sustaining.
F. Contributor	5% May be required to perform other duties as assigned. May be required to assist the agency or state government generally in the event of an emergency declaration by the Governor.

Special Assignments - Rating Earned	Special Assignments - Comments on Results Achieved
G. Contributor	Complete yearly mandatory training: Security awareness training, Preventing Workplace Violence, and Terrorism Security Awareness
H. Contributor	Additional training completed as required

Agency/Department Objectives - Rating Earned	Agency/Department Objectives - Comments on Results Achieved
I. Contributor	Accepts personal responsibility for personal conduct.

²⁰ The Annual Performance Evaluation included an attached Word document titled “[Grievant] – 2023 Classified Evaluation – Attached Documentation.”

²¹ The Annual Performance Evaluation included an attached Word document titled “[Grievant] – 2023 Classified Evaluation – Attached Documentation.”

J. Contributor	Administrative Compliance: Adhere to all policy requirements set forth by the agency and work site.
K. Below Contributor	Time, Attendance, and Leave: Complies with timekeeping requirements and work schedules - Failed to provide Supervisor a schedule of hours worked from January through August 2023.
L. Below Contributor	Provide positive, professional, and prompt service to facility users, customers, and co-workers - Negative internal/external comments about supervisor; Comments made to community members about previous clients who used event space.

In the Annual Performance Evaluation, under “Year-end Learning Accomplishments,” Supervisor noted the following:

A Performance Improvement Plan and Notice of Improvement were issued on [] September 14, 2023. In addition, a Customer Service Satisfaction Survey has been put in place to give each customer an opportunity to review events taking place at the [Facility]. So far out of the 36 surveys sent we have received 8 “Very Satisfied” reviews[] [Grievant] has shown progress toward the goals set in the PIP and I am hopeful that this progress will continue.

Continue to seek Professional Development opportunities with regard to resolving Conflict (PIP Required Completion 10.1.2023)
Continue to maintain a shareable calendar of events, contact names & numbers, and employee hours – let supervisor know of leave requests, etc. at least two weeks in advance or monthly so that supervisor can make calendar of working hours to match events: Still need contact names and numbers for events. PIP 9.8.2023)
Continue to use [Event Scheduling System] for all scheduling of [Facility] space (PIP 10.3.2023; Completed 10.2023)
Continue to plan to check-in with supervisor weekly or bi-weekly as feasible to discuss opportunities and challenges (PIP 10.1.2023)
Continue to comply with college policy & procedure (PIP 9.8.2023)
Complete [Customer Service Training] assigned by HR (PIP 10.3.2023 Completed September 2023).²²

Under “Supervisor’s Comments” Supervisor provided the following comment:

Over the last month, [Grievant] has shown progress toward the goals discussed in her performance improvement plan. In addition, we have received some positive reviews of the [Facility event space] usage. I am

²² Agency Ex. at 18.

hopeful that this progress will continue and that we will see an increased usage of the space and customer satisfaction during the upcoming year.²³

In the space provided for Employee's Comments, Grievant noted the following: "I do not agree with the comments and ratings on this evaluation. A grievance has been filed (10/12) regarding many of these situations that are being 'addressed.'"²⁴

A document entitled "[Grievant] – 2023 Classified Evaluation – Attached Documentation" was included as an attachment to Grievant's Annual Performance Evaluation.²⁵ The document identified areas where improvement had been made as well as areas where improvement was still needed, as follows:

Improvement Shown Since PIP dated September 14, 2023

- Showed flexibility in scheduling and preparing for last minute events – [Workforce Luncheon Event-1] and [Road Naming Ceremony Event-1]
- Has begun scheduling and working through process of preparing invoices through [Electronic Scheduling System]
- September sales tax reports were received October 1, 2023.
- Supervisor received 8 "Very Satisfied" customer satisfaction surveys on events held January 2023 through September 2023
- Supervisor has received leave and schedule requests and hours have been entered on shared calendar since September 12, 2023; however, ~~still need the names and contact information for facility users.~~ [following strikethrough was a notation indicating this had been "Done"].

Areas for Improvement

- Prepare and calculate monthly reports in a timely manner – *Late getting sales tax information and artisan sales to business manager throughout the year.*
- Establish and maintain client/customer relations – *Have received negative feedback due to negative experience with events Ex. [Holiday Party Event-1], [Wedding Event-1], [Baby Shower Event-1] Cancellation, [Bridal Shower Event-1]*
- Design, negotiate, and draft contracts – *Did not review contract with [Company A] closely and Facility must now pay and remain in contract until 2026. Did not prepare Standard Operating Procedures document. Supervisor prepared in September 2023.*
- Meet, greet, and support during events – *Did not offer to assist supervisor at [Fundraiser Event-1], [Workforce Event-1] in September; [Road Naming Ceremony Event-1] in September;*

²³ Agency Ex. at 19.

²⁴ Agency Ex. at 19.

²⁵ Agency Ex. at 21.

- Oversee billing and collecting of fees from all clients for space, equipment, food services, police services, and other related costs – *Did not collect for [Wedding Event-1] until after event; Due to complaints [Facility] was only able to collect 1/2 of the initial cost. Cancellation of [Baby Shower Event-1] resulted in no fees collected. Comment about tablecloths that had not been paid for during [Bridal Shower Event-1].*
- Time, Attendance, and Leave: Complies with timekeeping requirements and work schedules – *Failed to provide Supervisor a schedule of hours worked from January 2023 through August 2023. ~~Please add customer names and contact to calendar.~~* [following strikethrough was a notation indicating this had been “Done”].

On November 8, 2023, Supervisor and AVP-HR met with Grievant to discuss the status of Grievant’s completion of the specific requirements set forth in the September 14, 2023, Performance Improvement Plan.²⁶ During the meeting, Supervisor reviewed specific plans for improvement from the September 14, 2023 Performance Improvement Plan. Supervisor noted that she had heard feedback that Grievant had been helpful at an event at the Facility during the preceding week and she appreciated that effort by Grievant. Supervisor also noted her perspective that College events hosted at the Facility provided an opportunity for Grievant and Part-Time Employee to “shine” and to get to meet people and potentially become more involved in the College’s activities and events and to get those individuals more involved in the activities and events at the Facility.²⁷

During this meeting AVP-HR asked Grievant about Regional Event-1 that had been held at the Facility on October XX, 2024. AVP-HR discussed that some of the issues that Grievant had identified related to Regional Event-1 may present an opportunity for Grievant to develop some standard operating procedures, including Grievant’s information needs for events, which Grievant agreed to do as one of her action items from the meeting. Grievant also described having concerns about overstepping her boundaries with College officials or faculty members who may host events at the Facility, like the host for Regional Event-1 who also was a College faculty member. Supervisor and AVP-HR reassured Grievant that she needed to push for the details she needed in order to successfully prepare for events at the Facility. Grievant also described that additional staffing resources would help address some of the issues experienced during Regional Event-1.²⁸

During the November 8, 2023, meeting, Grievant also advised Supervisor and AVP-HR about an idea to hold [Market Event-1] at the Facility on December XX, 2023. Grievant credited Part-Time Employee with initially proposing the idea. Grievant, Supervisor, and AVP-HR discussed the benefits to the Facility for hosting such an event which would highlight the Facility’s artisans. Grievant, Supervisor, and AVP-HR also discussed ideas for the event itself. Supervisor instructed Grievant to “definitely” work with Supervisor and [a campus event coordinator] on [Market Event-1] because

²⁶ See Agency Ex. at 267-269 and Grievant Ex. 64.

²⁷ See Grievant Ex. Tab 64.

²⁸ Grievant Ex. Tab 64 (Gr. recording at 11:10-32:50, 1:03:41-1:09:30, 1:14:27-1:21:49).

Supervisor stated that she needed to know about it and the [campus event coordinator] would have helpful information about coordinating in relation to some local parades. Supervisor also advised Grievant that Supervisor would share with Grievant an invitation that had been used for a similar market event. Supervisor emailed the sample invitation to Grievant following the meeting.²⁹

On November 15, 2024, Witness 1 emailed a “proposal for [Market Event-1]” to Grievant. The proposal set forth the goals for [Market Event-1], community activities proposed for the event, and identified nine people involved in the event, including Witness 1 as “General Coordination, Printing & Marketing” and Grievant as “Venue Coordinator.” Witness 1 included a draft invitation for [Market Event-1].³⁰

On November 16, 2024, Grievant emailed Supervisor regarding [Market Event-1], Grievant wrote:

Per our conversation yesterday, we are requesting approval to have our Inaugural [Market Event-1] here at [the Facility] on Saturday, December 16, 2023. I have attached a copy of the invitation and basic plan for your review. As noted, we have plenty of volunteers available to help. I have also reached out to several of our artists to see if they would be interested in participating should it be approved. This is an excellent opportunity to boost sales and share our space with the community.³¹

Supervisor replied to Grievant’s email that same day, writing: “This looks good, [Grievant]. Let’s move forward with it. I hope it’s a great success.”³²

On November 20, 2024, Witness 1 emailed Supervisor the following information regarding [Market Event-1]:

I know that [Grievant] got your approval for the [Market Event-1] to happen at the Facility on Dec. 16, but we found out that [College President] is having his [party] that day at about the same time. It is such a busy time of year and events are bound to overlap, however, after talking this weekend, we thought that it might be beneficial to postpone and retheme the [Market Event-1] for spring. That way the campus community would have the opportunity to attend both without conflict. We haven’t sent invitations out yet, so we would only need to inform a few people that we had talked to in person. Just wanted to get your thoughts. I know you’re off this week, so just whenever you have a chance would be great.³³

²⁹ Grievant Ex. Tab 64 (Gr. recording at 54:24-1:03:41, 1:09:30-1:20:38) *and see* Grievant Ex. at 812-814.

³⁰ Grievant Ex. at 832, 815-816.

³¹ Grievant Ex. at 699.

³² Grievant Ex. at 699.

³³ Grievant Ex. at 833.

On that same day, Supervisor replied by email to Witness 1: "Thanks, [Witness 1]. [College President] announced their party after we had made our plans, but it is probably best to postpone to spring."³⁴

On the morning of November 28, 2023, Supervisor emailed Grievant regarding additional hours worked by Part-Time Employee as well as the email Supervisor received from Witness 1 about the Market Event-1. Supervisor wrote:

I communicated with [Part-Time Employee] yesterday regarding the overage in her hours for the November 3-16 pay period. She indicated that it was a busy time and that she had helped to cover some events and clean. I understand that this is a busy time of the year, and if you need additional help, please reach out to me beforehand; we can work together to see if [Part-Time Employee] can have extra hours or if someone from our office may come down to assist. We must keep part-time hours below the annual amount to comply with federal policies.

