



COMMONWEALTH OF VIRGINIA

Department Of Human Resource Management

Office of Employment Dispute Resolution

DECISION OF HEARING OFFICER

In re:

Case number: 12173

Hearing Date: December 5, 2024

Decision Issued: February 6, 2025

PROCEDURAL HISTORY

On July 5, 2024, Grievant was issued a Progressive Discipline Form indicating that it was a Notice of Written Warning II – Unsatisfactory Job Performance and a Notice of Dismissal-Termination for unsatisfactory performance following a 90-day Imposed Probation.¹

On August 3, 2024, Grievant timely filed a grievance to challenge the University's action. The matter advanced to hearing. On September 30, 2024, the Office of Employment Dispute Resolution assigned this matter to the Hearing Officer. On December 5, 2024, a hearing was held in a conference room at a University library.

APPEARANCES

Grievant
Grievant's Advocate
University Counsel
University Party Designee
Witnesses

¹ University Ex. 2.

ISSUES

1. Whether Grievant's performance failed to meet the expectations set forth in the Notice of Imposed Probation during the probationary period?
2. Whether the University's dismissal of Grievant was consistent with law and University policy?

BURDEN OF PROOF

The burden of proof is on the University to show by a preponderance of the evidence that its dismissal of Grievant for unsatisfactory performance was warranted and appropriate under the circumstances. The employee has the burden of raising and establishing any affirmative defenses. 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 a Senior Laboratory Research Specialist for a laboratory services Unit of the University. Grievant had been employed by the University for more than 12 years and had been working in the laboratory services Unit for approximately two years. Grievant was in the University and Academic Professionals employment group and subject to the University's HR Policies, code of conduct, and expectations of ethical conduct.²

The Unit provides laboratory services to investigators conducting medical research. The Unit receives specimens, including animal organs, from investigators, collects and processes tissue samples from those specimens, and provides the samples to the investigators who study and utilize the samples for research.³

Grievant began working in the Unit during April 2022. Grievant was responsible for receiving and processing orders from investigators, sample grossing, sample paraffin embedding and sectioning, and staining. Grievant's job duties also included recordkeeping and lab management.⁴

When Grievant first started working in the Unit, she was supervised by Unit Co-Director. Manager became Grievant's supervisor in October 2023, although testimony during the hearing indicated that Manager transitioned into that role through the end of

² Hearing Recording at 1:03:50-1:08:33 and see University Ex. 3, 4, and 5.

³ Hearing Recording at 3:29:30-3:31:47.

⁴ University Ex. 6.

2023 and early 2024. Manager reported to Unit Co-Director. Unit Co-Director reported to Executive Director.

Because of her on-going concerns with Grievant's performance during Grievant's first year with the Unit, Unit Co-Director worked with the University's Employee Relations staff to document Unit Co-Director's concerns with Grievant's performance in order to notify Grievant of the performance concerns and provide Grievant with a plan to improve performance.⁵

Unit Co-Director issued to Grievant a "Notice of Improvement Needed and Improvement Plan" memorandum dated March 10, 2023. The purpose of the memorandum was "to document an informal improvement plan for [Grievant's] work over the next sixty (60) days." The Notice of Improvement Needed memorandum set forth examples of performance deficiencies, including:

You need to work on organization and efficiency. There have been instances where we have been unable to immediately locate supplies received by you. Distribute items in a manner that conserves space and efficiency. Utilize existing lab resources such as trays as opposed to bags to help maintain organization within the lab.

- On Dec. 9, 2022, you were responsible for part of [an investigator's] order. Due to poor communication with [employee 2], this order was not finished in a timely manner, which made it very difficult to troubleshoot the problems with this order.
- On Jan. 17, 2023, we discussed that it was important for you to work on the organization since we were unable to locate some samples earlier that week in a rapid manner which delayed work for other staff members.

Improve time management. There have been multiple occasions in which you were not able to meet a deadline due to poor planning and prioritizing. The impact is incomplete or inaccurate work, and you work beyond your scheduled shift times. Additionally, this has become a safety issue.

- On Dec. 20, 2022, I discussed with you again about working beyond your scheduled shift times. You are still seen doing this every week.
- I informed you on Nov. 22, 2022, that our monthly meetings would require you to prepare a short write-up before the meeting. I provided you with examples. On Jan. 18, 2023, at our monthly meeting, you were not prepared for our meeting and did not have the write-up ready. You informed me you were too busy doing other things and wanted me to accept a different document you had prepared that did not follow what was requested. At this meeting on Jan. 18, 2023, you also informed me as you arrive at our meeting that you had just cut your finger because you had been rushing to finish something before our meeting. This lack of time management causes you to end up with an injury.

⁵ Hearing Recording at 1:20:00-1:22:00 and see University Ex. 9 at 26-50.

- You recently missed a meeting on February 15, 2023, due to a lack of organization and preparation. Advance communication is necessary when you anticipate missing a deadline or identifying a scheduling conflict.

Follow established Laboratory, Legal, and University policies and procedures.

- You have been observed with food and drink at your desk. I reminded everyone on Jan. 24, 2023, at our group meeting, this is a safety violation. On Jan. 26, 2023, I still saw a drink at your desk.
- On February 2, 2023, you were observed deviating from our standard protocol when tissue samples come off the processor. You focused on sectioning rather than embedding tissue coming off the processor leaving them exposed and potentially drying out. Your co-worker stopped what they were working on to complete this task.
- In Dec. 2022, I discussed with you the importance of making sure on the orders that you check off the correct boxes to ensure that everyone is charged correctly. In Jan. 2023 this issue is still occurring and was discussed with you again on Jan. 26.

Resolve work-related issues and disputes in a professional manner and through established business processes and partnerships. There have been multiple instances where your interaction with another co-worker was described as hostile due to tone and body language. Work on active listening skills; receiving, responding, and delivering constructive feedback. Being open to multiple perspectives when working to solve problems. . .

. . . Pay close attention to detail on written orders.⁶

The Notice of Improvement Needed memorandum also set forth specific recommendations for improvement and identified specific training to be completed as part of the improvement plan. Finally, the Notice of Improvement Needed memorandum directed Grievant to adhere to timelines and punctuality, improve time management organizational skills, and adhere to the University's Code of Conduct, including maintaining professionalism, respect, and accountability at all times. The memorandum noted that Unit Co-Director would plan to continue to meet weekly with Grievant to ensure that Grievant would have a "complete understanding of expectations" as well as Grievant's "responsibilities/priorities and the status of your work." Although the Notice of Improvement Needed memorandum was not considered "formal disciplinary action," the memorandum noted that "it may be considered in [Grievant's] performance evaluation or for future discipline, if necessary."⁷ Unit Co-Director discussed the Notice of Improvement Needed with Grievant during a meeting on March 22, 2023, and it was expected that the improvement plan would begin by March 27, 2023.⁸

⁶ University Ex. 9 at 1-4.

