



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12238

Hearing Date: June 3, 2025

Decision Issued: June 18, 2025

PROCEDURAL HISTORY

On January 14, 2024, Grievant was issued a Group I Written Notice of disciplinary action for unsatisfactory performance (Group I Written Notice). The Group I Written Notice described the nature of the offense as:

On December 10 and December 11, 2024, [Grievant's] supervisor was notified that trashcans in her assigned work areas had not been emptied and were overflowing. [Grievant] has been counseled on numerous occasions for failure to perform her duties.¹

On January 14, 2024, Grievant was issued a Group II Written Notice for failing to report to work on December 7, 2024 (Group II Written Notice-Attendance). The Group II Written Notice-Attendance described the nature of the offense as:

On December 7, 2024, [Grievant] failed to report to work for the University Graduation Ceremony. Attendance for this event was mandatory. [Grievant] received a Group I notice for a similar offense that occurred on September 23, 2024 when she failed to report to work for Freshman Move-In Day which was also a mandatory event.²

¹ Agency Ex. at I.

² University Ex. H. The Group II Written Notice-Attendance incorrectly identified the offense date for the prior active Group I written notice as September 23, 2024. That date, however, was the date of issuance of that Group I written notice, not the date of the offense. The date of the prior offense was Freshman Move-In Day, August 10, 2024. See University Ex. O.

On January 14, 2024, Grievant was issued a Group II Written Notice with termination for failing to attend a meeting as instructed on December 2, 2024 (Group II Written Notice-Insubordination/Failure to Follow Instruction). The Group II Written Notice-Insubordination/Failure to Follow Instruction described the nature of the offense as:

On December 2, 2024, [Grievant] was instructed by her supervisor to come to a meeting to review and discuss her performance evaluation. [Grievant] agree[d] to come immediately after she changed two trashcans. However, she failed to come at all prior to the end of her work shift.³

On January 18, 2025, Grievant timely filed a grievance to challenge the University's actions. The matter advanced to hearing. On February 18, 2025, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On June 3, 2025, a hearing was held at the University.

During the hearing, Grievant objected to University Exhibit A. Agency witnesses identified University Exhibit A as the Employee Work Profile for Grievant's position. Grievant disputed that Exhibit A was the Employee Work Profile for her position because, although Grievant is a Groundskeeper, the section of the Employee Work Profile describing the purpose of the position set forth the purpose for a Groundskeeper Superintendent. The Agency argued that the Employee Work Profile was a job description that was used for both the Groundskeeper position and the Groundskeeper Superintendent position. The document identified as University Exhibit A appeared to have been signed by Supervisor-1 on October 31, 2023, and acknowledged with "I refuse to sign" by Grievant on October 30, 2023. The Hearing Officer admitted University Exhibit A into the record. The rest of the University's exhibits were admitted into the record without objection.⁴ The Grievant proffered two exhibits after the extended deadline for the exchange of exhibits and witness lists. The exhibits were marked by the Hearing Officer as Grievant's Exhibits 65 and 66. The University objected to the exhibits because they were offered after the deadline for the exchange of exhibits. Grievant's Exhibits 65 and 66 were emailed correspondence from the University's Advocate in response to Grievant's request for documents (and the Hearing Officer's order for production) and an email from the University's Advocate to the Hearing Officer and the Grievant noting that the University objected to some of the witnesses identified on Grievant's witness list. As both exhibits reflected all or portions of email exchanges between the Grievant and the University's Advocate (and the Hearing Officer), the Hearing Officer admitted both exhibits into the record. The rest of the Grievant's exhibits were admitted into the record without objection.⁵ The Hearing Officer left the record open for five days for the University to provide a copy of a policy requested by the Grievant's Advocate pursuant to his questioning of a University witness regarding required use of University email accounts. On June 5, 2025, the University's Advocate provided the Grievant and this Hearing Officer with a University policy entitled "Communication via Electronic Mail." As requested by the Grievant's Advocate during the hearing, the Hearing Officer admitted the policy into the record as Grievant's Exhibit 67.⁶ On June 5, 2025, the University Advocate also submitted

³ Agency Ex. at G and Grievant Ex. at 25.

⁴ See Hearing Recording #1 at 5:43:08-6:07:24.