Also, [Witness 1] said the [Market Event-1] has been cancelled this year because [College President's] party is on the same evening. I have not heard from you yet, so I wanted to double-check. If you have decided to cancel, my suggestion for next year would be to plan it early and make it part of Small Business Saturday. Perhaps we can market it broadly during November next year.³⁵

Grievant sent an email reply to Supervisor later that afternoon. Grievant wrote:

I can understand your frustration regarding [Part-Time Employee's] overage of hours. As a result of being relieved of my supervisory duties on 9/1/23, I do not have access to her actual hours worked so I do not keep track. I do know that [Part-Time Employee] does her very best to stick to the schedule. We will strive to assess our needs to the best of our ability but also want to put customer service as a high priority. It is difficult to do so when only one person is scheduled. This is why we were hoping to have someone hired this summer.

We are planning on rebranding our [Market Event-1] to the springtime if possible and will try again for next year. We didn't want to [compete] with [College President's] party.³⁶

Supervisor replied to Grievant's email writing:

Thanks, [Grievant]. To clarify, I am not frustrated with the overage in [Part-Time Employee's] hours. As I mentioned in the email, if you need additional

³⁴ Grievant Ex. at 833.

³⁵ Agency Ex. at 298-299.

³⁶ Agency Ex. at 298.

help, I am happy to work something out for you. I just need you to communicate that to me beforehand.³⁷

On December 1, 2023, Grievant timely filed a grievance to challenge the College's assignment of a "Below Contributor" rating on Grievant's annual performance evaluation.³⁸

The Facility was scheduled to host Luncheon Event-2 on December 12, 2023. The Facility was closed on Monday, December 11, 2023 and neither Grievant nor Part-Time Employee were scheduled to work on December 11, 2023. Grievant and Part-Time Employee were both scheduled to be on the College's main campus on the morning of Tuesday, December 12, 2023 to participate in a meeting related to a grievance filed by Grievant.³⁹ On December 11, 2023, Supervisor asked another employee to check the Facility to confirm that the Facility was set up for Luncheon Event-2. That employee informed Supervisor that the Facility was not set up for the luncheon because there were no linens on the tables and the chairs were stacked on the tables. Supervisor directed that other employee to go back to the Facility on Tuesday morning to set up for Luncheon Event-2. Supervisor did not contact Grievant to inquire as to the set up for Luncheon Event-2. On the morning of December 12, 2023, Grievant sent an email to Supervisor (and copying Educational Foundation Executive Director) to advise her that Grievant "just found out that [Luncheon Event-2] has been cancelled" and to suggest that "[i]t might be good to maybe put a sign on the door to let people know" but that Grievant would not be able to go by the Facility to put the sign out herself. Educational Foundation Executive Director replied to Grievant that she had already planned to be at the Facility that day and would be there if anyone showed up for Luncheon Event-2.⁴⁰

On December 13, 2023, a member of the College's Threat Assessment team received information that Grievant made the statement that she would "pull the knife out of her back and cut [Supervisor's] throat." Supervisor testified that a member of the College's Threat Assessment team contacted Supervisor on December 14, 2023, and advised her not to come to campus that day because two College employees had alleged that Grievant had made a threatening statement about Supervisor at an off-campus location.⁴¹ The College's Threat Assessment team convened on December 14, 2023 to discuss the information received and appropriate steps forward. The Threat Assessment Team contacted Grievant to ask her about the statement Grievant was alleged to have made. Grievant denied making the statement. The Threat Assessment Team determined that the alleged statement "did not indicate an 'articulable and significant threat of violence to others.'"⁴²

Supervisor testified that she was uncomfortable being alone with Grievant after learning about the threat that Grievant was alleged to have made. Supervisor testified

³⁷ Agency Ex. at 298.

³⁸ Grievant Ex. at 216-258 and Agency Ex. at 161-302.

³⁹ Agency Ex. at 283-284.

⁴⁰ Agency Ex. at 10 and 569-573.

⁴¹ Hearing Recording at 1:11:00-1:14:05.

⁴² Agency Ex. at 641.

that she was concerned about her personal safety and would not schedule meetings that required her to be alone with Grievant.⁴³

Supervisor prepared a "Performance Re-Evaluation Plan" for Grievant which she provided to the reviewer, College President, for his review on December 15, 2023. Supervisor testified that she attempted to schedule a meeting with Grievant to discuss the Performance Re-Evaluation Improvement Plan, but AVP-HR was unavailable to participate in the meeting at the times Supervisor and Grievant were available and Grievant expressed concern with College President participating in the meeting as an alternative to AVP-HR because College President also would be meeting with Grievant as a step-respondent to her grievance. In lieu of meeting with Grievant, Supervisor sent the Performance Re-Evaluation Improvement Plan to Grievant on or around December 15, 2023. Grievant signed the Performance Re-Evaluation Improvement Plan on December 19, 2023. The Re-Evaluation Plan noted that it was an update of the Performance Improvement Plan that had been issued in September. The Performance Re-evaluation Improvement Plan set forth the following areas and plans for improvement:⁴⁴

The Coordinator of Events and Conferences, provides leadership in planning and managing a broad spectrum of events and functions.

The Coordinator ensures that all events enhance the college mission, cultivate culture, reinforce the college brand, and reflect campus-wide priorities.

The purpose of this position is to develop and execute a business plan for maximizing the use of facilities and services to generate additional income for the College

Develop and execute a business plan for maximizing the use of facilities and services to generate additional income for the College (Improvements Required: X Yes _No)

Standard:

1. Increase outside revenue for both the [Facility] and main campus.
2. Prepare and calculate monthly financial reports.
3. Establish and maintain client relations. Conduct site tours. Meet, greet, and support during events.
4. Design, negotiate, and draft contracts.

Area that Requires Improvement	Description of Observed Items Requiring Improvement
3.	Customer service complaints; discussing previous clients with potential clients, giving names and details of problems, telling other guests that services have not yet been paid for. Not available

⁴³ Hearing Recording at 2:48:08-2:55:29.

⁴⁴ Agency Ex. at 98-103.

	to assist when supervisor requests use of event space.
3.	Complaints about availability to help and set up for [Regional Event-1] [10/XX/2023];
2.	Monthly financial reports late in November 2023.

Plan of improvement for developing and executing a business plan for maximizing the use of facilities and services to generate additional income for the College:

Work toward providing excellent customer service even when customers present problems. Do not tell new customers the names or the experiences has with previous users of the space. Complete assigned Customer Service training. **Create Customer Service Survey both paper and digital. Work with Supervisor to create benchmarks for success/acceptable ratings
NEW: Continue to improve customer service. Work towards timely reporting and cross-training to help with timely reporting; Events should be set up at least one hour prior to event start.

Direct and coordinate services and activities to support the smooth business operations of Events and Conference Services (Improvements Required: __Yes X No)

Standard:

1. Establish working relationships with local vendors.
2. Develop relationship with campus partners.
3. Oversee billing and collecting of fees from all clients for space, equipment, food services, police services, and other related costs.
4. Create, implement and enforce policies and procedures for the use of facilities and services.

[Schedule all meeting and function space] (Improvements Required: X Yes __No)

Standard:

1. Assures set-up, media, and food requests happen.
2. Works with end users to resolve conflicts.
3. Create, implement and enforce guidelines for prioritizing events.

Area that Requires Improvement	Description of Observed Items Requiring Improvement
2.	Difficulty resolving conflicts with users of event space. Supervisor had to get involved and give a discount. Supervisor has fielded several complaints and make apologies. Five one-star reviews on website.
1.	Not available at beginning of the event to assist with customer needs.
1.	No set up for [Regional Event-1 10/XX/23] Had to reschedule [Baby Shower Event-1] and move to campus due to conflict September 2023.

Plan of improvement for scheduling for all meeting and function space.

Identify professional development opportunity on conflict resolution and customer service and present to supervisor by September 15, 2023.

New: Ensure that setups are complete at least 1 hour prior to event reservation and communicate clearly with supervisor if additional resources will be needed in order to complete the setups on time; work on scheduling conflicts so cancellations will not occur due to errors.

Other Duties as Assigned (Improvements Required: X Yes ___ No)

Standard:

1. Oversight of the [Facility] and business transactions.
2. Compliance with College Policy & Procedure

Area that Requires Improvement	Description of Observed Items Requiring Improvement
2.	Failure to provide schedule of hours and events to supervisor when asked. Light cleanup after/before events not taken care of by [Facility] employees. No one scheduled to be at the [Facility] when someone from [county office] can come and clean.

Plan of improvement for other duties as assigned.

Maintain calendar that notifies supervisor of events, contact names and numbers and employee hours. Preferably done monthly for planning purposes. [Supervisor] will serve as the supervisor of [Facility] employees and will make a schedule for [Facility] employees beginning 9/8/2023. Supervision responsibilities may be reinstated upon completion/review of Performance Improvement Plan. Light cleaning should be done by [Grievant] and staff. Schedules should be adjusted to be present when someone from the county comes in to clean.

New: Areas should be free of clutter so that housekeeping can clean the spaces needing cleaned.

DHRM Civility in the Workplace expectations (Improvements Required: XYes ___ No)

Standard:

1. Non-discriminatory conduct is demeaning, intimidating, or insensitive behavior that is not targeted specifically toward individuals based on their characteristics or affiliation with a particular group, class, or category
2. Works with end users Discriminatory conduct is behavior that targets individuals in protected classes and is illegal. Federal and legal complaint procedures are available for individuals subject to illegal discriminatory conduct in addition to those available in the agency or administered by the Department of Human Resource Management.

Area that Requires Improvement	Description of Observed Items Requiring Improvement
1.	Disrespectful to supervisor and others

Plan of improvement for civility in the workplace. When supervisor and other college members visit the site to help with operations planning, please join them on the walk-through and show them what items need to be moved, etc.

DHRM Code of Conduct (Improvements Required: X Yes ___ No)

Standard: Including but not limited to the following expectations.

1. Report to work as scheduled and seek approval from the supervisor in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.
2. Perform assigned duties and responsibilities with the highest degree of public trust.
3. Devote full effort to job responsibilities during work hours.
4. Maintain the qualifications, certification, licensure, and/or training requirements identified for their positions.
5. Demonstrate respect for the agency and toward agency coworkers, supervisors, managers, subordinates, residential clients, students, and customers.
6. Use state equipment, time, and resources judiciously and as authorized.
7. Support efforts that ensure a safe and healthy work environment.
8. Utilize leave and related employee benefits in the manner for which they are intended.
9. Resolve work-related issues and disputes in a professional manner and through established business processes.
10. Meet or exceed established job performance expectations.