⁷ University Ex. 9 at 1-5 and see Grievant Ex. 4 and 5.

⁸ See University Ex. 9 at 25, 50-51.

Grievant disagreed with the performance deficiencies and the issuance of the Notice of Improvement Needed.⁹

In late March or early April 2023, Grievant also received a performance review for the 2022 performance year. The performance review described Grievant's overall performance as "Developing" which is defined as "Proactively making progress in learning and adapting to new responsibilities and goals; demonstrates proactive growth in demonstrating competency behaviors." Unit Co-Director noted in her comments about the overall rating that:

There are areas where [Grievant] is successful and developing but key essential areas need improvement.

1. [Grievant] has not demonstrated respect for the agency and toward the agency of her supervisors which is insubordination. There are many instances where I have explained what we want to do in the [Unit] and how we should handle samples. She listened, received this information by email, and still did what she wanted to do instead of what I asked her to do. I have asked her to be efficient but not rush since mistakes happen when rushing. One example of this is she cut herself because she was rushing to a meeting with us. She hadn't organized her time well to make sure she wouldn't need to rush. ...

3. [Grievant] does not resolve work-related issues and disputes in a professional manner. As mentioned above she is very defensive when asked to troubleshoot a problem. She continues to just say her point of view and is not listening to the corrective action. Her voice will rise making it uncomfortable for everyone.¹⁰

Unit Co-Director included comments setting forth Opportunities for Growth and/or Improvement:

I think more attention to detail is needed. Efficiency is key without hurrying and making mistakes. Too many mistakes have been made because of hurrying. [Grievant's] comments on organization and initiative skills are important. [Grievant] needs to work on organization and efficiency as well as improve time management. Communication is a skill that has to be improved. Being receptive without being defensive to troubleshooting and critiques must be improved. [Grievant] needs to resolve work-related issues in a professional manner. It is also essential that [Grievant] follows established lab procedures.¹¹

⁹ Grievant Ex. 4 and 5.

¹⁰ University Ex. 8 at 10.

¹¹ University Ex. 8 at 8.

Grievant disagreed with the performance review and appealed the evaluation through the University's appeal process. The performance review and rating were upheld and remained unchanged.¹²

Grievant sent an email to the University's Employee Relations group requesting assistance and asserting that she was being singled out for discipline.¹³ Grievant also submitted a memorandum to a University employee relations staff dated April 3, 2023, by which Grievant alleged that she was experiencing "abuse, harassment, and intimidation" by Unit Co-Director.¹⁴ Grievant also alleged that the performance review and the Notice of Improvement Needed were a continuation of the alleged abuse, harassment, and intimidation that Grievant alleged to have been experiencing. This memorandum appeared to follow-up discussions Grievant had with an employee relations staff after receiving the Notice of Improvement Needed. The University's office of Employee Relations investigated Grievant's allegations and issued a report of its findings.¹⁵

Grievant also submitted a complaint to the University's Office of Equity and Access Services during the Spring of 2023 alleging discrimination based on race/national origin and retaliation. The Office of Equity and Access Services investigated Grievant's complaint and issued a report of its findings dated November 27, 2023.¹⁶

During a Unit meeting on or about July 19, 2023, Unit Co-Director discussed with Unit staff that some staff members were experiencing sensitivity to the odor of a chemical used in the Unit's tissue processor. Unit Co-Director instructed Unit staff, including Grievant, that they should no longer wipe counters with Citrasolv soaked rags and that after the processor had completed its cleaning process, they should wipe it out and close the lid leaving it open only a "crack" if necessary. Unit Co-Director instructed the Unit staff that they were no longer allowed to leave the lid on the processor wide open to allow for air drying after use.¹⁷ Unit Co-Director also instructed Unit staff that, if someone was sitting near the processor when a staff member wanted to open the processor, the staff should advise that person or ask their permission, before opening the lid of the processor.¹⁸

On October 20, 2023, at 11:54 a.m., Grievant sent an email to Unit Co-Director setting forth items that she wanted to discuss during their "check-in" meeting scheduled for that day. The email included allegations that Grievant was experiencing aggression from employee 2 and that a "hostile work environment" had been created. Grievant also alleged that false accusations were being made against her and that Unit Co-Director was singling her out with additional scrutiny.¹⁹

¹² University Ex. 8 and see Grievant's Ex. 5 and see Hearing Recording at 1:17:50-1:20:00.

¹³ University Ex. 9 at 13-14.

¹⁴ Grievant Ex. 6.

¹⁵ University Ex. 26.

¹⁶ University Ex. 28.

¹⁷ University Ex. 13, 3-15-24 A at 14-16, Hearing Recording 4:28:17-4:31:21.

¹⁸ Hearing Recording 4:28:17-4:31:21 and 8:58:56-9:06:34.

¹⁹ Grievant Ex. 11.

Because there continued to be areas where Grievant's performance needed to improve, Unit Co-Director worked with University human resources staff to issue a "Written Counseling Memo" to Grievant dated October 23, 2023.²⁰ The Written Counseling Memo identified specific areas where Grievant's performance still needed to improve, including:

Organization and efficiency – [Unit-Sheet-Project] intake with Form Smartsheets are sometimes missing information.

- Order #0##6 shows you completed tasks, but the assigned and assigned task cells are not filled out. Order #0##3 shows you completed the tasks, but again, you never assigned it to yourself to let others know you were working on it. I have now helped fill these in with a group meeting, but I would like you to do this as you are working on them.
- Order sheets are not with the orders sometimes, and these are your responsibility to complete. On 8/29/23, this one wasn't printed, and then again on 9/6/23, it was not with the sample but printed and on your desk.
- Order #0##2 shows that you were tracking that only 174 slides were cut, but there were 49 samples, and there should have been five slides per sample, which would have been 245 slides, and these were your responsibility.
- Order #0#04, which had been marked and received and checked a box, it then showed you had unchecked a box at 4:30 pm in Smartsheet on 09/01/23, a day you had left at 3:30 pm. It is not clear why you were working on the Smartsheet when you left for the weekend early. This caused a customer to have to reply that he had dropped off the order and caused the customer to have the perception that we lost their samples. As we have discussed, careful, thorough work is key to this position, and we have to be attentive in what we are doing, including just checking a box correctly.
- On 8/16/23, I wrote to you regarding Order 0#68 I: "[investigator] needs his order as a priority. This order came in on 8-7-23. I understand it hasn't been processed or embedded yet. I am confused since it says by you it is in the embedding stage on the project sheet. You also assigned this to yourself on 8-9. I understand a long run happened on 08-11, but these samples did not get into this run. I had two questions. 1. Why didn't they get in the run on 8-11-23? 2. Why did you mark on the sheet in the project stage that the samples are embedded when it is not even processed yet?" Your reply was you said you didn't mark the Smartsheet, and then you said you thought since [employee 2] talked to the customer, he was doing it. But you had marked the Smartsheet, which tracks in history on 8-9, that it was in the embedding stage. [employee 2], in following the Smartsheet, thought you had embedded it. As we have discussed, the process that we are following is the Smartsheet. Your