⁵ Hearing Recording #2 at 3:17:15-3:29:47.

⁶ Hearing Recording #1 at 42:42-45:16, Hearing Recording #2 at 4:22:40-4:28:20.

a copy of an email dated December 2, 2024. The hearing record was not left open for receipt of this document and the Hearing Officer did not admit the document into the hearing record and did not consider it further.

APPEARANCES

Grievant
Grievant's Advocate
University Advocate
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the written notices?
2. Whether the behavior constituted misconduct?
3. Whether the University'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)?
4. 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 University 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 to discipline 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 termination, Grievant was a Groundskeeper for Norfolk State University. Grievant worked for the University for more than eight years. Grievant presented evidence that showed that from 2018 to 2023 various University students, faculty, and staff sent emails to University managers that were complimentary of Grievant's work at the University.⁷

⁷ Grievant Ex. at 4-22.

Grievant's regular scheduled work hours were 7:00 am to 4:00 pm, Monday through Friday.⁸ As a Groundskeeper, Grievant was required to work during mandatory University events and during inclement weather.⁹

Supervisor-1 and Supervisor-2 were both supervisors in the University's Grounds department. Grievant could receive instruction from Supervisor-1 or Supervisor-2.

On May 6, 2024, Grievant was issued a work order setting forth her "trash schedule," that is, the area for which she was expected to monitor and empty trash cans and clear trash and debris throughout each day on a daily basis. Supervisor-1 and Grievant both testified that Grievant was expected to work according to her trash schedule from May 6, 2024, through at least the end of December 2024. Grievant's trash schedule included the following:

CAMPUS WIDE-LAWN MAINTENANCE & LANDSCAPING

[Building-1] (Trash Cans & Parking Lots included)

[Building-2] (Trash Cans & Parking Lots included)

[Building-3] (Trash Cans)

[Building-4] (Trash Cans included)

[Building-5] (Trash Cans & Parking Lots included)

[Building-6] (Trash Cans & Parking Lots included)

[Building-7] (Trash Cans & Parking Lots included)

[Building-8] (Trash Cans & Parking Lots included)

Please clean away trash and leaves from drains along Route.

Please be advised you may be called or asked to do something outside of your area.¹⁰

On June 3, 2024, Grievant received a Notice of Improvement Needed. The Notice of Improvement Needed listed as a performance deficiency that Grievant was "riding pass trash and debris."¹¹ At Grievant's request, Supervisor-1 captured Grievant's Improvement Plan in a Facilities' Management work order that set forth a schedule for Grievant to perform her work duties. Grievant was expected to follow the Improvement Plan work order through at least December 31, 2024. Grievant's schedule for performing her duties pursuant to the Improvement Plan work order was as follows:

From: 7:15 am to 9:45 please follow your trash schedule

From: 9:50 am to 2:00 pm please address the following:

[Building-9] balcony (9:50 to 10:25 am)

[Building-9] loading dock area (10:30 to 11 am)

⁸ See University Ex. H at 2, Grievant Ex. 63, and see Hearing Recording #1 at 4:47:01-5:01:12.

⁹ See Hearing Recording #1 at 13:42-23:35, 1:39:25-1:47:00, 2:35:50-2:40:20, 4:31:37-4:34:56, 5:04:00-6:07:24 and Hearing Recording #2 at 38:36-40:44, 1:35:08-1:39:42.

¹⁰ See Grievant Ex. at 31 and see Hearing Recording #1 at 3:00:52-3:02:50, 4:22:00-4:31:24, 4:35:55-4:39:19.

¹¹ University Ex. at R.

Check [Building-10] for leaves and trash around the whole building (12 pm to 12:25 pm)

Check [Building-11] trash cans and address any debris (12:30 to 1 pm)

Address any trash and debris down [Street-A] from (1:15 pm to 1:45 pm)

From 2:00 pm to 4:00 pm please follow your trash schedule.

Please clean away trash and leaves from drains along Route.