Area that Requires Improvement	Description of Observed Items Requiring Improvement
1.	Failure to provide planned work schedule since Jan 2023
2.	Comments about previous clients to community members
3.	Light cleaning should be done before & after events by [Grievant] and staff. On 11.29.2023 the store, hallways and offices were cluttered. Heavy piece of glass was propped up in the hallway causing a safety concern. Helium tank not on a proper base. No clear pathway in case of fire emergency.
5.	Negative internal/external comments about supervisor; comments about a hostile work environment without conversation with supervisor about potential issues in the workplace.
6.	
9.	Comments to others about work environment, but no request to speak with supervisor or HR about problems.
10.	Failure to meet basic employee expectations.

Plan of improvement for civility in the workplace. Plan to discuss issues on a weekly or bi-weekly call between employee and supervisor. During these calls opportunities and challenges can be determined; however, final decisions will be made by the supervisor.

Summary of Improvement Plan:

Area of Improvement	Improvement Required	Required Completion Date	Status as of 12/15/23:
	Use [Electronic Scheduling System] for all meeting and function space. Coordinate with Campus Events Coordinator to schedule training and uploading of contracts by October 1, 2023	10/3/2023	Complete.
	Maintain a shareable calendar that notifies supervisor of events, contact names and numbers and employee hours. Preferably done monthly for planning purposes. *12/15/23: Do not change the schedule once approved by supervisor.	9/8/2023	Incomplete: Schedule changes for self and other employees after schedule is approved. As part of maintenance, need immediate compliance with not changing schedule(s) or hours of other employees once approved.
	Professional development needed with regard to resolving conflict among end users (Crucial Conversation Book, Ted Talks, Seminars, etc.)	10/1/2023	Complete.
	Plan to discuss issues on a weekly or bi-weekly call between employee and supervisor. During these calls opportunities and challenges can be determined; however, final decisions will be made by the supervisor.	10/1/2023	Complete.
	Comply with college policy and procedure. DHRM Code of Conduct: Resolve work-related issues and disputes in a professional manner and through established business procedures.	9/8/2023	Incomplete. Employee has included other employees on emails (12/4/23) to point out perceived errors without allowing supervisor the time to address.
	Comply with college policy and procedure. DHRM Code of Conduct: Perform assigned duties and	12/6/2023	Incomplete. A workload

	responsibilities with the highest degree of public trust.		schedule was requested on 12/6/23 to provide information and allow supervisor to suggest efficiencies and/or supports to employee. Schedule has not been provided.
	Complete [Customer Service Training] – HR can assign	10/3/2023	Complete.

Later in the evening on December 15, 2023, the Educational Foundation Executive Director advised Grievant by email that in light of issues identified during a walkthrough earlier that day, a decision had been made to cease scheduling any events at the Facility in order to allow time to conduct a safety inspection and make any needed repairs.⁴⁵

On January 3, 2024, Supervisor sent an email to several employees, including Grievant. Supervisor noted that Supervisor expected to “take a deeper dive and streamline our processes.” Supervisor also listed other priorities for each reporting unit to “begin focusing on” and suggested that email recipients should “please be ready to give an update on these items/priorities.” For the Facility, Supervisor set forth the following items/priorities:

- Plan/Begin Inventory (January)
- Contact new artists for new inventory
- Contact old artists to remove/replace older inventory
- Continue to cross-train [an educational foundation employee] on reporting
- Continue to work on SOP’s for events and retail spaces⁴⁶

Later in the afternoon on January 3, 2024, in an email regarding scheduling, Supervisor advised Grievant that Part-Time Employee was sick and likely would not be in for the rest of the week. Supervisor also reiterated to Grievant that “[s]ince it is slow, this would be a good time to start the inventory process and call some artisans to pick up older inventory and bring in new inventory once inventory is complete.”⁴⁷

On January 11, 2024, Supervisor sent an email to College President and AVP-HR setting forth her concerns with Grievant’s performance and noting concern for Supervisor’s personal safety and the safety of Facility property,⁴⁸ Supervisor wrote:

⁴⁵ Agency Ex. at 44.

⁴⁶ Agency Ex. at 360, 363 *and see* Agency Ex. 353.

⁴⁷ Agency Ex. at 361.

⁴⁸ Agency Ex. at 484-574.

This list is not all-inclusive of the events over the past year, but it is a good representation. I would ask that it be shared with DHRM, the [Agency] attorneys, etc., so they can fully understand the scope of the issues and decide if there is enough information for my safety and the safety of [property] to be taken into consideration.

In the meantime, because of the identified electrical issues, I will recommend to the [Educational Foundation Board] that we close the [Facility] until the electrical wiring and fire alarm systems can be fixed. The [Educational Foundation] can continue to pay the employee during this time, but she will not report to the [Facility].⁴⁹

Supervisor then set forth a listing of concerns related to Grievant's performance over the year. Supervisor also included the following related to the alleged threat made by Grievant and investigated by the College's Threat Assessment Team:

On the morning of December 14, 2023, I received a call from a member of the Threat Assessment Team asking if I would be on campus that day, because two employees of the college had notified the college that they had run into [Grievant] in a store and she was telling them about her grievance hearing and proceeded to tell them that "she would take the knife out of her back and slit [Supervisor's] throat with it." I was advised to not come to campus until Threat Assessment could meet and determine whether or not this was a credible threat. They determined that the threat was not literal, as there was no actual knife. Upon speaking with someone at the [Agency], they were told to wait until January 12, 2024, to have another conversation with [Grievant], and she could be terminated at that time based on the 90-day re-evaluation plan that is done when someone receives a Below Contributor on their annual evaluation. On January 3, 2024, the Director of Operations told me that [Grievant] had asked him in December, "What would happen to the Foundation if the building burned down?" He said he did not feel comfortable with some of the questions she was asking and that she had pointed out electrical safety concerns. A walk-through was scheduled with him and others for January 11, 2024, to determine the safety issues in the building.⁵⁰

On the morning of January 18, 2024, Supervisor sent Grievant a "reminder" email directing Grievant to:

Please work on inventory and call artists to pick up pieces that have been there for a while. I imagine it will be slow over the next few weeks, and only one event is scheduled for the remainder of January, so you should have plenty of time to complete this.⁵¹

⁴⁹ Agency Ex. at 484.

⁵⁰ Agency Ex. at 486.

⁵¹ Agency Ex. at 351-352.

Grievant replied to Supervisor on that same day, writing: "I will try to have it completed to the best of my ability seeing as I am the only one on the schedule." Supervisor responded that "[g]enerally, January and February are slow sales months. That, coupled with no events, should allow you some time to work on it. Keep me posted."⁵²

On Saturday, January 20, 2024, at 10:58 am, Supervisor emailed Grievant to inquire as to whether Grievant was working at the Facility that day and whether contactors had scraped the parking lot because the area had been experiencing inclement weather. After Grievant replied that she was working that day, Supervisor sent another email noting that "I feel certain it will be a slow sales day, so I hope you'll take advantage of that time to work on inventory and reaching out to artisans about bringing in new pieces to freshen up the store."⁵³ In her reply, Grievant stated: "I will be working on inventory as much as possible today. I will need help if you would like it to be completed by the end of January."⁵⁴ Supervisor replied that:

Having managed inventory in two large stores before working at [College], I do not understand why you feel that you could not complete the inventory over the next four working days. In my email communication to you on January 3rd, I asked you to begin working on it. Have you started it yet? Perhaps you should send me a detailed list of how you currently perform inventory, and we can discuss it to see if efficiencies can be found.⁵⁵

Grievant replied, on that same afternoon:

You have told me in the past that customer service is a top priority. Now you are telling me that inventory trumps everything else. These are conflicting messages. I am one person attempting to do a job that needs at least one other person at minimum. In my previous email sent this morning, I asked you for help and you denied it. I also asked for clarification of your expectations of inventory and was denied that as well.

I feel that your comment about me not knowing how to perform inventory was made in a derogatory manner. I have done inventory for the store for the last two years to your satisfaction but have always had additional staff to assist. My concern with your inventory timetable of four days is unrealistic. While I have performed about 35% of the inventory, I have also been responsible for all the other duties on both the retail and event side of the business by myself, hosting a major event with 80 guests, while dealing with the constant barrage of emails regarding my job performance. Although you stated I should begin the inventory process on 1/3/24, I needed to provide the sales report and commission statement for our

⁵² Agency Ex. at 351.

⁵³ Agency Ex. at 370.

⁵⁴ Agency Ex. at 370.

⁵⁵ Agency Ex. at 368-369.

November/December sales (33 artists) on the 5th and the 10th per your request.⁵⁶

Supervisor responded by email, writing

I'm sure if we pull the sales reports for each day since we returned on January 2nd, we would find that they have been less than \$100 per day – some days likely \$0. You were asked not to schedule any events until the safety concerns have been addressed so help me understand what you are doing each day that is preventing you from finishing up the inventory?⁵⁷

Grievant was not scheduled to work on January 21, 2024, January 22, 2024, or January 23, 2024.

On January 22, 2024, Supervisor emailed Grievant. Supervisor wrote:

On Saturday, January 20, 2024, I asked you to send me your current inventory procedures so I could review them for efficiencies since you said you were having difficulty completing that task. I have not yet received those and will be in Richmond tomorrow and Wednesday. I will likely not have time while I am there to review them. Please continue with the inventory process you followed last year and update me on Friday, January 26.⁵⁸

When Grievant returned to work on January 24, 2024, Grievant emailed the inventory procedures to Supervisor and stated: "I am not having issues completing the task but it is a very different set of protocols from the one that was performed using Quick Books. The prep work takes the most amount of time."⁵⁹ Supervisor replied on January 25, 2024, with questions regarding the process.

On January 30, 2024, Supervisor and AVP-HR met with Grievant to discuss the Performance Re-Evaluation Plan that Supervisor had provided to Grievant by email on December 15, 2023. During the meeting, they reviewed a document that Grievant had provided at Supervisor's request setting forth Grievant's daily activities. Supervisor noted that the purpose of the document was to provide information so that they could determine whether there might be any efficiencies that could be gained. The group discussed that the document Grievant prepared included activities that Grievant may actually only perform on a weekly or monthly basis and Grievant indicated that it had been hard to develop the information because the work needed can be unpredictable. AVP-HR suggested that a way for Grievant to get a better sense of her daily activities would be for Grievant to log her daily activities for a couple of weeks after the inventory had been completed. AVP-HR also asked Grievant for a reasonable timeframe to complete the task and it was determined that Grievant would log her daily activities over the period from February 6 – February 20.⁶⁰

⁵⁶ Agency Ex. at 367-368.