²⁰ University Ex. 10.

assumption that [employee 2] was doing it because he talked to the customer is not following the process. The result of these actions was that it slowed down the task being completed for the customer.

Following established policies and procedures

- On 8/8/2023, you were pouring a carcinogen outside of the hood on a bench, which resulted in splashing on the bench and could have resulted in a lab member or yourself coming into contact with the carcinogen.
- On 7/14/2023, you were performing H&E staining outside the hood with chemicals that are toxic and should be used in the hood for safety reasons.
- On multiple occasions, we discussed not checking boxes for others on the smartsheet or the forms that we attach to the orders, and still, you have acknowledged that you have done this during a meeting on 7-12-2023. On 7-24-2023, the sample was received by [employee 1], and the customer replied on a Saturday. You, in turn, responded to the email on Saturday and clicked off the box it was received prior to discussing with [employee 1] if she had even received the samples.
- On 4/25/2023, you explained to me you were attempting to help a co-worker process some samples, but you were unable to do it that Friday and came in on Sunday alone without notifying me despite a previous discussion where I directed you to communicate to me in advance when planning to work outside normal hours.
- On 4/30/23, after we had this discussion on 4/25/23, you came in on Sunday and only notified me after the fact. During a follow-up conversation, you told me you knew I would say “no”, so you just came in without notifying me.
- During a conversation on 8-29-2023, you informed me that you had been working since 8 a.m., despite the communication in an email sent to you on 1-19-2023 in which I confirmed your working hours as 8:30 a.m.-4:30 p.m.
- On 8/30/2023, you received notice from [an investigator’s] lab that a sample was not processed from a group of 16. During a conversation with [an HR employee] and me, you indicated that you had been in a hurry and grabbed the samples. You also stated there is no policy that you need to follow in this situation. As previously discussed, the policy regarding processing samples is to process all samples from one order at a time if they are in the processor at that time. We should be counting the samples and ensuring they match what the customer has stated, and if they have not communicated the number of samples, reach out to them to confirm.

Resolving work-related issues in a professional manner – This is an area of significant opportunity that you have yet to improve upon despite the resources, tools, processes, and communications provided to you. . . .

- I have assigned you daily reports to send me before the end of your work day. You send them inconsistently, and you frequently provide them after work hours, which defeats the purpose of allowing them to add to our productivity, collaboration and accountability. You have often questioned why I have directed you to send them despite my explanation to you that they are important for me to know what work has been completed and what work is left to be done. You failed to send them to me from 8/2/23 until 8/7/23 until I again reminded you that you were directed to send them to me. As of 10/19/23, you have not provided the reports on 9/4-9/6/23 and again on 9/14, 9/15, and 9/25-10/6/23, and you have not provided me with any valid reason for not sending them to me. The daily reports are important for productivity and accountability and for your success as an employee, and you are being insubordinate in failing to provide them to me.²¹

The Written Counseling Memo noted that it “will serve as notice to you of the issues we discussed and my expectations of you moving forward” and that “this plan articulates critical responsibilities and the desired areas of focus for immediate improvement.” The plan included:

- Reviewing the [University] Code of Conduct and its expectations about employee workplace interactions, including respect, accountability and integrity.
- Focusing on your [Talent@University] smart goals and competencies and competencies, which are essential requirements for your position. These have already been approved this year. ...
- You will meet with me bi-weekly to discuss your performance. I, in turn, will continue to provide recaps of our meetings. This will make it easier for you to list strengths and opportunities in performance evaluations and act as a reference for outlining what we discussed and agreed to.
- You are expected to meet or exceed established job performance expectations as articulated in the performance management guidelines. You are expected to make work-related decisions and take actions in the best interest of [University], our customers, and our team within the core,
- You should exercise discretion and independent judgment with respect to matters of significance. Your schedule must be managed to ensure the completion of the required duties that are within the scope of your role. You must immediately begin to effectively and efficiently manage the work in your areas of responsibility to ensure all tasks and assignments are completed by established deadlines and within established work hours. If there is a need for an exception, I am expecting you to communicate with me Prior to making an adjustment to your schedule.²²

²¹ University Ex. 10 at 1-4.

²² University Ex. 10 at 4-5.

Grievant submitted a memorandum dated October 30, 2023, responding to the Written Counseling and disputing information provided in the Written Counseling. Grievant also alleged that the Written Counseling was issued to retaliate against Grievant for engaging in protected activity.²³

Grievant contacted the University's Office of Integrity and Compliance during the Fall of 2023 alleging that Unit Co-Director was retaliating against her for reporting concerns to the University's Office of Equity and Access Services and Employee Relations. The Office of Integrity and Compliance investigated Grievant's allegations and issued a report of its findings dated December 18, 2023.²⁴

Manager became Grievant's direct supervisor in October 2023. Manager reported to Unit Co-Director.²⁵ The testimony during the hearing was that Manager transitioned into his supervisory role through the end of calendar year 2023 and early 2024.

On February 22, 2024, Grievant filed a Charge of Discrimination with the Virginia Office of Civil Rights and the Equal Employment Opportunity Commission alleging harassment, retaliation and discrimination by the University based on national origin and race.²⁶

Grievant received a performance review for the 2023 performance year in March 2024.²⁷ Grievant received an overall performance rating of "Needs Improvement." Manager gave Grievant a rating of "Successful" for the following performance goals: Customer Satisfaction, Equipment Deficiencies, and Training. Manager gave Grievant a rating of "Needs Improvement" for the following performance goals: Delivery Dates, Error Mitigation and Correction, and Safety. Manager gave Grievant a rating of "Below" for the following performance goals: Production/Teamwork/Process Improvement and Professionalism. Manager also rated Grievant as not demonstrating core competencies. Manager specifically noted in his overall comments that there were "opportunities for improvement in the following areas: (1) adherence to [University/Unit] safety policies, (2) organization and time management, (3) following general [Unit] policies and guidance, (4) professionalism, and (5) technical laboratory skills."²⁸ Manager also included in his comments a set of highlights concerning [Grievant's] performance in 2023:

(1) As a group, [Unit] has implemented safety policies to remain in compliance with institutional guidelines. Select examples include the decision to transport chemicals through the hallway (within secondary containment) and not through [another employee's] office, that reusable

²³ University Ex. 10 at 6-27.