Please be advised you may be called or asked to do something outside your area.¹²

On December 2, 2024, Supervisor-1 was busy, but needed to meet with Grievant to review her performance evaluation. Supervisor-1 asked Supervisor-2 to tell Grievant that Supervisor-1 needed to see her. Supervisor-2 found Grievant somewhere on the University grounds and told Grievant that Supervisor-1 wanted to see her. Grievant told Supervisor-2 that she had to empty two trash cans first and then she would go see Supervisor-1. Grievant emptied the trash cans, dumped the trash she had collected, parked and plugged in her work cart to charge, gathered her belongings, got into her truck, and then drove to the building where Supervisor-1's office was located. Grievant testified that as she parked her truck, she saw Supervisor-1 standing outside the building talking to Supervisor-2 and another employee. According to Grievant, she entered the building and waited for Supervisor-1 until she clocked out at 3:49 pm. Grievant testified that she then left work for the day without speaking to Supervisor-1. Supervisor-1 testified that he encountered Grievant at 3:55 pm and advised Grievant they could meet at that time. According to Supervisor-1, Grievant responded by telling Supervisor-1 that she was off the clock, and she then left work for the day. Although Supervisor-1 and Grievant had differing recollections as to whether they had any interaction in the moments before Grievant left work for the day on December 2, 2024, there was no dispute that Grievant did not meet with Supervisor-1 before she left work on that day.¹³

On December 6, 2024, Supervisor-1 sent an email to Assistant Director-Grounds regarding the status of Grievant's performance evaluation. Supervisor-1 included Director-Building Services and Supervisor-2 as recipients on the email. Supervisor-1 wrote:

. . . [Grievant] has now refused twice to review and sign her performance evaluation form she was asked to meet with us on Monday, Dec. 2nd 2024 to which she replied she had to change two trash cans, and she would come by to sign at 2:43 pm as time went by 3:55 pm came and she was asked to sign she replied she was off the clock smiled and left. Then again on Dec. 5th, 2024, she just smiled and walk away without signing anything. We are continuing to have this pattern of behavior from [Grievant] that has surpassed a level that can be managed without Human Resources involvement. [Grievant's] lack of teamwork as a Grounds Member is having

¹² Agency Ex. at R and Grievant Ex. at 30 and see Hearing Recording #1 at 3:00:52-3:02:50, 4:22:00-4:31:24, 4:35:55-4:39:19.

¹³ Hearing Recording #1 at 2:40:20-2:43:00, 3:02:50-3:13:06, 4:47:01-5:01:12, Hearing Recording #2 at 1:20:08-1:49:08, 2:11:05-2:18:14, 2:56:24-2:58:48 and see Agency Ex. H at 2 and Grievant Ex. 26.

a very negative impact upon the overall morale of the department and presents a negative impression upon the performance of the Grounds Department.¹⁴

The University's Fall Graduation ceremony for University students was held on Saturday, December 7, 2024. That day was a mandatory workday for University groundskeepers, other Grounds staff, and other essential employees. Grievant did not report to work on December 7, 2024, and Grievant did not call out from work that day.¹⁵

At approximately 4:54 pm on December 10, 2024, Director of Administration-Facilities reported to Supervisor-1 that trash cans were overflowing at Building-X and along Street-A.¹⁶

On December 13, 2024, Supervisor-1 sent another email to Assistant Director-Grounds with a copy to Director-Building Services and Supervisor-2. Supervisor-1 repeated the information he had included in his December 6, 2024 email regarding his efforts to meet with Grievant to discuss her performance evaluation. Supervisor-1 also described concerns with Grievant's performance. Supervisor-1 wrote:

. . . On Dec. 10, 2024, at 4:54 pm the [Director of Administration-Facilities] called about trash cans overflowing in [Grievant's] area at [Building-X] and along [Street-A] once again this is twice her supervisor had to stop working to address issues dealing with [Grievant] not doing her Job as requested. [Grievant] has been given numerous Improvement plans to help address issues related to not following her supervisor's requests to perform her job duties, in which she has requested work orders (please see attachments) to help her which she doesn't want to follow. On Dec. 11th at 9:25 am the [VP-Facilities Management] stop me to address trash cans near [Building-9] where the President comes in and out of. I asked [Grievant] to please stop riding pass trash and she just smiles and makes derogatory statements. [Grievant's] unwillingness to correct her behavior and our numerous of unsuccessful attempts to coach and counsel her has left me with emails from her with statements that are false, misleading and defamation of character.¹⁷

On January 2, 2025, Grievant returned to work following a period of leave during the holidays. When Grievant went to retrieve a cart that she used for work, she found a bullet resting on the driver's side seat of the cart. Grievant reported the incident to University campus police. The campus police removed the bullet and asked Grievant questions about the cart. Grievant reported that she had not used the cart since December 19, 2024.¹⁸

¹⁴ Grievant Ex. 26.