⁵⁷ Agency Ex. at 366-367.

⁵⁸ Agency Ex. at 365.

⁵⁹ Agency Ex. at 364.

⁶⁰ Grievant Ex. Tab 65 (Gr. recording at 00:01-31:04).

During the meeting on January 30, 2024, Supervisor also provided Grievant with a Group II Written Notice of disciplinary action for failing to follow instructions to complete the inventory.⁶¹ Supervisor instructed Grievant again that she needed to focus on completing the inventory and Grievant advised Supervisor that the inventory was mostly completed and that she just had a number of small items left that she wanted someone else to count behind her. Supervisor suggested that if Part-Time Employee was working that day, Part-Time Employee could provide that second count of the remaining items for Grievant. When Grievant said that Part-Time Employee was off that day, Supervisor suggested that Grievant could scan the inventory and have Part-Time Employee conduct that second count on the following day (January 31, 2024).⁶²

On February 5, 2024, Supervisor advised Grievant, by email, that a decision had been made to close the Facility until electrical issues could be addressed and that Grievant now would need to report to an office on campus beginning the following day. Supervisor also advised Grievant that Grievant “may also want to bring your Standard Operating Procedure Manuals to ensure any of those procedures are up to date.”⁶³ Grievant replied to Supervisor’s email with questions about completion of the inventory, whether Part-Time Employee had been notified, and how to retrieve files and other items from the Facility. Supervisor advised Grievant that Grievant would not be able to finish the inventory until the Facility re-opened and advised Grievant that she would have to schedule a time with campus police to return to the Facility.⁶⁴

On February 6, 2024, Supervisor emailed Grievant to advise her that Supervisor would be working from home that day but had emailed the rest of the team to let them know that Grievant would be working with them on-campus. Supervisor also advised Grievant that while she was working at the campus location her work schedule would be Monday through Friday, 7:45 am – 4:30 pm, with a 45-minute lunch daily. Supervisor noted that they “try to coordinate lunches so that the office is always covered in case a student or donor comes by” and instructed Grievant to “please work with others to ensure adequate coverage during the lunch period. If you need to be away from your desk for any other reason, please let me know.”⁶⁵

On February 7, 2024, Supervisor contacted the College’s Chief of Campus Police (with a copy to AVP-HR) to request an increased campus police presence where she and Grievant worked on campus because Grievant would be working on campus and Supervisor “still [felt] uncomfortable given the threats that were reported to [the College’s Threat Assessment Team] in December.”⁶⁶

On the afternoon of February 7, 2024, Supervisor sent Grievant an email requesting that Grievant send her an electronic copy of the inventory “as it stands right now with any differences highlighted.” Supervisor also provided instructions to Grievant

⁶¹ Agency Ex. at 359; see *a/so* Grievant Ex. at Tab 65 (Gr. recording at 43:22-50:26).

⁶² Grievant Ex. Tab 65 (Gr. recording at 43:22-50:26).

⁶³ Agency Ex. at 42-43.

⁶⁴ Agency Ex. at 42.

⁶⁵ Agency Ex at 46.

⁶⁶ Grievant Ex. at 827.

regarding contacting artisans related to old and new inventory. Supervisor advised Grievant that “[t]his is also a good time for you to continue to work on Standard Operating Procedures. Please send me copies of those as you finish them as well. These should be completed by no later than March 2.”⁶⁷ Grievant replied to Supervisor by email on February 15, 2024, to get clarification as to whether there were any specific Standard Operating Procedures that Supervisor wanted Grievant to complete first. Supervisor responded that day that they could have a discussion on the following Monday.

On Monday, February 19, 2024, Supervisor responded to Grievant’s request for clarification about the deadline for completing the Standard Operating Procedures and advised that “Standard Operating Procedures for all functions of the [Facility] should be updated with any changes and sent to me by Friday, February 23. These would include SOPs for events, running the register, processes for petty cash, processes for artisan payouts, processes for receiving/returning inventory from/to artisans, the bi-annual inventory processes, and any other processes related to running the event or retail side of the [Facility.]” Supervisor also reminded Grievant that she was required to get approval before adjusting her schedule because this was important to ensure the office had adequate coverage and noted that Grievant had not followed that prior instruction on February 16, 2024.⁶⁸

Grievant replied to Supervisor’s email requesting clarification of the deadline for completing the Standard Operating Procedures and noting that Supervisor’s email on February 7, 2024, had provided a later deadline. Supervisor responded on the morning of February 18, 2024, confirming the February 23, 2024 deadline for completion of the Standard Operating Procedures noting that Grievant seemed to be caught up on contacting the artisans and should be able to complete the Standard Operating Procedures by the end of the week, but that they could discuss the deadline if Grievant needed more time to finish them all.⁶⁹

On March 1, 2024, Supervisor re-evaluated Grievant’s performance. The Re-Evaluation Performance Evaluation was not reviewed by a “Reviewer” as the College noted on the form that such review was “not required for re-evaluation.” Supervisor provided Grievant the Re-evaluation Performance Evaluation with an overall rating of Below Contributor as follows:⁷⁰

Core Responsibilities - Rating Earned	Core Responsibilities - Comments on Results Achieved
B. Below Contributor	25% Planning – See Attached ⁷¹ Develop and execute a business plan for maximizing the use of facilities and services to generate additional income

⁶⁷ Agency Ex. at 69-70.

⁶⁸ Agency Ex. at 81-82.

⁶⁹ Agency Ex. at 81.

⁷⁰ Agency Ex. at 54-60.

⁷¹ The March 1, 2024 Performance Evaluation included an attached Word document titled “[Grievant] – 2024 Re-Evaluation Plan – Attached Documentation – March 1, 2024.”

	<p>Increase outside revenue for the [Facility] - BC</p> <p>Prepare and calculate monthly reports in a timely manner – BC</p> <p>Establish and maintain client/customer relations – BC</p> <p>Design, negotiate, and draft contracts – BC</p>
C. Below Contributor	<p>35% Coordination – See Attached⁷²</p> <p>Direct and coordinate services and activities to support the smooth business operations of the [Facility] – BC</p> <p>Assures set-up, media, and food requests happen. – BC</p> <p>Create, implement and enforce policies and procedures for the use of facilities and services – BC</p> <p>Supervisor put together Standard Operating Procedure in September 2023 for implementation</p>
D. Below Contributor	<p>15% - Scheduling – See Attached⁷³</p> <p>Works with end users to resolve conflicts – BC</p> <p>Create, implement and enforce guidelines for prioritizing events - BC</p> <p>Acts as chief scheduler for all meeting and function space</p>
E. Below Contributor	<p>20% Oversee [Facility] and daily business operations; - See Attached⁷⁴</p> <p>Supervise [Facility] employees and scheduling; BC</p> <p>Manage inventory and sales; BC</p> <p>Build relationships with local artisans and craftspeople to support the arts in the region with a goal of becoming self-sustaining.</p>
F. Contributor	<p>5% May be required to perform other duties as assigned.</p> <p>May be required to assist the agency or state government generally in the event of an emergency declaration by the Governor.</p>

Special Assignments - Rating Earned	Special Assignments - Comments on Results Achieved
G. Contributor	Complete yearly mandatory training: Security awareness training, Preventing Workplace Violence, and Terrorism Security Awareness
H. Contributor	Additional training completed as required

⁷² The March 1, 2024 Performance Evaluation included an attached Word document titled “[Grievant] – 2024 Re-Evaluation Plan – Attached Documentation – March 1, 2024.”

⁷³ The March 1, 2024 Performance Evaluation included an attached Word document titled “[Grievant] – 2024 Re-Evaluation Plan – Attached Documentation – March 1, 2024.”

⁷⁴ The March 1, 2024 Performance Evaluation included an attached Word document titled “[Grievant] – 2024 Re-Evaluation Plan – Attached Documentation – March 1, 2024.”

Agency/Department Objectives - Rating Earned	Agency/Department Objectives - Comments on Results Achieved
I. Contributor	Accepts personal responsibility for personal conduct.
J. Contributor	Administrative Compliance: Adhere to all policy requirements set forth by the agency and work site.
K. Below Contributor	Time, Attendance, and Leave: Complies with timekeeping requirements and work schedules - Failed to provide Supervisor a schedule of hours worked from January through August 2023 - Left Early on Friday, February 16, 2024 without approval - Away from desk on Friday, February 23, 2023 without approval.
L. Below Contributor	Provide positive, professional, and prompt service to facility users, customers, and co-workers - Negative internal/external comments about supervisor; Comments made to community members about previous clients who used event space. - Had additional complaints regarding [Regional Event-1] -Set up not complete for [Luncheon Event-2] - Did not participate in walk-through with [College officials] and Supervisor in November 2023.

Supervisor included with the Re-evaluation Performance Evaluation a document entitled “[Grievant] – 2024 Re-Evaluation Plan – Attached Documentation – March 1, 2024” that identified areas where performance had improved as well as areas where satisfactory performance had not been achieved, as follows:⁷⁵

Improvement Shown Since Evaluation dated November, 2023

- Showed flexibility in scheduling and preparing for last minute events – [Workforce Luncheon-1] and [Road Naming Ceremony-1]
- Has begun scheduling and working through process of preparing invoices through [Electronic Scheduling System]
- December & January sales tax reports and Artisan Reports were received on time.

⁷⁵ Agency Ex. at 58-59.

- Supervisor has received several “Very Satisfied” customer satisfaction surveys on events held from September 2023 through January 2024
- Supervisor has received leave and schedule requests and hours have been entered on shared calendar since September 12, 2023, with the exception of having to remind to send in November 2023.