²⁴ University Ex. 27.

²⁵ Hearing Recording at 1:33:50-1:34:24.

²⁶ Grievant Ex. 20.

²⁷ University Ex. 11 at 1-21. The documentation shows that the performance review was completed by Manager on February 27, 2024, and signed by the reviewer, Unit Co-Director on February 27, 2024. An HR professional signed off on the performance review on March 11, 2024. Grievant did not sign her performance evaluation until June 10, 2024, but she submitted her first appeal of the 2023 Performance Review to Manager on March 26, 2024. See Grievant Ex. 18.

²⁸ University Ex. 11 at 11-12.

sharps should be stored in foam blocks so that the blade is covered, and that hazardous chemicals should only be dispensed in the fume hood. [Grievant] violated each of these policies after they were universally agreed upon/understood by members of the lab. I recommend that she is retrained on these procedures.

(2) There is room to improve organization and time management skills. For example, there was an incident where a customer requested their order and [Grievant] could not locate it. This is not a good look for [Unit] given that we are a service-focused entity and should be able to regularly locate customer samples. She was also 20 minutes late for a group lab meeting. She left to get coffee and her lab members had to wait for her return to begin the meeting. She also missed a meeting entirely earlier in the year.

(3) [Grievant] has breached general [Unit] policies/guidance on many occasions throughout 2023. In addition to the safety concerns referenced above, some examples include her failure to follow instructions regarding proper formatting of documents, to complete fields she was assigned in Smartsheet, and she did not confirm that she read and understood the minutes from the 11/20/2023 meeting – important information was discussed, and everyone was required to document that they read/understood it. She also failed to regularly maintain her daily tracking Smartsheets, despite multiple reminders to do so. She has since started tracking again.

(4) There is room to improve behavior/professionalism. She routinely talks over [Unit Co-Director] and has gotten physically close during challenging conversations. She does not stop the behavior when [Unit Co-Director] asks her to, which is referenced in both her Performance Improvement Plan and Written Counseling. She routinely calls the actions of other lab members into question when she is confronted about workplace policies and/or performance. There is room for her to take responsibility for her actions and resolve issues/disputes in a measured, professional manner.

(5) [Grievant] demonstrates a commitment to excellence; however, there are routine technical and administrative errors in her work. There were various issues surrounding processing, embedding, and sectioning throughout 2023, as well as errors in the [Unit] Smartsheet and with our internal billing process.²⁹

Grievant disagreed with the performance review and appealed the evaluation through the University's appeal process. The performance review and rating were upheld and remained unchanged.³⁰

The University placed Grievant on a 90-day Imposed Probation starting March 13, 2024.³¹ Manager worked with University human resources staff to develop the Notice of Imposed Probation. The Notice of Imposed Probation listed the reasons for the imposed probation as "Unsatisfactory Performer" and "Rated 'Needs Improvement' during 2023

²⁹ University Ex. 11 at 11-12.

³⁰ University Ex. 11; Grievant Ex. 18.

³¹ Agency Ex. 12 at 1-28.

Performance Review Cycle. The Notice of Imposed Probation included expectations during the imposed probation and made clear that the plan “must be successfully passed by the time frames indicated in this document, or disciplinary action up to and including termination may result.”³² The Notice of Imposed Probation included the following “Manager’s expectations during imposed probation:”

During this imposed probationary period which will conclude on June 11, 2024, [Grievant] must demonstrate the following performance and conduct expectations in order to successfully pass the performance re-evaluation. [Grievant] is expected to complete all tasks and assignments at a level that is satisfactory to [the Unit].³³

The Notice of Imposed Probation also set forth the following “Expectations during imposed probation:”

This plan provides you with an additional 90 days to demonstrate that you can successfully meet the minimum requirements for your position. In your role, it is critical that you demonstrate the ability to follow standard operating procedures for the department, including performing to certain standards. As you were reminded in person during the October 23, 2023 meeting with [Unit Co-Director] and [a human resources staff member], and at other meetings throughout the performance cycle, and as documented in your October 23, 2023 written counseling and improvement plan, your failure to follow established protocols cannot be permitted to continue. Your failure to follow our policies and procedures may result in disciplinary action up to and including termination if you fail to meet the expectations listed below.³⁴

Overall Performance – You must demonstrate a commitment to your role and responsibilities in order to successfully pass this re-evaluation period and sustain and progress your career at [University]. You have this opportunity to take ownership of your role and demonstrate that you are able to perform the required duties successfully.

- You are expected to meet or exceed established job performance expectations as articulated in the [University] performance management guidelines. You are expected to make work-related decisions and take actions in the best interest of [University], our customers, and our team within the core.
- You should exercise discretion and independent judgment with respect to matters of significance. Your schedule must be managed to ensure the completion of the required duties that are within the scope of your role. You must immediately begin to effectively and efficiently manage the work in your areas of responsibility to ensure all tasks and assignments are completed by established deadlines and within work hours. If there is a need for an exception, I am

³² Agency Ex. 12 at 1.

³³ University Ex. 12 at 1.

³⁴ University Ex. 12 at 2.

expecting you to communicate with me prior to making an adjustment to your schedule.