¹⁵ See Hearing Recording #1 at 13:42-23:35, 2:35:50-2:40:20, 4:31:37-:34:56, 5:04:00-6:07:24, Hearing Recording #2 at 38:36-40:44, 1:35:08-1:39:42, and University Ex. H at 2.

¹⁶ Hearing Recording #1 at 5:04:00-6:00:00 and Grievant Ex. 29.

¹⁷ Grievant Ex. 29.

¹⁸ Grievant Ex. 51.

On January 14, 2025, the University issued to Grievant the Group I Written Notice, the Group II Written Notice-Attendance, and the Group II Written Notice-Insubordination/Failure to Follow Instructions. The University terminated Grievant's employment effective January 14, 2025.¹⁹

At the time of her termination, Grievant had prior active discipline. Grievant had an active Group II written notice²⁰ issued on September 23, 2024, for failure to follow instructions and insubordination related to proper trash removal procedures. Grievant also had an active Group I written notice²¹ issued on September 23, 2024, for unacceptable attendance for failure to report to work on Student Move-In Day as required. Although Grievant disputed the merits of those disciplinary actions and generally asserted that the University impeded her efforts to file grievances, there was no evidence that those prior active disciplinary actions had been rescinded or were the subject of an on-going grievance.

CONCLUSIONS OF POLICY

The responsibility of the Hearing Officer is to determine whether the University has proven by a preponderance of the evidence that the disciplinary actions as set forth in the written notices were warranted and appropriate under the circumstances. To do this, the Hearing Officer reviews the evidence *de novo* (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the disciplinary action; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the University was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

Group I Written Notice

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

The University has not met its burden of proving by a preponderance of the evidence that Grievant engaged in unsatisfactory work performance on December 10, 2024, or on December 11, 2024.

In the Group I Written Notice, the University described Grievant's offense as "[o]n December 10 and December 11, 2024, [Grievant's] supervisor was notified that trash cans in her assigned work areas had not been emptied and were overflowing. [Grievant] has been counseled on numerous occasions for failure to perform her duties."²²

¹⁹ See Agency Ex. F, G, H, and I.

²⁰ University Ex. K.

²¹ University Ex. O.

²² Agency Ex. I.

Grievant testified that she did not recall that trash cans in her work areas were overflowing on December 10 and December 11, 2024, and Grievant generally denied that she her work performance was unsatisfactory on those dates.²³

The evidence showed that on December 13, 2024, Supervisor-1 sent an email to Assistant Director-Grounds with a copy to Director-Building Services and Supervisor-2 describing the reports of overflowing trash cans on December 10 and 11, 2024.²⁴ At that time, Supervisor-1 noted that Director of Administration-Facilities reported on December 10, 2024 at 4:54 pm that trash cans were overflowing at Building-X and along Street-A. Director of Administration-Facilities testified during the hearing and consistent with Supervisor-1's email, that on December 10, 2024, she reported her observation of overflowing trash cans at Building-X and along Street-A.²⁵