Areas where Satisfactory Performance has not been achieved – Updated March 1, 2023

- EWP Standard – Section B – 25% Planning: Prepare and calculate monthly reports in a timely manner – *Artisan sales reports were not turned in until November 22, 2023. EWP reviewed and sent on November 2, 2023 with request to sign and returned still not returned. One email indicated that it would take two 8-hour days to complete sales reports. More initiative should be taken to ensure that artisans are paid in a timely manner and sales reports are completed quickly so that tax reports can be filed and that 1099's are on file for every artisan prior to the end of the year.*
- EWP Standard – Section B – 25% Planning: Establish and maintain client/customer relations – *Negative customer service review from [Regional Event-1] and [Baby Shower Event-1] Cancellation*
- EWP Standard – Section B – 25% Planning: Design, negotiate, and draft – *Did not respond to supervisor's request to reach out to [Company A] about helping with tablecloths during December.*
- EWP Standard – Section C – 30% Direct & Coordinate Services and Activities to Ensure Smooth Operations – *Meet, greet, and support during events – Did not have [Luncheon Event-2] set up in December 2023. Did not plan and execute the [Market Event-1] in December 2023 as requested by supervisor.*
- EWP Standard Section K – Time, Attendance, and Leave: *Multiple email requests from supervisor in November 2023 for scheduling needs to complete December schedule. Left early on Friday, February 16, 2024 without supervisor approval; Away from desk for nearly an hour on Friday, February 23, 2024, supervisor had to email to find out where employee was.*
- EWP Standard Section K: Provide positive, professional, and prompt service to facility users, customers, and co-workers – *Did not participate in walk-through on November 27, 2023 when [College officials] and Supervisor visited to talk about moving tables. Hallways were cluttered with decorations, a helium tank, and a large piece of glass during walk-through.*

- DHRM Conduct #3: Devote full effort to job responsibilities during work hours. *Supervisor had to mention that personal calls should be kept to a minimum. Visitors to employees' desk are frequent and for long periods of time.*
- DHRM Conduct #10: Meet or exceed job performance expectations. *SOP's were not completed with the expected details and quality expected of a professional in this role since 2021. Inventory was not completed in January despite requests from supervisor. A daily schedule was requested in December 2023 and reviewed by supervisor January 31, 2024. Areas that were not daily tasks were discussed and sent back to the employee; however, no new and accurate daily schedule has been provided to the supervisor. Employee in this level of management should not need direct requests from supervisor to complete basic tasks.*
- DHRM Conduct #9: Resolve work-related issues and disputes in a professional manner and through established business practices. *Negative internal/external comments about supervisor; Frequent disrespectful emails to supervisor.*

Supervisor met with Grievant to advise her of the Re-evaluation Performance Evaluation and provide Grievant with written notification of Supervisor's intention to terminate Grievant pursuant to DHRM Policy 1.40 "based on [Grievant's] below contributor performance and [Grievant's] inability to achieve satisfactory performance during the re-evaluation period following [Grievant's] annual evaluation."⁷⁶ Supervisor advised Grievant that Grievant could provide a written response to the notice which would allow Grievant "to provide any additional information you feel would impact the final decision."⁷⁷ Supervisor gave Grievant until close of business on Monday, March 4, 2024 to provide such a response.

Grievant provided a written response⁷⁸ to each of the areas where Supervisor had indicated that Grievant's performance had not been satisfactory as follows:

Written Response to Intention to Terminate Employment – [Grievant]

Areas where Satisfactory Performance has not been achieved - Updated March 1, 2023

- EWP Standard - Section B - 25% Planning: Prepare and calculate monthly reports in a timely manner - Artisan sales reports were not turned in until November 22, 2023. EWP reviewed and sent on November 2, 2023 with request to sign and return, still not returned. One email indicated that it

⁷⁶ Agency Ex. at 60.

⁷⁷ Agency Ex. at 60.

⁷⁸ Agency Ex. at 89-92.

would take two 8-hour days to complete sales reports. More initiative should be taken to ensure that artisans are paid in a timely manner and sales reports are completed quickly so that tax reports can be filed and that 1099's are on file for every artisan prior to the end of the year.

Response: This is intentionally misleading. [Supervisor] communicated absolutely no expectations or oversight prior to described point in time. During this time all paperwork was completed in a timely manner and without complaint. Since communicating her desires clearly, employee has consistently met expectations.

If disputed, supporting documentation exists and can be provided upon request.

- EWP Standard - Section B - 25% Planning: Establish and maintain client/customer relations - Negative customer service review from [Regional Event-1]; [Baby Shower Event-1] Cancellation

Response: [Supervisor] has unreasonably obsessed over 2 (two) of negative reviews where expectations were either unclear and contractually limited. A plethora of incredibly positive feedback has been ignored to intentionally disparage the employee. If disputed, supporting documentation exists and can be provided upon request.

- EWP Standard - Section B - 25% Planning: Design, negotiate, and draft - Did not respond to supervisor's request to reach out to [Company A] about helping with tablecloths during December.

Response: [Supervisor] was made aware that [Company A] requires 5 (five) business days lead-time. Employee communicated this to [Supervisor] on several occasions and offered alternative options. [Supervisor] took it upon herself to micro-manage and manipulate the situation in effort to undermine and disparage employee. If disputed, supporting documentation exists and can be provided upon request.

- EWP Standard - Section C - 30% Direct & Coordinate Services and Activities to Ensure Smooth Operations - Meet, greet, and support during events - Did not have [Luncheon Event-2] set up in December 2023. Did not plan and execute the [Market Event-1] in December 2023 as requested by supervisor.

Response: Employee and staff clearly communicated options to supervisor. [Supervisor] has either intentionally or incompetently shifted responsibility to employee. [Luncheon Event-2] was cancelled the day prior due to illness. [Market Event] was pushed to Spring due to scheduling issues. The decision to shift the [Market Event-1] was made solely by [Supervisor].

Employee has exhibited a demonstrated record of encouragement and support of all [Facility] endeavors. If disputed, supporting documentation exists and can be provided upon request.

- EWP Standard Section K - Time, Attendance, and Leave: Multiple email requests from supervisor in November 2023 for scheduling needs to complete December schedule. Left early on Friday, February 16, 2024 without supervisor approval; Away from desk for nearly an hour on Friday, February 23, 2024, supervisor had to email to find out where employee was.

Response: Employee has verifiable track record of years of dedicated service that involved many additional hours of committed labor beyond scheduled hours. Friday, February 16th - Employee worked through lunch and informed supervisor in charge as [Supervisor] was on vacation/makes a habit of not being on campus on Fridays.

Friday, February 23rd - Employee accounted for every moment away from desk. If [Supervisor] needed assistance from employee, a text or cell phone call would have been more appropriate than an email. [Supervisor] cannot determine from her office whether phone calls and texts on personal cell phone were of business or personal in nature. Employee regularly gives out cell phone number to artists and event clients.

This level of oversight is not demanded or expected from any other employees and highlights a personal vendetta against employee. If disputed, supporting documentation exists and can be provided upon request.

- EWP Standard Section K: Provide positive, professional, and prompt service to facility users, customers, and co-workers - Did not participate in walk-through on November 27, 2023 when [College officials] and Supervisor visited to talk about moving tables. Hallways were cluttered with decorations, a helium tank, and a large piece of glass during walk-through.

Response: The employee was not informed of or invited to participate in referenced conversation. She did interact with Director of Operations at length in a prior walkthrough to establish needs. Employee would have happily participated if requested.

Facility concerns expressed by [Supervisor] were addressed by employee and team in a timely and complete manner.

If disputed, supporting documentation exists and can be provided upon request.

- DHRM Conduct #3: Devote full effort to job responsibilities during work hours. Supervisor had to mention that personal calls should be kept to a minimum. Visitors to employees' desk are frequent and for long periods of time.

Response: These remarks are greatly exaggerated to serve [Supervisor's] personal vendetta against the employee. No detailed information regarding

phone calls or visits was ever provided or discussed with employee. Other department employees are free to take personal calls and fraternize around campus unfettered. It has been verified that [Supervisor] has boasted publicly in “not firing employees but making them so miserable, they eventually abandon employment.” If disputed, supporting documentation exists and can be provided upon request.

- DHRM Conduct #10: Meet or exceed job performance expectations. SOP's were not completed with the expected details and quality expected of a professional in this role since 2021. Inventory was not completed in January despite requests from supervisor. A daily schedule was requested in December 2023 and reviewed by supervisor January 31, 2024. Areas that were not daily tasks were discussed and sent back to the employee; however, no new and accurate daily schedule has been provided to the supervisor. complete basic tasks.

Response: Employee contests these allegations. These complaints can only reflect a lack of competence and integrity in [Supervisor] that are easily verifiable. [Supervisor] has stated to other employees that she “knows everything there is to know about the [Facility]” but asked employee to write specific job training to use with the expectation to terminate employment.

The employee sincerely believes that this statement is intentionally misleading and a direct result of [Supervisor's] lack of supervision and oversight for over 2 years. [Supervisor] has never visited the [Facility] for the express purpose of learning day-to-day processes. [Supervisor] sent [bookkeeper for Educational Foundation] down to [Facility] for “training” but accounting audit being performed auditors prevented additional training. Supporting documentation exists and can be provided upon request.

- DHRM Conduct #9: Resolve work-related issues and disputes in a professional manner and through established business practices. Negative internal/external comments.

Response: Employee has always done her very best to deal with [Supervisor] in a professional and respectful manner. The employee has never received a similar criticism in over 30 years of professional service.

Upon filing grievances against [Supervisor], the employee began to be contacted by multiple parties about past unethical and inappropriate behavior by [Supervisor]. The employee encouraged these parties to communicate any concerns through appropriate Human Resource channels. When employee reached out to [AVP-HR] regarding hostile behavior, employee was told that she should “speak to her supervisor”. [AVP-HR] was fully aware of the escalating issues between the two parties and did nothing to mediate.

Supporting documentation exists and can be provided upon request.