- You are expected to be available to meet with me and the team in person and virtually. Any changes to planned meetings should be communicated to me, in advance, with a valid business-related reason.
- You are expected to be responsive to email/phone messages sent to you within two business days of receipt. However, if the matter is pertaining to samples and needs to be addressed to avoid damaging the samples, you are expected to respond as soon as possible.
- Arrive to work on time (8:30 a.m. to 5:00 p.m.) with advance notice to me if you are running late or are unable to report to work. Send an email to the supervisor confirming that you have started your work day each day.
- Update the team using the Smartsheet by filling it out completely and accurately by the end of each business day, 4:30 p.m.
- Schedule weekly one-on-one meetings with me to provide updates on your tasks and assignments.
- Proactively and positively participate in your imposed probation plan, which provides you with an additional opportunity to demonstrate that you can successfully perform your responsibilities.³⁵

Training – You must create and maintain a Google sheet for tracking your projects to ensure you are effectively managing your assignments to meet established deadlines. Be prepared to share your list with me each week. You must review and reference all standard operating procedures and available materials for your role on a regular basis to ensure you are following them. All forms and tracking methods must contain complete and accurate information.³⁶

Professional Behavior – You are expected to adhere to all [University] policies, including but not limited to the following:

- As outlined in the [University] Code of Conduct, you are required to engage the customers, the team, and me in a respectful and professional manner that is collegial and collaborative. I expect the team to engage with you in the same manner
- You are required to be open to constructive feedback regarding your performance and work outputs. If you have a concern or disagree with feedback or an interaction, you are to engage with me, HR, or the appropriate campus partner for support in a respectful, professional and productive manner.³⁷

Manager testified that because Grievant was also already required to updated her Smartsheet daily tracking sheet with respect to her work status, he advised Grievant that

³⁵ University Ex. 12 at 2-3.

³⁶ University Ex. 12 at 2-3.

³⁷ University Ex. 12 at 2-3.

she did not need to create a separate Google sheet to track her work as described by the Notice of Imposed Probation. Grievant would continue to update her Smartsheet daily tracking sheet to satisfy this tracking requirement of the Imposed Probation.³⁸

On March 15, 2024, at approximately 12:55 p.m., Unit Co-Director entered a room of the Unit. No one was in the room at the time, but Unit Co-Director could smell Citrasolv.³⁹ Unit Co-Director checked the tissue processor and found that the lid had been left “wide open.” Unit Co-Director then entered another room on the Unit and observed a liver sample unattended under a fume hood. Unit Co-Director testified that she observed that the liver sample was not fully immersed in liquid.⁴⁰ Unit Co-Director also observed a pile of used gloves sitting out in the work area. Unit Co-Director took photographs of what she observed.⁴¹

Unit Co-Director asked Lab Technician-1 and another staff member if they were working on the liver sample and they indicated they were not, but that Grievant had been working in the hood.⁴² Grievant also had been working with the processor.⁴³

Grievant returned to the area within approximately 10 minutes and Unit Co-Director asked if she could speak with her, but Grievant indicated she was busy with her work, so Unit Co-Director decided to speak with Grievant about her observations during a meeting that could include Manager.⁴⁴ They met to discuss Unit Co-Director’s observations on March 19, 2024.⁴⁵

On or about March 20, 2024, Manager took an order that contained two samples (blocks) for sectioning and noticed that the blocks had two different order numbers, one for Order 0##4 and the other for Order 0##5. Because there should only have been a single order number for both blocks, Manager suspected that a mistake had been made but needed to determine whether the samples had been mislabeled or whether two orders had been mixed up. Grievant was not at work at the time, but Grievant had received, processed, and embedded the order. While attempting to sort out the issue with the samples, Manager discovered that Grievant had not uploaded the investigator sample spreadsheet form as part of the intake log which was part of the protocol for entering information into Smartsheet. If the investigator sample spreadsheet had been uploaded would have made it easier to determine the nature of the mistake. Lab Technician-1 eventually was able to locate the form. Based on the information provided on the form, it was determined that Grievant had mislabeled one of the blocks and that both of the blocks should have been labeled as part of Order 0##4. Once the nature of the error was identified, Lab Technician-1 was able to fix the labels to reflect that both blocks were part of the same order (Order 0##4).⁴⁶

³⁸ Hearing Recording at 6:25:20-6:28:35.

³⁹ University Ex. 13, 3-15-24 A at 7-8, Hearing Recording at 4:24:30-4:28:17.

⁴⁰ University Ex. 13, 3-15-24 B at 1-4, Hearing Recording at 4:24:30-4:28:17, 4:31:15-4:34:16.

⁴¹ See University Ex. 13, 3-15-24 A, B, C.

⁴² University Ex. 13, 3-15-24 B at 7-9.

⁴³ University Ex. 13, 3-15-24 A at 7-8, Hearing Recording at 2:46:36-2:48:00.

⁴⁴ Hearing Recording at 6:31:41-6:33:25, University Ex. 13, 3-19-24 and University Ex. 13, 3-20-24 at 1-3.

⁴⁵ University Ex. 13, 3-15-24 A at 7-13.

⁴⁶ Hearing Recording at 2:49:08-2:57:26, 6:33:25-6:38:45 and see University Ex. 13, 3-20-24 at 1-2, Ex. 15 at 17-20.

On April 4, 2024, Manager met with Grievant and advised her that he had noticed that she had not updated her personal tracking Smartsheet as she had been instructed to do as part of the imposed probation. Grievant had been instructed to update her personal tracking sheet by the end of each week at the latest. As of April 4, 2024, Grievant had not updated her tracking sheet since March 25, 2024.⁴⁷

On or about May 23, 2024, Manager discussed with Grievant that she had incorrectly entered data into her Smartsheet tracking sheet and noted that she was failing to meet an expectation of the imposed probation.⁴⁸

Manager had regular check-in meetings with Grievant throughout the imposed probation period. Manager scheduled a check-in meeting with Grievant for Thursday, June 6, 2024, at 10:00 a.m. Manager sent Grievant a chat message reminding her of the meeting at 8:56 a.m. on June 6, 2024. Grievant did not appear for the meeting as scheduled. At 10:08 a.m., Manager sent another message to Grievant asking if she was planning to come to the meeting. Manager then went looking for Grievant and found her working in the lab. Grievant told Manager that she thought their meeting was scheduled to start at 10:30 rather than 10:00 a.m.⁴⁹

Manager issued a Due Process Memorandum to Grievant dated June 24, 2024. The memorandum advised Grievant that Manager intended to issue disciplinary action to her “up to and including termination” and provided Grievant an opportunity to provide information to Manager before a final decision would be made. The memorandum noted that:

Despite a Written Counseling issued to you on October 23, 2023, for being negligent in your job duties and failing to meet the minimum expectations; the 90-day improvement plan following your March 13, 2024 imposed probation; the continuous coaching provided by me to you; and ongoing support from your HR Professional, you have not sustained performance improvement and continue to exhibit the behaviors and performance concerns that resulted in your Written Counseling and imposed probation.