Building-X was not a building identified on Grievant's Improvement Plan or on her trash schedule.²⁶ Although Street-A was identified on Grievant's Improvement Plan as an area for her to remove trash and debris, the Improvement Plan required Grievant to do so from 1:15 pm to 1:45 pm each day.²⁷ The University presented no evidence that Grievant's work schedule or work area had been modified to include Building-X on December 10, 2024. The University also provided no evidence to show that Grievant had not picked up trash along Street-A consistent with her Improvement Plan, that is from 1:15 pm to 1:45 pm on December 10, 2024, that she had been instructed to pick up trash along Street-A at a later time on that date, that she rode past trash without picking it up, or that it was unreasonable for trash cans along Street-A to become full between 1:45 pm and 4:54 pm. Supervisor-1 broadly testified about the events of December 10 and December 11, 2024 and generally testified that Grievant had not addressed the overflowing trash cans when she was asked to do so and that he had to perform the work. It was not clear, however, if or when Supervisor-1 asked Grievant to address trash along Street-A or if he asked Grievant to address trash at Building-X.²⁸ The evidence showed that Grievant's daily work schedule was from 7:00 am to 4:00 pm, so it is unlikely she would have been asked to address trash removal that same day after Director of Administration-Facilities reported the overflowing trash cans at 4:54 pm on December 10, 2024. Supervisor-1 broadly testified that at some point on December 10 or December 11, 2024, he asked Supervisor-2 to tell Grievant to address overflowing trash cans. It was not clear from his testimony whether that included asking Grievant to address the overflowing trash cans reported by Director of Administration-Facilities.²⁹ Although Supervisor-2 testified during the hearing, Supervisor-2 did not provide any testimony regarding any conversations he may have had with Supervisor-1 or Grievant regarding overflowing trash cans on December 10, 2024, or December 11, 2024.³⁰ The University has not met its burden of providing that Grievant's performance with respect to emptying trash cans and

²³ Hearing Recording #2 at 3:05:40-3:09:57.

²⁴ Hearing Recording #1 at 5:04:00-6:00:00 and Grievant Ex. 29.

²⁵ Grievant Ex. 29.

²⁶ Grievant Ex. 30-31.

²⁷ Grievant Ex. 30-31.

²⁸ Hearing Recording #1 at 2:43:45-2:48:58, 2:53:02-2:55:30 and see Hearing Recording #1 at 35:00-38:27, 1:47:00-1:53:00.

²⁹ See Hearing Recording #1 at 2:43:15-2:48:58, 2:53:02-2:55:30, 4:35:55-4:39:19.

³⁰ See Hearing Recording #2 at 1:20:08-1:49:08.

picking up trash at Building-X or along Street-A was unsatisfactory on December 10, 2024, or on December 11, 2024.

In his December 13, 2024 email, Supervisor-1 also reported that on December 11, 2024 at 9:25 am the VP-Facilities Management reported that trash cans needed to be addressed near Building-9.³¹ During the hearing, VP-Facilities Management testified that he often reported his observations of trash cans and other issues that needed to be addressed, but he could not recall with any detail, what, if anything he may have reported to Supervisor-1 on December 11, 2024.³² Supervisor-1 testified to his recollection that VP-Facilities Management reported overflowing trash cans at Building-9 and also at Building-3 on December 10 or December 11, 2024. Supervisor-1 also testified to his recollection that Assistant Director-Grounds also reported an issue with trash in front of Building-5 on that same day and in the same time frame as the report of trash from VP-Facilities Management.³³

With respect to overflowing trash cans near Building-9, the University presented no evidence as to how it determined that Grievant's performance was unsatisfactory or how Grievant's performance was inconsistent with her Improvement Plan which required her to empty trash cans at the Building-9 balcony from 9:50 am to 10:25 am and at the Building-9 loading dock area from 10:30 am to 11:00 am.

With respect to overflowing trash cans near Building-3 and Building-5, those trash cans were not mentioned by Supervisor-1 in his December 13, 2024 email,³⁴ by VP-Facilities Management during his testimony,³⁵ or by Assistant Director-Grounds during his testimony.³⁶ Even assuming that Supervisor-1's recollection was correct, and there were reports of overflowing trash cans in front of Building-3 and Building-5 on December 11, 2024 around 9:25 am when VP-Facilities Management reported the overflowing trash cans at Building-9, the University still has not met its burden of proof. Although Building-3 and Building-5 were among the eight locations listed on Grievant's trash schedule, the University has not shown how Grievant's performance was unsatisfactory because two of the eight locations that she was instructed to address between 7:15 am and 9:45 am and again between 2:00 pm and 4:00 pm every day were reported as needing attention at approximately 9:25 am. There was no evidence that Grievant was expected to have been to Building-3 or Building-5 before 9:25 am as part of her schedule on December 11, 2024, or that it was unreasonable for trash cans in those areas to have become full by that time.