On March 6, 2024, the College notified Grievant that her employment was being terminated immediately “based on your below contributor performance and your inability to achieve satisfactory performance during the re-evaluation period following your annual evaluation.”⁷⁹ In the termination letter, Supervisor also noted that Grievant had been given an opportunity to respond to the re-evaluation document and Supervisor provided her reply to Grievant’s response as follows:

1. The EWP expressly states that the employee will prepare and calculate monthly reports in a timely manner. Despite this item being in the EWP and on the evaluation as an area of improvement given to the employee during their annual evaluation, November reports were still late adding extra burden to colleagues.
2. The EWP expressly states that the employee is to establish and maintain customer relations and work with end users to resolve conflicts. Neither of these objectives were met with the [Regional Event-1] or the [Baby Shower Event-1]. And while there may have been successful events, in and around those two, these are glaring instances of poor performance that harms the reputation of the [Facility] and jeopardizes future bookings.
3. The EWP expressly states that the employee direct and coordinate services and activities that support smooth business operations. Despite being directly asked to contact [Company A] in early December, with whom we have a contract, regarding the use of linen tablecloths in December, this was not done. This resulted in employees taking linens home to launder them and the [Facility] not being open all available hours.
4. The EWP expressly states that the employee direct and coordinate services and activities that support smooth business operations.
 - a. We discussed the [Market Event-1] on November 15th and agreed on the date of Dec. 16, 2024. On November 20th I was contacted by [Witness 1] telling me that “we found out [College President] is having his [party]. After talking this weekend, we thought it might be beneficial to postpone and re-theme for spring.” I had to reach out to you to find out why [Witness 1] was e-mailing me and why [Witness 2] was contacting [College President] regarding an event that was your responsibility. Not doing this event meant that we missed a critical time to help our artisans sell their seasonal wares and to increase our sales during the holiday season.
 - b. The morning of December 12 you e-mailed to let me know that you had just found out that the [Luncheon Event-2] was canceled and could we put a sign on the door for you. [Another employee] had been there the day before and the venue was not set up for the luncheon. You were not scheduled to work at all on Monday or scheduled to work Tuesday at the [Facility], meaning that had the event happened, the space would have been unprepared. I had to ask a colleague to re-schedule so they could arrange for the setup.
5. Per the re-evaluation plan from 12/15/2024 and DHRM policy 1.60 Standards of Conduct, which states, employees are to report to work as

⁷⁹ Agency Ex. at 87-88.

scheduled and seek approval from the supervisor in advance for any changes to the established work schedule, including the use of leave and late or early arrivals and departures.

a. When working on the December schedule, I had to reach out more than once to obtain the information necessary to complete the December schedule for the [Facility] which delayed the December schedule.

b. On multiple occasions since your re-evaluation plan in December, you have left early or made changes to your schedule without seeking prior approval which is a violation of DHRM policy 1.60.

6. The EWP clearly states that the employee is to provide positive, professional, and prompt service to facility users, customers, and co-workers. During the walk through that you requested, you were asked multiple times to join the group. I had to come seek you out twice to come comment or give context on questions and each time you returned to your desk rather than staying with the group and helping.

7. Per DHRM policy 1.60 Employee Standards of Conduct, employees are expected to devote full effort to job responsibilities during work hours. You have a state-issued desk phone from which to conduct all job-related work, so there would be no need to use your personal phone for anything other than personal use. This is a violation of DHRM policy 1.60, Employee Standards of Conduct.

8. Per DHRM policy 1.60 Employee Standards of Conduct, employees are expected to meet or exceed established job performance expectations. Additionally, the EWP clearly states the employee is to create, implement and carry out policies and procedures for the use of facilities and services.

a. You were asked to write the standard operating procedures because they had not been done even though they have been in your EWP since your start date in 2021. With the [Facility] being closed, this presented a good opportunity to address this deficiency. Unfortunately, the quality of the work was subpar and still need extensive revision.

9. Per DHRM policy 1.60 Employee Standards of Conduct, employees are expected to resolve work-related issues and disputes in a professional manner and through established business processes. Your response provided to the notice of termination is yet another example of the ongoing unprofessional treatment and name-calling you have subjected me to throughout this process, which is violation of DHRM policy 1.60, employee Standards of Conduct.

CONCLUSIONS OF POLICY

Annual Performance Evaluation

Whether the College's evaluation of Grievant was arbitrary or capricious

State agencies may not conduct arbitrary or capricious performance evaluations. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned

basis.” GPM § 9. A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer’s authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee’s job performance.

Evaluation of Grievant’s performance as part of her annual performance evaluation appeared to this Hearing Officer to be made more complicated by the fact that the College did not appear to have immediately investigated Grievant’s October 12, 2023, allegations of bullying behaviors and retaliation by her supervisor. The delay in the College’s definitive response to Grievant about her concerns may arguably have provided some ambiguity to Grievant with respect to her communications with Supervisor. Grievant did not point to, and this Hearing Officer did not identify specific performance expectations that may have been unreasonable as a result of the College’s delay in investigating and responding to Grievant’s allegations of bullying behaviors and retaliation by Supervisor.

The College’s November 1, 2023 evaluation of Grievant’s performance was neither arbitrary nor capricious. The College considered Grievant’s core responsibilities and performance expectations for the evaluation period. Grievant’s performance had not been satisfactory to the College and Supervisor had issued a Notice of Improvement/Substandard Performance, including a Performance Improvement Plan that set forth specific examples of areas where performance was deficient as well as expectations for improvement. Grievant argued that her performance was being unfairly assessed based on a few bad on-line reviews made by difficult clients and guests. Grievant’s point is well taken; however, the College’s consideration of client feedback as part of its assessment of Grievant’s performance in a client-facing service position is not unreasonable, particularly where, as here, Supervisor also identified areas of concern with respect to Grievant’s actions and performance during those events. Grievant also asserted that she believed that she did not have to post her schedule or Part-Time Employee’s schedule on the shared calendar because, at the time Grievant stopped posting the hours, Grievant was responsible for approving time for Part-Time Employee and Grievant, herself, was an exempt employee. Grievant’s assertions about her assumptions may explain why she decided to stop following the instruction she previously had been given to post schedules on the shareable calendar, but it does not excuse her failure to continue to follow the instruction until provided a different instruction by her Supervisor. Grievant’s explanation of her assumptions related to the instruction also does not excuse the fact that it required multiple emails and repeated instructions from Supervisor for Grievant to begin posting the information again. Grievant asserted that Supervisor did not address issues with her when they occurred and waited to “pile on.” The performance period is an annual period and, while it may be helpful and a best practice for a manager to raise and address issues as they occur, the timeline for Supervisor’s efforts to address performance issues does not seem inordinate and appeared to address issues that arose during the performance year.

Grievant asserted that the Below Contributor rating on Grievant's annual performance evaluation was retaliation in response to Grievant filing a grievance related to Supervisor's treatment of Grievant. Grievant pointed to the timing of the performance evaluation within a few weeks of Grievant's filing of a grievance to suggest that the College's actions were retaliation. Grievant asserted that Supervisor treated her differently and became more critical of her performance after Grievant filed a grievance. Grievant also asserted that Supervisor did not provide coaching to help improve Grievant's performance. In order to succeed on her retaliation claim, Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.⁸⁰ If the College presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence to show that the Agency's stated reason was a mere pretext or excuse for retaliation.⁸¹ Grievant engaged in protected activity when she filed a grievance on October 12, 2023. Grievant experienced an adverse employment action when she received a "Below Contributor" rating on her performance evaluation on November 1, 2023. The College has demonstrated, however, that it had non-retaliatory business reasons for issuing a "Below Contributor" performance rating to Grievant because Grievant's performance during the evaluation period had not been satisfactory. Because the Agency had non-retaliatory reasons for its actions and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met her burden to prove that the Agency's issuance of a "Below Contributor" rating on Grievant's November 1, 2023 performance evaluation was retaliation.

Re-Evaluation and Dismissal

The College may remove Grievant from employment only if its re-evaluation was not arbitrary or capricious and it followed State policy.

Whether the College's re-evaluation of Grievant was arbitrary or capricious

As with performance evaluations, state agencies may not conduct arbitrary or capricious performance re-evaluations. Arbitrary or capricious is defined as "[i]n disregard of the facts or without a reasoned basis." GPM § 9. A performance rating is arbitrary or capricious if management determined the rating without regard to the facts, by pure will or whim. An arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence. If an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. If a Hearing Officer concludes an evaluation is arbitrary or capricious, the Hearing Officer's authority is limited to ordering the agency to re-evaluate the employee. GPM § 5.9(a)(5). The question is not whether the Hearing Officer agrees with the evaluation, but rather whether the evaluator can present sufficient facts upon which to form an opinion regarding the employee's job performance.

⁸⁰ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

⁸¹ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

Grievant generally disputed the College's assessment of her performance and disputed the facts related to specific examples of Grievant's performance.

Evaluation of Grievant's performance during the re-evaluation performance period appeared to this Hearing Officer to be made more complicated by the fact that the College did not appear to have immediately investigated Grievant's October 12, 2023, allegations of bullying behaviors and retaliation by her supervisor. The delay in the College's definitive response to Grievant about her concerns may arguably have provided some ambiguity to Grievant with respect to her communications with Supervisor. For this reason, this Hearing Officer did not find the College's performance expectations and assessment of Grievant's performance related to Luncheon Event-2 to be reasonable. The College determined in the Re-evaluation Performance Evaluation that Grievant had failed to timely set up for Luncheon Event-2 because the event space was not set up by some time on December 11, 2023, the day before the event and Grievant and Part-Time Employee both were scheduled to be in a meeting on campus related to a grievance filed by Grievant on the morning of December 12, 2023, the day the Facility was expected to host Luncheon Event-2. The evidence showed that Luncheon Event-2 was cancelled on December 11th, at which point no set up would be required for the event. The College's assessment of Grievant's performance appeared to primarily relate to her failure to communicate with Supervisor either to request help to ensure the set up occurred while Grievant was scheduled to be off from work or to make clear Grievant's plans for ensuring that the Facility was set up in time for the event. While such a performance expectation may be reasonable under most circumstances, this Hearing Officer does not find it reasonable in this case, where the College did not appear to have provided clarity to Grievant for navigating communications with her Supervisor in this situation, when Grievant's ability to ensure the set up for the event was complicated by a meeting related to her grievance and allegations against Supervisor, when Grievant knew that Luncheon Event-2 was cancelled on the day before the event, and the event space ultimately did not need to be set up for the event.

The Re-Evaluation Performance Evaluation also inappropriately included examples of Grievant's performance that occurred prior to the annual performance evaluation issued on November 1, 2023.⁸² As Grievant correctly pointed out, Grievant could not reasonably be expected to demonstrate improved performance based on activities that occurred prior to the annual performance evaluation and the start of the re-evaluation period. For purposes of the Re-Evaluation Performance Evaluation, this Hearing Officer does not consider relevant the examples of performance that occurred prior to November 1, 2023.

Even excluding the examples of performance issues that occurred prior to November 1, 2023 from the re-evaluation and performance related to Luncheon Event-2, however, this Hearing Officer cannot conclude that the College's re-evaluation of Grievant

⁸²See Agency Ex. at 54-60. Examples of performance that appeared to have occurred prior to November 1, 2023, included: Regional Event-1 (or any customer reviews related to such event), Baby Shower Event-1 (or any customer reviews related to such event), "Failure to provide Supervisor a schedule of hours worked from January through August 2023, "Supervisor put together Standard Operating Procedure in September 2023 for implementation," and "Negative internal/external comments about supervisor," Comments made to community members about previous clients who used event space."

was without any basis in fact such that it was arbitrary or capricious. The College monitored Grievant's work performance during the three-month re-evaluation period and then compared that work performance to Grievant's core responsibilities and performance expectations.