The evidence for this disciplinary action is your repeated failure to meet the minimum expectations for your Senior Laboratory Research Specialist position. On March 13, 2024, you were placed on imposed probation, and I provided you with detailed expectations about how you were expected to perform within your role within a 90-day time period. Based on the information you provided, my observations, and your work product during this time, it is evident that you continue to demonstrate an inability to follow directions, an inability to perform your job duties successfully, and an inability to meet the positions minimum expectations.⁵⁰

⁴⁷ University Ex. 13, Hearing Recording at 6:38:45-6:40:37.

⁴⁸ University Ex. 13, 5-10-24 at 3-11, Hearing Recording at 6:41:27-6:42:00.

⁴⁹ Hearing Recording at 6:42:00-6:43:47, University Ex. 13, 6-6-24 and Ex. 16.

⁵⁰ University Ex. 1 at 40-45.

On July 5, 2024, Grievant was issued a Progressive Discipline Form indicating that it was a Notice of Written Warning II – Unsatisfactory Job Performance and a Notice of Dismissal with termination effective July 5, 2024.⁵¹ The University described the nature of the offense as Grievant’s continued failure to meet the minimum expectations of her position during the imposed probation period.

CONCLUSIONS OF POLICY

The University’s “Great Place” HR Policies (HR Policies) set forth the University’s performance management and progressive discipline policies and procedures. The University has integrated its performance management and progressive discipline processes.⁵²

The performance period for University employees begins on January 1 of each year and ends on December 31 of that year. University employees receive performance reviews on at least an annual basis.

The HR Policies provide that an annual overall performance review rating of “needs improvement” or “below expectations” may substitute for the initial steps (i.e., written warnings) of the University’s progressive discipline process.⁵³

An employee may receive an overall performance review rating of “needs improvement” or “below expectations” on their annual performance review if the employee has received a notice of improvement needed with an accompanying improvement plan during the performance review period. If an employee was unsuccessful in addressing the areas of improvement as outlined in the improvement plan, the employee is placed on imposed probation, which also is a step in the University’s progressive discipline process.⁵⁴

The HR Policies provide that imposed probation may be for a period of 30, 45, 60, or 90 calendar days. The HR Policies note that imposed probation does not ordinarily occur prior to a written warning or an unsatisfactory performance review. The employee’s manager must prepare a Notice of Imposed Probation form which sets forth the reasons for the probation, its duration and the manager’s expectations for the employee during the period of the probation. The manager then must meet with the employee, present the notice form, and have the employee sign the notice, acknowledging receipt of the form. If the employee refuses to sign, the manager indicates that the employee refused to sign before placing it in the employee’s personnel file. Employees who fail to meet the expectations set forth in the Notice of Imposed Probation during the probationary period may be dismissed or face further disciplinary action with appropriate notice and a reasonable opportunity to respond.⁵⁵

⁵¹ University Ex. 2.

⁵² University Ex. 3 at 14.

⁵³ University Ex. 3 at 14, 24 and see Grievant’s Ex. 3 at 15, 25.

⁵⁴ University Ex. 3 at 14, 24 and see Grievant’s Ex. 3 at 15, 25.

⁵⁵ University Ex. 3 at 24 and see Grievant’s Ex. 3 at 25.

Whether Grievant's performance failed to meet expectations set forth in the Notice of Imposed Probation during the probationary period

The preponderance of the evidence showed that Grievant's performance during the Imposed Probation period did not meet the expectations set forth in the Notice of Imposed Probation.

Timely and Accurate Smartsheets/ Satisfactory completion of assignments

The Notice of Imposed Probation required Grievant to complete all tasks and assignments at a level that was satisfactory to Unit management. Grievant also was required to completely and accurately fill out the Smartsheets.⁵⁶ The evidence showed that Grievant had been repeatedly advised that she was expected to ensure that work related documentation and records were complete and accurate, including maintaining accuracy related to orders and in the Unit and daily tracking Smartsheets.⁵⁷ Grievant failed to meet these reasonable expectations and to satisfactorily perform an assignment when she mislabeled sample blocks for Order #0##4 on or about March 20, 2024 and failed to follow protocols by not uploading information from the investigator into Smartsheet. Grievant's failure to satisfactorily complete her work and follow Smartsheet protocols caused other members of the Unit to have to search for that information in order to resolve Grievant's error and ensure that the investigator's order was appropriately and timely processed.⁵⁸ Grievant also repeatedly was instructed to update and maintain her daily tracking Smartsheet.⁵⁹ Grievant did not deny that she received this instruction. The preponderance of the evidence showed that Grievant failed to update her daily tracking Smartsheet as required during the Imposed Probation from March 25, 2024, to April 4, 2024. Grievant continued to fail to meet the University's expectations that she would timely and accurately update information in the Smartsheets during the Imposed Probation, including, on or about May 23, 2024, when Manager observed that Grievant incorrectly entered data into her Smartsheet tracking sheet.⁶⁰

Grievant argued that she was unsure how to complete the daily tracking Smartsheet and that, although Unit Co-Director had required her to maintain and update the daily tracking Smartsheet, Unit Co-Director never articulated to Grievant how the daily tracking Smartsheet would improve Grievant's performance.⁶¹ It is reasonable for a supervisor to require an employee to track and update their work. That Grievant disagreed with the need for or use of the daily tracking Smartsheet did not excuse her from the reasonable expectation that she would complete the daily tracking Smartsheet as instructed. If Grievant had questions about how to complete the daily tracking Smartsheet, it was reasonable for the University to expect that she would seek guidance rather than simply disregard the requirement.

⁵⁶ University Ex. 12 at 1-2.

⁵⁷ University Ex. 8 at 8, Ex. 9 at 1, 2, and 3, Ex. 10 at 1 and 2, Ex. 11 at 3, 11, and 12, Ex. 12 at 2 and 3.

⁵⁸ Hearing Recording at 2:49:08-2:57:26, 6:33:25-6:38:45.

⁵⁹ University Ex. 11 at 11, Ex. 13, 3-20-24 at 10-16, Hearing Recording at 6:38:45-6:40:37, 4:06:00-4:09:09, 4:50:10-4:51:19 and see Hearing Recording at 2:49:08-2:58:28.

⁶⁰ University Ex. 13, 5-10-24 at 3-11, Hearing Recording at 6:41:27-6:42:00.

⁶¹ See Hearing Recording at 9:12:00-9:20:09.

Grievant also argued that Grievant's errors with the Smartsheets were "minor," had no significant impact on operations, and that "everyone makes mistakes."⁶² Grievant worked in a Unit that provided services to investigators to support medical research. Ensuring the accuracy of the work performed by the Unit was critical to ensure the integrity of the Unit's and the investigators' work and to maintain the Unit's reputation with those investigators. Although Grievant argued that "everyone makes mistakes" and other Unit employees made mistakes, including mistakes with Smartsheets, Grievant did not show that other Unit employees continued to fail to meet performance expectations for accuracy after being repeatedly advised to improve their performance in this area.