Supervisor-1 broadly testified that at some point on December 10 and/or December 11, he asked Supervisor-2 to tell Grievant to address overflowing trash cans. Although Supervisor-2 testified during the hearing, Supervisor-2 did not provide any testimony regarding any conversations he may have had with Supervisor-1 or Grievant

³¹ Grievant Ex. 29.

³² See Hearing Recording #1 at 2:16:45 - 2:28:22.

³³ See Hearing Recording #1 at 2:43:15-2:48:58, 2:53:02-2:55:30, 4:35:55-4:39:19.

³⁴ Grievant Ex. 29.

³⁵ See Hearing Recording #1 at 2:16:45 - 2:28:22.

³⁶ See Hearing Recording #1 at 11:14 - 2:13:27.

regarding overflowing trash cans on December 10, 2024, or December 11, 2024.³⁷ To the extent that Supervisor-1 testified that Supervisor-2 told Supervisor-1 that he found Grievant “just sitting,” there was no evidence as to when or where Grievant was “sitting” or how that supported the University’s determination that Grievant’s work was unsatisfactory with respect to emptying specific trash cans. Although Supervisor-1 testified that he ultimately addressed the overflowing trash cans, the University did not present evidence to show that his decision or need to do so was the result of Grievant’s unsatisfactory performance. Supervisor-1 also testified that given the number of grounds staff at the University, it was a challenge for them to ensure that there was never any unsightly trash. He also testified that his determination regarding how he decided to address unsightly trash may be affected by who was reporting the trash and his availability at the time.³⁸ The University has not met its burden of proving by a preponderance of the evidence that Grievant’s performance with respect to emptying trash cans at Building-9 (or Building-3 or Building-5) was unsatisfactory on December 10, 2024, or on December 11, 2024.

The University has not met its burden of proving by a preponderance of the evidence that Grievant engaged in unsatisfactory work performance on December 10, 2024, or on December 11, 2024.

Whether University’s discipline was consistent with law and policy

Because the University has not met its burden of proving that Grievant engaged in unsatisfactory performance, the Agency’s issuance of the Group I Written Notice was not consistent with policy and the Group I Written Notice must be rescinded.

Because the Agency has not met its burden of proof, there is no need to consider mitigating or aggravating factors with respect to the Group I Written Notice.

Group II Written Notice - Attendance

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

The University proved by a preponderance of the evidence that Grievant engaged in misconduct when she failed to report to work for Fall Graduation on December 7, 2024, as required.

The University described the offense as:

On December 7, 2024, [Grievant] failed to report to work for the University Graduation Ceremony. Attendance for this event was mandatory. [Grievant] received a Group I notice for a similar offense that occurred on September

³⁷ See Hearing Recording #2 at 1:20:08 – 1:49:08.

³⁸ See Hearing Recording #1 at 2:43:15-2:48:58, 2:53:02-2:55:30, 4:35:55-4:39:19.

23, 2024, when she failed to report to work for Freshman Move-In Day which was also a mandatory event.³⁹

Grievant admitted that she did not report to work, or call out from work, on December 7, 2024. Grievant argued that she was not aware of the mandatory requirement to work on December 7, 2024. Grievant also testified that at that time she was focused on her husband's health as he was recovering from surgery.⁴⁰

Several witnesses credibly and consistently testified that groundskeepers, and other essential personnel, were required to report to work for specific mandatory events, including the Fall Graduation on December 7, 2024.⁴¹ Further, the evidence showed that Grievant had repeatedly been put on notice that she was required to report to work for mandatory events, including graduation. As early as March 21, 2018, as part of Grievant's probationary progress review, Grievant was put on notice that she was expected to report to work for certain mandatory events. At that time, Grievant received a probationary progress review noting that "[Grievant] has shown tendency to miss important working events, as all grounds department is essential Personnel (student move-ins, homecoming week, snow days)."⁴² Grievant also received feedback in a performance evaluation she received on October 30, 2023, specifically noting that Grievant "fails to consistently report to work to support the grounds team for graduation, school openings, home football games and other special events per her work profile" and that "[Grievant] must improve upon her attendance relative to supporting the needs of the university during major events and activities."⁴³ As recently as September 23, 2024, Grievant received a Group I written notice of disciplinary action for her failure to report to work for a mandatory work event, Student Move-In Day.⁴⁴ With respect to Fall Graduation, Supervisor-1 testified that as early as July 2024, he provided the Grounds staff, including Grievant, with a written list of the mandatory work events and dates, including the date for Fall Graduation. Supervisor-1 also reminded Grounds staff during their meetings as early as October 2024 of the date and mandatory work requirement for Fall Graduation. Supervisor-1 noted that he posted the dates of mandatory events beside the time clocks to help remind Grounds staff of those dates.⁴⁵ Assistant Director-Grounds and Supervisor-2 also both testified that the Grounds staff were made aware of the dates of the mandatory events they were required to work during staff meetings and that the dates were posted by the time clocks.⁴⁶