With respect to the assessment that Grievant did not plan and execute Market Event-1 as directed by Supervisor, Grievant argued that Supervisor did not come up with the idea for that event and Grievant was not responsible for that event. Grievant also argued that it was Supervisor, not Grievant, who made the decision to move the date for Market Event-1 from the holiday season to sometime in the Spring. Based on the testimony of Witness 1, Witness 2, and Part-Time employee, it does appear that the initial idea for Market Event-1 came from Part-Time Employee, Witness 1, Witness 2 and others. The evidence also is clear, however, that on November 8, 2023, Grievant discussed Market Event-1 with Supervisor and AVP-HR. During that discussion, Grievant, Supervisor, and AVP-HR brainstormed ideas for the event and discussed the benefit to the Facility of hosting the event. Supervisor gave Grievant the clear instruction to "definitely" work with Supervisor and [a campus event coordinator] on [Market Event-1].⁸³ Based on that conversation and her direction to Grievant, it was reasonable for Supervisor to expect Grievant to work with Supervisor on Market Event-1 and to keep Supervisor apprised of the status of planning and execution for Market Event-1. Although the evidence suggests that Witness 1, and others, were volunteers for Market Event-1, there was no evidence to suggest that Witness 1's participation with the event altered or changed Supervisor's instruction to Grievant regarding Grievant, not Witness 1, working with Supervisor on Market Event-1. The College has shown that there was a basis for its determination that Grievant failed to meet performance expectations with respect to the planning and execution of Market Event-1.

With respect to the College's assessment that Grievant did not meet job performance expectations with respect to the inventory project, Grievant argued that she did not fail to meet expectations because no firm deadline for completion of the inventory was established when, on January 3, 2024, Supervisor first directed her to "plan/begin" inventory. Grievant asserted that she began performing the inventory but had trouble completing the inventory due to weather-related closures of the Facility and because Part-Time Employee had been out sick and not scheduled to work leaving Grievant to work alone at the Facility. Although Grievant did not miss a firmly established deadline for completing the inventory, the preponderance of the evidence showed that Grievant failed to meet reasonable performance expectations for completion of the inventory project. It is reasonable for an employer to expect that when an employee is instructed to perform work, the employee will perform the work expeditiously or the employee will timely advise the employer of barriers toward progress or ask for clarification of priorities. Supervisor credibly testified that based on her experience, her expectation when she assigned the project was that the inventory project could be completed in approximately a week if an employee focused their time on the task.⁸⁴ This Hearing Officer did not find this expectation to be unreasonable. The consistent witness testimony was that January and February were slower months for the Facility's retail store and that after December 15,

⁸³ Grievant Ex. Tab 64 (Gr. recording at 54:24-1:03:41, 1:09:30-1:20:38) *and see* Grievant Ex. at 812-814.

⁸⁴ Hearing Recording at 1:17:00-1:22:44.

2023, no new events were being booked for the Facility's event space. Supervisor testified that there were approximately 799 pieces of merchandise to inventory.⁸⁵ Grievant appeared to dispute that number. Even assuming that the Facility had at least double the estimated pieces of merchandise to inventory, Supervisor's expectations for completion of the inventory project do not appear to be unreasonable to this Hearing Officer. The evidence showed that from January 3 through January 20, Grievant worked at the Facility on January 3, January 4, January 5, January 6, January 9, January 11, January 12, January 13, January 18, and January 20. Although Grievant was the only employee scheduled to work at the Facility during that time, the evidence indicated that there were only two events held at the Facility between those dates.⁸⁶ It was reasonable for the College to expect that Grievant would have sufficient time to complete the inventory project or to have made significant progress toward completion during that time. Part-Time Employee returned to work at the Facility on January 23, 2024. Grievant worked at the Facility on January 24, January 25, January 26, January 27, January 30, and January 31. There was only one event scheduled at the Facility during that time. Grievant had Part-Time Employee to assist with work at the Facility on January 24, January 25, and January 31.⁸⁷ It was not unreasonable for the College to expect that the inventory would be completed before the end of January. The evidence, however, appeared to show that the inventory project assigned to Grievant was "almost" complete by the time the Facility was closed on February 6, 2024, over a month after Grievant had been assigned the inventory project.⁸⁸ The College has shown that it had a basis for determining that Grievant failed to meet performance expectations that she prioritize and timely complete the inventory project she was assigned on January 3, 2024.⁸⁹

The College determined that Grievant failed to meet performance expectations with respect to time, attendance, and leave when she adjusted her schedule without receiving prior approval from her Supervisor. Grievant asserted that on February 16, 2024, she worked through lunch and informed an available manager that she was leaving early. Grievant offered no evidence to suggest that Supervisor had authorized or approved such actions by Grievant in lieu of receiving approval from Supervisor to adjust her schedule. Grievant asserted that "no one else" was required to satisfy the same requirements for providing or adjusting their schedules. However, Grievant did not demonstrate that "others" were in a similar position to Grievant or had been put on notice of similar performance issues. This Hearing Officer does not dispute Grievant's dedication to her work or that Grievant's job often required her to work long hours and on weekends and evenings. The September 14, 2023 Performance Improvement Plan, the November 1, 2023 Annual Performance Evaluation, and the December 15, 2023 Performance Re-Evaluation Plan, however, made clear that the College expected Grievant to improve her performance related to her scheduled work hours, including providing her schedule to Supervisor and obtaining approval from Supervisor before adjusting her schedule. This was not an unreasonable expectation and Supervisor repeatedly reminded Grievant of

⁸⁵ Hearing Recording at 1:17:43-1:21:24.

⁸⁶ Agency Ex. at 604.

⁸⁷ Agency Ex. at 604.

⁸⁸ Agency Ex. at 69-70, Grievant's Ex. Tab 67 (Gr. Hearing Recording at 7:43-10:53)

⁸⁹ Hearing Recording at 1:17:00-1:22:44, *see also* Agency Ex. at 334-342, 360-363, 374-381, 385.

the expectation. The College has shown that it had a basis for determining that Grievant failed to meet this expectation during the performance re-evaluation period.⁹⁰

The College's re-evaluation of Grievant was neither arbitrary nor capricious. The College considered Grievant's core responsibilities and performance expectations for the three-month re-evaluation period and then compared her work performance during the re-evaluation period to those expectations.

Whether the Agency complied with State policy

DHRM Policy 1.40⁹¹ provides that an employee who receives a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed as follows:

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.

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

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

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 (3)-month re-evaluation period.

⁹⁰ See Agency Ex. at 46, 82, 98-103, 368-369.

⁹¹ DHRM Policy 1.40, Performance Planning and Evaluation.

An employee whose performance during the re-evaluation 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's salary at least 5%.

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

If the agency determines that there are no alternatives to demote, reassign, or reduce the employee's duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an unsatisfactory re-evaluation will be terminated at the end of the three (3)-month re-evaluation period.⁹²

The College developed a Performance Re-Evaluation Plan for Grievant that was provided to Grievant by email on December 15, 2023 and signed by Grievant on December 19, 2023. During the hearing, no reason was provided to explain why the College failed to provide the Performance Re-Evaluation Plan to Grievant within 10 workdays of the evaluation meeting during which the Grievant received her annual performance evaluation. Although the College should have provided Grievant with a Performance Re-Evaluation Plan within 10 workdays of Grievant's annual performance evaluation meeting, its failure to do so in this case ultimately was harmless error. The Performance Re-Evaluation Plan that was provided to Grievant on December 15, 2023, essentially set forth the same standards and identified similar issues, with a few updates, as the performance improvement plan that Grievant received on September 14, 2023. Additionally, although the College was late in providing Grievant with a Performance Re-Evaluation Plan, it appeared to also extend the period during which it re-evaluated Grievant's performance to three months following the provision of the Performance Re-Evaluation Plan. The September 14, 2023 Performance Improvement Plan and the December 15, 2023 Performance Re-Evaluation Plan were sufficient in detail to properly inform Grievant of the College's expectations for her work performance during the re-evaluation period.

Grievant argued that the College's re-evaluation of Grievant's performance and dismissal of Grievant were retaliatory. In order to succeed with a retaliation defense,

⁹² DHRM Policy 1.40, Performance Planning and Evaluation.

Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.⁹³ If the College presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the College's stated reason was a mere pretext or excuse for retaliation.⁹⁴ Grievant engaged in protected activity when she filed grievances on October 12, 2023, December 1, 2023, and February 1, 2023. Grievant experienced adverse employment actions when she received an overall rating of Below Contributor on her Re-evaluation Performance Evaluation and was dismissed from her employment. Grievant asserted that Supervisor treated her differently and became more critical of her performance after Grievant began filing grievances. Grievant appeared to argue that Supervisor's motives and pre-determination to terminate Grievant's employment were evidenced by Supervisor's January 11, 2024, email to College President and AVP-HR asking that they request legal and policy guidance as to whether there was sufficient basis at that point to terminate Grievant's employment and that such information be reviewed with consideration to Supervisor's safety. Although Supervisor's on-going and apparently unaddressed concerns about her safety raised a question for this Hearing Officer with respect to Supervisor's potential bias (conscious or unconscious) toward Grievant, the College has demonstrated that it had non-retaliatory business reasons for its actions based on Grievant's unsatisfactory performance. Grievant's performance was not meeting expected standards and continued to fail to meet those performance standards during the re-evaluation period. Grievant has not shown that but for her engagement in protected activity, the College would not have found her performance during the re-evaluation period unsatisfactory and would not have dismissed her. Because the College had non-retaliatory reasons for its actions and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met her burden to prove the College's re-evaluation of Grievant's performance and dismissal of Grievant were retaliation. It is this Hearing Officer's observation that much of the contention and concern about retaliation and bias in this matter may have been avoided or mitigated if the College had followed relevant best practices and more strictly adhered to procedures for performance management.

The College's re-evaluation and dismissal of Grievant was consistent with policy. Accordingly, the College's decision to remove Grievant must be upheld.

Group II Written Notice

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include acts of minor misconduct that require formal disciplinary action." Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action." Group III offenses "include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination."⁹⁵

⁹³ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

⁹⁴ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App'x 139, 140 (4th Cir. 2014).

⁹⁵ See DHRM Policy 1.60, Standards of Conduct.

Whether Grievant engaged in the behavior and whether the behavior constituted misconduct

The College asserted in the Written Notice that Grievant had failed to follow instructions when she did not complete the inventory by January 20, 2024 or ask for assistance by that time, when she did not provide her inventory procedures to Supervisor until January 24, 2024, and when she still had not completed the inventory by the time of the issuance of the Written Notice (January 30, 2024).

As noted above, Grievant did not dispute that on January 3, 2024, Supervisor directed her to begin working on the inventory. Grievant argued that Supervisor did not establish a firm deadline for completion of the inventory when Supervisor first directed her to “plan/begin inventory.” Grievant asserted that she began the inventory but had trouble completing the inventory due to weather-related closures of the Facility and because Part-Time Employee had been out sick and not scheduled to work leaving Grievant to work alone at the Facility. Supervisor first directed Grievant to “plan/begin inventory” on January 3, 2024 in two separate emails, one of which also generally directed the email recipients that they should “begin focusing on” the listed “priorities” and suggested that email recipients should “please be ready to give an update on these items/priorities.”⁹⁶ On January 20, 2024, approximately two and half weeks after Supervisor first directed Grievant to begin the inventory, Supervisor emailed Grievant to observing that she expected that day to be a slow sales day and suggested that Grievant take advantage of the time to work on the inventory. Grievant responded that she would be working on inventory and, for the first time, advised Supervisor that if Supervisor wanted the inventory completed before the end of the month, Grievant would need additional help.⁹⁷ At that point, Supervisor reminded Grievant that she had instructed Grievant to begin working on the inventory on January 3, 2024. Supervisor advised Grievant that she did not understand why Grievant felt that she “could not complete the inventory over the next four working days” and suggested to Grievant that “[p]erhaps you should send me a detailed list of how you currently perform inventory, and we can discuss it to see if efficiencies can be found.”⁹⁸ Grievant then advised Supervisor that she had “performed about 35% of the inventory” and noted that she had been responsible for her other duties, including hosting an event.⁹⁹ At 5:53 pm, Supervisor replied observing that retail sales had been low and that Grievant had not had responsibility for scheduling new events at the Facility. Supervisor also asked Grievant to help her understand what Grievant was doing each day that was preventing her from finishing up the inventory.¹⁰⁰ The evidence showed that Grievant was not scheduled to work on January 21, 2024, January 22, 2024, or January 23, 2024, as her normal workdays were Tuesday through Saturday and she had been approved to take leave on January 23, 2024. On Monday, January 22, 2024, Supervisor sent an email to Grievant that made clear that she had expected Grievant to immediately share the inventory procedures with her pursuant to their email exchange on January 20, 2024, but Supervisor at that point indicated that she would not have time to review those procedures before Supervisor’s return on January

⁹⁶ Agency Ex. at 360, 363 and 361 *and see* Hearing Recording at 1:17:00-1:22:44.

⁹⁷ Agency Ex. 369-370.

⁹⁸ Agency Ex. at 368-369.

⁹⁹ Agency Ex. at 367-368.

¹⁰⁰ Agency Ex. at 366-367.

25, 2024 from travel. Supervisor then instructed Grievant to “[p]lease continue with the inventory process you followed last year and update me on Friday, January 26, 2024.”¹⁰¹ On January 24, 2024, Grievant sent the inventory procedures to Supervisor.¹⁰² On January 26, 2024, Grievant provided the requested update to Supervisor, advising her that “[a]s of today, we are finished with almost all the smaller collections. We still need to inventory 4-5 of our larger collections (jewelry, leather crafts, etc) that have a lot of little pieces. Based on what I have completed so far, it appears that there are only a few discrepancies that I will need to research. I anticipate we should have inventory completed in the next two weeks.”¹⁰³

Although it was reasonable for Supervisor to expect that Grievant would expeditiously perform the inventory project she was assigned on January 3, 2024, Supervisor did not provide an instruction as to the specific date by which Grievant should complete the project. Supervisor’s expectations with respect to a deadline for completion of the inventory became clearer when she advised Grievant on January 20th that Supervisor believed the inventory could be completed within four workdays. Supervisor had not, up to that point set a firm deadline. When Supervisor described her expectation that the work could be completed within Grievant’s next four workdays, she then asked Grievant to share her procedures without establishing a firm deadline and then set January 26th as a deadline for Grievant to update her as to the status of the inventory.

Although Grievant did not miss a firmly established deadline for completing the inventory, the preponderance of the evidence showed that Grievant failed to meet reasonable performance expectations for completion of the inventory project. It is reasonable for an employer to expect that when an employee is instructed to perform work, the employee will perform the work expeditiously or the employee will timely advise the employer of barriers toward progress or ask for clarification of priorities. Supervisor credibly testified that based on her experience, her expectation when she assigned the project was that the inventory project could be completed in approximately a week if an employee focused their time on the task.¹⁰⁴ This Hearing Officer found this expectation to be reasonable. The consistent witness testimony was that January and February were slower months for the Facility’s retail store and that after December 15, 2023, no new events were being booked for the Facility’s event space. Supervisor testified that there were approximately 799 pieces of merchandise to inventory.¹⁰⁵ Grievant appeared to dispute that number. Even assuming that the Facility had at least double the estimated pieces of merchandise to inventory, Supervisor’s expectations for completion of the inventory project do not appear to be unreasonable. The evidence showed that from January 3 through January 20, Grievant worked at the Facility on January 3, January 4, January 5, January 6, January 9, January 10, January 11, January 12, January 13, January 18, and January 20. Although Grievant was the only employee scheduled to work at the Facility during that time, the evidence indicated that there were only two events held at the Facility between those dates.¹⁰⁶ It was reasonable for the College to expect

¹⁰¹ Agency Ex. at 365-366.

¹⁰² Agency Ex. at 364.

¹⁰³ Agency Ex. at 381.

¹⁰⁴ Hearing Recording at 1:17:00-1:22:44.

¹⁰⁵ Hearing Recording at 1:17:43-1:21:24.

¹⁰⁶ Agency Ex. at 604.

that Grievant would have sufficient time to complete the inventory project or to have made significant progress toward completion during that time. Part-Time Employee returned to work at the Facility on January 23, 2024. Grievant worked at the Facility on January 24, January 25, January 26, January 27, January 30, and January 31. There was only one event scheduled at the Facility during that time. Grievant had Part-Time Employee to assist with work at the Facility on January 24, January 25, and January 31.¹⁰⁷ It was not unreasonable for the College to expect that the inventory would be completed before the end of January. The evidence, however, appeared to show that the inventory project assigned to Grievant was “almost” complete by the time the Facility was closed on February 6, 2024, over a month after Grievant had been assigned the inventory project.¹⁰⁸

Whether the Agency’s discipline was consistent with law and policy

Grievant’s failure to prioritize and make timely progress toward completion of the inventory was unsatisfactory performance, a Group I offense.¹⁰⁹

It is unclear to this Hearing Office whether the College provided Grievant with notice of its intent to issue the written notice and an opportunity to respond consistent with the due process requirements of DHRM Policy 1.60. Based on the evidence provided, it appeared that the College first discussed its intention to pursue discipline related to Grievant’s failure to timely complete the inventory on January 30, 2024, when the College presented Grievant with the Written Notice and asked her to sign the notice indicating her receipt of the notice. To the extent the College failed to afford Grievant with due process any such issues were resolved by the hearing. Grievant had an opportunity to present evidence and question College witnesses.

Grievant argued that the disciplinary action was the result of retaliation by Supervisor. In order to succeed with a retaliation defense, Grievant must show that (1) she engaged in a protected activity; (2) she experienced an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action.¹¹⁰ If the College presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the College’s stated reason was a mere pretext or excuse for retaliation.¹¹¹ Grievant engaged in protected activity when she filed grievances on October 12, 2023, and December 1, 2023. Grievant experienced an adverse employment action when she received a Written Notice of disciplinary action. Grievant argued that Supervisor treated her differently and became more critical of her performance after Grievant began filing grievances. Grievant appeared to argue that Supervisor’s motives and predetermination to terminate Grievant’s employment were evidenced by Supervisor’s January 11, 2024 email to College President and AVP-HR asking that they request legal and policy guidance as to whether there was sufficient basis at that point to terminate Grievant’s employment and that such information be reviewed in the with consideration of Supervisor’s safety. Although Supervisor’s on-going and

¹⁰⁷ Agency Ex. at 604.

¹⁰⁸ Agency Ex. at 69-70, Grievant Ex. Tab 67 (Gr. Hearing Recording at 7:43-10:53)

¹⁰⁹ See DHRM Policy 1.60, Standards of Conduct, Attachment A.

¹¹⁰ See *Netter v. Barnes*, 908 F.3d 932, 938 (4th Cir. 2018) (citing *Univ. of Tex. S.W. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013)); *Villa v. CavaMezze Grill, LLC*, 858 F.3d 896, 900-901 (4th Cir. 2017).

¹¹¹ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App’x 139, 140 (4th Cir. 2014).

apparently unaddressed concerns about her safety raised a question for this Hearing Officer with respect to Supervisor's potential bias (conscious or unconscious) toward Grievant, the preponderance of the evidence showed that the College had non-retaliatory business reasons for its discipline of Grievant because Grievant failed to meet reasonable performance expectations with respect to completion of the inventory project. Grievant has not shown that, but for her engagement in protected activity through the filing of grievances, the College would not have issued the discipline for her failure to timely complete the inventory project. Because the College had non-retaliatory reasons for its discipline of Grievant and Grievant has offered no evidence to suggest that those reasons are mere pretext, Grievant has not met her burden to prove the College's issuance of discipline to Grievant was retaliation. It is this Hearing Officer's observation that much of the contention and concern about retaliation and bias in this matter may have been avoided or mitigated if the College had followed relevant best practices and more strictly adhered to procedures for performance management and discipline.

Mitigation

Virginia Code § 2.2-3005.1 authorizes hearing officers to order appropriate remedies including "mitigation or reduction of the agency disciplinary action." Mitigation must be "in accordance with rules established by the Department of Human Resource Management...."¹¹² Under the Rules for Conducting Grievance Hearings, "[a] hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation." A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive. In light of this standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the College's evaluations of Grievant's performance and decision to remove Grievant are **upheld**.

For the reasons stated herein, the College's issuance to Grievant of a Group II Written Notice of disciplinary action is **reduced** to a Group I Written Notice of disciplinary action.

¹¹² Va. Code § 2.2-3005.

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 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.¹¹³

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

¹¹³ 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.