Follow Policy and Procedure/Satisfactorily Complete Assignments

The Notice of Imposed Probation made clear that Grievant was required to follow the Unit's procedures and policies and to complete all tasks and assignments at a level that was satisfactory to Unit management.⁶³

The preponderance of the evidence showed that Grievant failed to follow Unit policies and procedures and satisfactorily complete her assignment on March 15, 2024, when she left the lid on the processor "wide-open" after using it. The evidence showed that on July 19, 2023, Unit Co-Director instructed Unit staff, including Grievant that when using the processor, after the processor had completed its cleaning process, they should wipe the processor out and close the lid leaving it open only a "crack" if necessary. Unit Co-Director instructed the Unit staff that they were no longer allowed to leave the lid on the processor wide open to allow for air drying after use.⁶⁴ Unit Co-Director also instructed Unit staff that, if someone was sitting near the processor when a staff member wanted to open the processor, the staff should advise that person or ask their permission, before opening the lid of the processor.⁶⁵ Grievant did not dispute that she left the processor lid "wide-open" on March 15, 2024 and Grievant admitted that the Unit policy had been to leave the processor lid "cracked," not wide-open, due to the sensitivities two Unit employees had to the smell of CitraSolv. Grievant stated she had followed that policy "for a long time." Grievant asserted that after the processor was moved to a location where no one was working directly beside it, she was only required to ask the employees who experienced sensitivities if it was okay to leave the lid wide-open to dry. Grievant asserted that with their approval, she would leave the lid of the processor wide-open.⁶⁶ Although Grievant appeared to assert that Unit Co-Director approved a change to the policy, that assertion is not supported by the evidence. Unit Co-Director, Manager, and Lab Technician-1 all credibly and consistently testified that the policy continued to be that the processor lid, if left open, should only be open "a crack" and not "wide-open" as it had been on March 15, 2024.⁶⁷ Grievant also appeared to argue that leaving the lid of the processor wide open was not contrary to performance expectations or safety policies because CitraSolv as used in the Unit was not hazardous or toxic. Whether the policies

⁶² Hearing Recording at 9:06:25-9:20:09.

⁶³ University Ex. 12 at 1-2.

⁶⁴ University Ex. 13, 3-15-24 A at 14-16, Hearing Recording 4:28:17-4:31:21.

⁶⁵ Hearing Recording 4:28:17-4:31:21 and 8:58:56-9:06:34.

⁶⁶ Hearing Recording 8:58:56-9:06:34 and see University Ex. 13, 3-15-24 A, at 10.

⁶⁷ Hearing Recording at 2:46:36-2:48:00, 2:45:15-2:46:03, 3:13:50-3:15:43, 4:28:17-4:31:21, 6:28:35-6:29:30.

and protocols with the use of the processor were “safety” policies, the Unit had a policy that required that the processor lid remain shut and, if opened to dry, that it only would be slightly or “cracked” open. The preponderance of the evidence showed that Grievant did not follow that policy on March 15, 2024.

The preponderance of the evidence showed that Grievant also failed to follow Unit policies and procedures and did not satisfactorily complete her work on March 15, 2024 when she left a specimen out of its sample tube and unattended for approximately 10 minutes.⁶⁸ The testimony of University witnesses was that it was a standard lab protocol that when Unit employees were working with a specimen, they were required to ensure the continued integrity of the specimen by not leaving it out and unattended and by ensuring that the specimen was always properly covered in liquid to prevent it from drying out. If a Unit employee had to step away from a specimen, they were required to put the specimen back inside the specimen’s sample tube so that it was covered and would not be at risk of getting over turned or misplaced.⁶⁹ Grievant admitted that she left the specimen unattended for approximately 10 minutes, but, asserted that the specimen was fully covered in liquid. Grievant also appeared to argue that it was not uncommon for Unit employees to leave specimens unattended while they performed other tasks in the Unit.⁷⁰ Even assuming the specimen had been properly covered in liquid, the credible and consistent testimony of the University witnesses, including Lab Technician-1, was that if a Unit employee had to step away from their work with a specimen, they were required to return the specimen back to the sample tube, in order to ensure the integrity of the specimen. The preponderance of the evidence showed that Grievant did not follow that protocol on March 15, 2024.

Meeting attendance

The preponderance of the evidence showed that Grievant failed to meet a reasonable performance expectation on June 6, 2024, when she did not timely attend a meeting scheduled by Manager. The Notice of Imposed Probation included the expectation that Grievant would “be available to meet with [Manager] . . . in person and virtually” and that “[a]ny changes to planned meetings should be communicated to [Manager], in advance, with a valid business reason.”⁷¹ The evidence showed that Grievant had been repeatedly advised of the expectation that she would appropriately manage her time and would timely attend meetings.⁷² Grievant did not deny that she was late for the meeting on June 6, 2024, but argued that other people sometimes were late for meetings and that being late for one meeting was a minor mistake. That other people may have been occasionally late to meetings does not excuse Grievant’s failure to timely report for the meeting on June 6, 2024.⁷³ Additionally, there was no evidence to suggest that “other people” had received repeated instructions to ensure their timely attendance at meetings. The preponderance of the evidence showed that Grievant had been

⁶⁸ University Ex. 13, 3-15-24 B.

⁶⁹ Hearing Recording at 2:46:03-2:46:36, 3:22:26-3:25:25, 3:20:00-3:21:05, 4:31:15-4:34:16, 4:36:30-4:37:20, 6:29:25-6:31:41.

⁷⁰ Hearing Recording at 8:56:30-8:58:56.

⁷¹ University Ex. 12 at 2.

⁷² University Ex. 9 at 2, Ex. 10 at 5, and Ex. 11 at 11.

⁷³ Hearing Recording at 9:20:35-9:21:30.

repeatedly instructed to improve her time management, including ensuring that she allocated her time so that she could timely attend meetings. When Grievant failed to timely attend the meeting with Manager on June 6, 2024, she did not meet the University's reasonable performance expectation.

This Hearing Officer did not consider Grievant's performance with respect to the information entered into Smartsheets related to Order 0**0 because any performance by Grievant with respect to that Order would have occurred prior to the Imposed Probation. Although the issues related to that order were discovered by the University on or about March 18, 2024, the relevant Smartsheet entries for that order were made on February 28, 2024.⁷⁴

There was insufficient evidence for this Hearing Officer to make findings with respect to Grievant's performance with respect to the proper or timely disposal of used gloves on March 15, 2024

This Hearing Officer does not find that Grievant's out-of-office replies on May 10, 2024, and May 13, 2024, rise to the level of unsatisfactory performance. It was not clear to this Hearing Officer why or when the out-of-office reply changed between Friday, May 10 and Monday, May 13, 2024, but the out of office reply Grievant used on May 13, 2024, provided two alternative contacts for investigators attempting to communicate with the Unit while Grievant was on vacation. According to Grievant, at the time Grievant set her out of office reply she was subject to the terms of a protective order prohibiting her from having any contact with employee 2, who also continued to work for the University.⁷⁵ Although a better approach would have been for Grievant to discuss her concerns about using an out-of-office reply with Manager before setting the out-of-office reply and leaving for vacation, this Hearing Officer does not find that Grievant's performance with respect to the out-of-office reply was reasonably considered unsatisfactory under these circumstances.

Even in the absence of the allegations related to the Smartsheet for Order 0**0, the disposal of gloves on March 15, 2024, and the May 10-13 out-of-office replies, the preponderance of the evidence showed that the University reasonably determined that Grievant failed to meet the performance expectations set forth in the Notice of Imposed Probation.

Whether the University's dismissal of Grievant was consistent with law and University policy?

The University put Grievant on notice that her performance was not meeting expectations when she received the Notice of Improvement Needed memorandum in March 2023. Grievant was advised of the areas where her performance was deficient and provided a plan for improving performance. When Grievant continued to have performance issues, the University issued a Written Counseling to Grievant in October 2023. The Written Counseling advised Grievant of the areas where her performance

⁷⁴ See University Ex. 13, 3-20-24 at 2.

⁷⁵ Hearing Recording at 10:22:54-10:26:20.

continued to be deficient. Because of Grievant's performance issues throughout the 2023 performance period, Grievant received an overall performance rating of "Needs Improvement." Because Grievant's performance was not meeting the University's expectations and Grievant had previously been provided notice that she needed to improve her performance and had failed to do so, the University placed Grievant on an Imposed Probation for 90 days. At the end of Grievant's Imposed Probation, Manager determined that Grievant had failed to meet the expectations set forth in the Notice of Imposed Probation.

An employee who fails to meet the expectations set forth in the Notice of Imposed Probation during the probationary period may be dismissed or face further disciplinary action with appropriate notice and a reasonable opportunity to respond.

Following a written due process notification with an opportunity to respond, a Written Warning II may be issued to an employee as the formal document setting forth the factual basis for performance concerns. An employee receiving a Written Warning II and who has received notice of and demonstrated a pattern of unsatisfactory job performance that has not been corrected after an opportunity has been provided to correct identified performance deficiencies through the formal progressive discipline process may be dismissed without that employee having access to any further phases of the progressive disciplinary process.

The HR policies provide that a manager may dismiss an employee with the approval of that manager's manager and [University] HR, where the employee has demonstrated a documented pattern of unsatisfactory job performance that has not been corrected after written notice and an opportunity has been provided to correct identified performance deficiencies through the progressive discipline process. Although the HR Policies describe that a manager must present the employee with the Notice of Dismissal and provide an opportunity for the employee to respond before the dismissal becomes effective, in this case, the University appeared to satisfy this requirement by providing Grievant a due process memorandum that described Grievant's performance deficiencies and put Grievant on notice that the University was considering disciplinary action up to and including termination.

Grievant argued that the University did not follow policy because the University did not use a "Notice of Improvement Needed" form that Grievant had found on the University's website to "formally" notify Grievant of her need to improve and provide her with a performance improvement plan. This Hearing Officer is not persuaded. Neither the current HR Policies, nor the previous HR Policies cited by Grievant, require the use of a specific form to notify an employee that their performance needs to improve. Employee Relations Consultant testified that the University does not require managers to utilize a specific form to provide notice to an employee that performance needs to improve.⁷⁶ In this case, Unit Co-Director provided Grievant with a memorandum notifying Grievant of the need to improve in March 2023 specifically identifying areas of performance where improvement was needed and a plan for improving performance. Unit Co-Director then regularly met with Grievant to discuss her performance. When Grievant's performance

⁷⁶ Hearing Recording at 1:10:25-1:11:34.

still did not meet expectations, Unit Co-Director provided written counseling to Grievant in October 2023 to advise Grievant of the areas where Grievant still needed to work to improve performance. Grievant received an overall rating of “Needs Improvement” for her 2023 Annual Performance Review and consistent with the University’s HR Policies, Grievant was placed on an Imposed Probation.

Grievant argued that the University did not prove that Grievant’s performance deficiencies had a severe impact on University operations or reputation. This Hearing Officer does not interpret the University’s HR Policies to require that the University demonstrate an actual severe impact on University operations or reputation where the University has shown that Grievant failed to meet the expectations set forth in the Notice of Imposed Probation during the probationary period.

Grievant argued that the dismissal was the result of retaliation. 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.⁷⁷ If the University presents a non-retaliatory business reason for the adverse employment action, then Grievant must present sufficient evidence that the University’s stated reason was a mere pretext or excuse for retaliation.⁷⁸

This Hearing Officer does not need to determine whether Grievant engaged in protected activity, because even assuming Grievant did engage in protected activity, it is clear that the University had nonretaliatory business reasons for its actions. The University has demonstrated that the University advised Grievant of its performance concerns and worked to improve Grievant’s performance, but Grievant continued to have performance issues. The University’s efforts to improve Grievant’s work performance culminated in the issuance of the Notice of Imposed Probation after which Grievant continued to fail to meet the University’s performance expectations. Grievant has not shown that, but for her engagement in protected activity, the University would not have dismissed Grievant. Because the University had non-retaliatory reasons for its dismissal 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 University’s issuance of the Notice of Written Warning II and Notice of Dismissal was retaliation.

The University’s issuance of a Notice of Written Warning II and Notice of Dismissal with termination to Grievant was consistent with law and University policy.

DECISION

For the reasons stated herein, the Agency’s decision to issue a Notice of Written Warning II – Unsatisfactory Job Performance and Notice of Dismissal-Termination to Grievant is **upheld**.

⁷⁷ 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).

⁷⁸ See, e.g., *Felt v. MEI Techs., Inc.*, 584 Fed. App’x 139, 140 (4th Cir. 2014).

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.⁷⁹

Angela Jenkins

Angela Jenkins, Esq.
Hearing Officer

⁷⁹ 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.