That Grievant was concerned about her husband's health may explain her failure to report to work, or call out, but it does not excuse her misconduct. The preponderance of the evidence showed that Grievant was required to report to work for Fall Graduation on December 7, 2024. The preponderance of the evidence also showed that Grievant failed to report to work, or call out, on December 7, 2024.

³⁹ University Ex. H.

⁴⁰ See Hearing Recording #2 at 2:45:11-2:46:47, 2:49:03-2:51:45.

⁴¹ See Hearing Recording #1 at 13:42-23:35, 1:39:25-1:47:00, 2:35:50-2:40:20, 4:31:37-4:34:56, 5:04:00-6:07:24 and Hearing Recording #2 at 38:36-40:44, 1:35:08-1:39:42.

⁴² Agency Ex. P.

⁴³ Agency Ex. S.

⁴⁴ Agency Ex. O.

⁴⁵ Hearing Recording #1 at 2:35:50-2:40:20, 3:38:55-3:40:00, 4:31:37-4:34:56.

⁴⁶ Hearing Recording #1 at 11:14-2:13:27 and Hearing Recording #2 at 1:20:08-1:49:08.

The University has met its burden of proving that Grievant engaged in misconduct when she failed to report to work for Fall Graduation on December 7, 2024, as required.

Whether University's discipline was consistent with law and policy

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."⁴⁷

Grievant appeared to dispute the University's identification of the offense code for her misconduct as unsatisfactory attendance rather than "refusal to work overtime." Whether the University identified the offense code for Grievant's offense as unsatisfactory attendance or a refusal to work overtime, the Group II Written Notice-Attendance clearly put Grievant on notice that she was being disciplined for failing to report to work for a mandatory event on December 7, 2024 and the University has proved that Grievant engaged in such misconduct.

In this case, Grievant's unacceptable attendance or failure to report to work as required, rose to the level of a Group II offense. Such misconduct is serious and, in this case, Grievant's misconduct was repeated in nature.⁴⁸ An agency may terminate an employee who has accumulated two active Group II written notices.

The University's discipline was consistent with law and policy.

Group II Written Notice – Insubordination/Failure to Follow Instruction

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

The preponderance of the evidence showed that Grievant failed to follow reasonable supervisory instructions when, on December 2, 2024, she failed to meet with Supervisor-1 after she had been instructed to do so.

The University described the offense as:

On December 2, 2024, [Grievant] was instructed by her supervisor to come to a meeting to review and discuss her performance evaluation. [Grievant] agree[d] to come immediately after she changed two trashcans. However, she failed to come at all prior to the end of her work shift.⁴⁹

⁴⁷ See DHRM Policy 1.60, Standards of Conduct.

⁴⁸ See DHRM Policy 1.60, Standards of Conduct, Attachment A.

⁴⁹ Agency Ex. at G and Grievant Ex. at 25.

Supervisor-1 testified that after he asked Supervisor-2 to instruct Grievant to see him, the next time he encountered Grievant was at 3:55 pm. Supervisor-1 advised Grievant they could meet at that time. According to Supervisor-1, Grievant responded by telling Supervisor-1 that she was off the clock and then she left work for the day without meeting with him.⁵⁰

Grievant did not dispute that she never met with Supervisor-1 on December 2, 2024 after receiving instruction to do so. Grievant testified that she reported to Supervisor-1's office for some period of time before she left work for the day. Grievant also asserted that she never specified a specific time or indicated that she would immediately meet with Supervisor-1 following the instruction from Supervisor-2. Based on Grievant's timeline of events, she received the instruction from Supervisor-2 at approximately 3:07 pm and then she emptied two trash cans, dumped trash, parked and plugged in her cart, gathered her things and put them in her truck, drove her truck to Supervisor-1's office building, parked her truck, saw Supervisor-1 standing outside the building, entered the building, and then waited for some period of time outside of Supervisor-1's office before clocking out at 3:49 pm and leaving work for the day. According to Grievant, she did not speak to Supervisor-1 at any time following her receipt of the instruction from Supervisor-2 to see Supervisor-1 and before leaving work on December 2, 2024⁵¹

Even accepting Grievant's version of the events of December 2, 2024, the preponderance of the evidence showed that Grievant engaged in misconduct. Supervisor-1, through Supervisor-2, gave Grievant a reasonable instruction to meet with him on the afternoon of December 2, 2024. It was reasonable for him to expect that she would follow that instruction and meet with him before she left work for the day. The preponderance of the evidence showed that Grievant did not follow that instruction or meet that reasonable expectation. If, as Grievant asserted, she saw Supervisor-1 standing outside of his office building, it was her responsibility to advise Supervisor-1 that she was there to meet with him as she had been instructed to do. Particularly, if, as Grievant asserted, she had to leave work prior to the end of her scheduled workday to timely attend an afterwork appointment. Further, if Grievant had to leave work prior to the end of her scheduled workday, it also was her responsibility to make Supervisor-2 or Supervisor-1 aware that she had a limited time that afternoon within which to meet Supervisor-1 due to an after-work commitment and seek further instruction if needed. Grievant did neither. According to Grievant, she saw Supervisor-1 standing outside the building, but rather than advising him that she was ready to meet with him or of her time constraints, she walked into the building without speaking to him and then waited for him inside the building for some period of time before clocking out at 3:49 pm and leaving work for the day. According to Grievant, she never spoke with Supervisor-1 before leaving work that afternoon. Grievant did not meet with Supervisor-1 on the afternoon of December 2, 2024, as she had been instructed to do.

⁵⁰ See Hearing Recording #1 at 2:40:20-2:43:00, 3:02:50-3:13:06, 4:47:01-5:01:12 and Grievant Ex. 27 and 29.

⁵¹ See Hearing Recording #2 at 2:11:05-2:18:14, 2:56:24-2:58:48.

The University has met its burden of proving by a preponderance of the evidence that Grievant failed to follow supervisory instructions when, on December 2, 2024, she failed to meet with Supervisor-1 after she had been instructed to do so.

Whether University's discipline was consistent with law and policy

Group II offenses "include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action."⁵² Failure to follow supervisory instruction is a Group II offense.⁵³ An agency may terminate an employee who has accumulated two active Group II written notices.

The University's discipline was consistent with law and policy.

Grievant's Other Defenses

Grievant argued that the University's disciplinary actions were part of on-going abuse, harassment, discrimination, and retaliation by the University. The University showed that it had business reasons for its discipline of Grievant based on Grievant's misconduct and Grievant offered no evidence that would suggest that those reasons were mere pretext for abuse, harassment, discrimination or retaliation.

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...."⁵⁴ 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.

Grievant asserted that there were other employees who were tardy or were in a leave without pay status and were not terminated. Grievant also stated that other employees may have refused to follow an instruction and were not terminated.⁵⁵ This Hearing Officer does not consider tardiness or a leave without pay status to be similar to a failure to report to work for a mandatory event. Additionally, other than her general testimony, Grievant did not provide any details or evidence to show that the other

⁵² See DHRM Policy 1.60, Standards of Conduct.

⁵³ See DHRM Policy 1.60, Standards of Conduct, Attachment A.

⁵⁴ Va. Code § 2.2-3005.

⁵⁵ Hearing Recording #2 at 2:39:14-2:45:11.

employees she generally referenced were similarly situated to Grievant and received less discipline for the same or similar offenses.

In light of the applicable standard, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the University's issuance to Grievant of the Group II Written Notice-Attendance and the Group II Written Notice-Insubordination/Failure to Follow Instruction with termination are **upheld**.

For the reasons stated herein, the University's issuance to Grievant of the Group I Written Notice for unsatisfactory performance is **rescinded**.

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.⁵⁶

⁵⁶ 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.

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer