

Issue: Immediate Termination (second unsatisfactory performance evaluation);  
Hearing Date: March 6, 2002; Decision Date: April 23, 2002; Agency: Old Dominion  
University; AHO: Carl Wilson Schmidt, Esquire; Case Number: 5390;

**Administrative Review: Hearing Officer Reconsideration Request; Date of  
Request: May 3, 2002; Reconsideration Decision Date: May 16, 2002;  
Outcome: No newly discovered evidence revealed. Request to reopen hearing  
denied; Judicial Review: Appealed to the Circuit Court in the City of Norfolk on  
06/12/02; Outcome: Appeal withdrawn. Court dismissal order dated 07/18/02**



***COMMONWEALTH of VIRGINIA***  
***Department of Employment Dispute Resolution***

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Case Number: 5390**

Hearing Date: March 6, 2002  
Decision Issued: April 23, 2002

**PROCEDURAL HISTORY**

On December 28, 2001, the Old Dominion University removed Grievant from her employment after Grievant received her second unsatisfactory evaluation. On January 21, 2002, Grievant filed a Grievance contesting her removal and contending that her evaluation was "arbitrary, capricious, and vindictive" and that she was "subjected to work in a hostile, vindictive and unhealthy work environment." The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On February 13, 2002, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On March 6, 2002, a hearing was held at the Agency's regional office.

**APPEARANCES**

Grievant  
Agency Party Designee  
Agency Counsel  
Legal Assistant Advocate  
Cashiering Supervisor  
Accounts Receivable Manager  
Cashiering Auditor

Administrative and Program Support III  
Two Cashiers  
Account Clerk II

## **ISSUE**

Whether Grievant should be removed from employment.

## **BURDEN OF PROOF**

The burden of proof is on the University to show by a preponderance of the evidence that Grievant's removal should be upheld. 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:

The Old Dominion University employed Grievant as an Administrative and Program Specialist III with the working title of Cashier until her removal on December 28, 2001. She was one of up to five cashiers, depending on staffing levels. Her work included accepting payments from students and adjusting student accounts. She relied on detailed account codes in order to process money. The chief objective of Grievant's position was:

Post student payments by mail or in person. Assist with processing locked bank bags and verifying cash. Complete account analysis for assigned accounts. Provide accurate information to students/public via the counter/telephone. Process mail for the Cashiers. Prepare and process adjustments, post return checks, audit subsidiary cash reports and assist in preparing the daily bank deposit.<sup>1</sup>

Grievant began working for the University on August 10, 2000. She received a Probationary Progress Review on November 13, 2000 describing her progress as "Fair But Needs Improvement." The review also stated, "Performance expectations need improvement and additional training is being provided."<sup>2</sup> On February 2, 2001, Grievant received another Probationary Progress Review describing her progress as "Fair But

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<sup>1</sup> Agency Exhibit 8.

<sup>2</sup> Agency Exhibit 2.

Needs Improvement.” Grievant’s supervisor stated, “Overall performance of job expectations show a need for improvement with consistent training.”<sup>3</sup> Attached to the review were examples of errors Grievant had made.

On May 30, 2001, the Accounts Receivable Manager sent Grievant a counseling memorandum stating:

I am writing this memo to document our discussion on May 22, 2001 relating to your job performance and customer service skills.

I received a complaint from [Ms. VB] regarding your treatment of her while making a payment at the cashiers window. [Ms. VB] said that you were very argumentative with her, disputing the charge she was trying to pay. After you reviewed the account a few minutes, [Ms. VB] indicated that you finally realized that she was correct. She also stated that you were upset when she changed her mind and decided to pay her debt using part check and part credit card.

After paying her account in full, she went to the Registrar’s office to take care of some concerns with her experimental learning courses. Once downstairs, she was told there was a hold on her account and she needed to speak with an Office of Finance representative. Already frustrated, she came back to our office to inquire about the hold.

She came back upstairs to your window and asked when the hold would be removed. You answered “holds are removed at midnight and her hold would be removed at that time.” She said at this point she demanded that her hold be removed immediately and asked to speak to a supervisor. Only, at this point, did you remove her financial hold. She said that you nonchalantly motioned for her to have a seat on the couch and a supervisor would be with her.

There was no reason for you to explain the automated process of removing holds to [Ms. VB]. Her hold should have been removed immediately upon receiving payment in full. All holds must be removed immediately, if payment in full is made at the window. You did not follow procedures since you posted this payment before you actually had it in your hand. You became upset with [Ms. VB] because you had already posted her payment for the full amount as a check payment. This caused you to have to reverse your entry because it was incorrect.

The Commonwealth of Virginia “Standards of Conduct and Performance” provides guidelines for acceptable job performance. The job performance

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<sup>3</sup> Agency Exhibit 3.

you exhibited is unsatisfactory and future incidents of this nature will not be tolerated.<sup>4</sup>

On July 18, 2001, the Cashiering Supervisor gave Grievant a counseling memorandum stating:

I am writing this memo to document your work performance as it related to your Employee Work Performance Plan. One of the major responsibilities of a Cashier is the accuracy of collecting funds and balancing your cashiering session at the close of each day. The balancing process predetermines the Universit[y's] commonwealth, local and payroll deposits for the next day.

On two separate occasions your sessions were not balanced at the close of the day. The first occasion (June 22, 2001) your admission deposits were not correctly coded. This caused the deposit to have [an] overage in cash (ADCS) and a shortage in charged (ADCH).

On the second occasion (July 9, 2001) in posting the CKOA (scholarship checks) you neglected to post the full face value of the check to the student's account. This caused the deposit to have an overage in checks.

You must ensure each category on your cashiering session is balanced daily. Accuracy is a very important aspect in cashiering. Future incidents of this nature may constitute a written notice.

As your supervisor, I am always available to assist you with any questions or concerns that you may have.<sup>5</sup>

Grievant replied on July 19, 2001 to the counseling memorandum by stating:

I can only say my mistakes came from trying to get out of [the] office as close to 5pm as possible. I should have made one final check and I would have [noticed] my CKOA did not balance. As for the ADCS and ADCH I realize the mistake and tried to correct it. However, I was not aware of the proper procedure to correct an error was to "release the funds." I learned the correct procedure after [the] error was made.<sup>6</sup>

On July 31, 2001, the Cashiering Supervisor sent Grievant a counseling memorandum stating:

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<sup>4</sup> Agency Exhibit 4.

<sup>5</sup> Agency Exhibit 6. Attached to the memorandum were examples of the problems identified.

<sup>6</sup> Agency Exhibit 6.

I am writing this memorandum to document your work performance as it related to your Employee Work Performance Plan

On July 24, 2001, you processed 40 payment plans for the upcoming Fall (2000110) Term. In auditing your payment plans there were seven errors detected. The ratio of errors compared to the quantity of plans processed were estimated to be an 18% error ratio, well beyond the 4% ratio allowed.

Prior to processing your payment plans you came to my office and asked if you are to include the \$100 payment for housing and the \$40 processing fee payment. I informed you at that time not to include and to set them up for the full amount of the housing, tuition and meal plan.

To correct these errors you were given the account copies (TSAAREV), copies of the payment plans and emailed a date of completion. When processing the corrections the payment plan processing fees were ignored, creating a duplication of the processing fee on each account. On one student account [KJ] the payment plan processing fee was charged a total of 9 time totaling \$360.00.

As a cashier it is your responsibility to ensure all work processed is complete and accurate. Accuracy is a very important aspect of your cashiering duties.

As your supervisor I am always available to assist you with any questions or concerns that you may have.<sup>7</sup>

On the following day, August 1, 2001, the Cashiering Supervisor issued a Notice of Improvement Needed/Substandard Performance to Grievant. This Notice states:

This form documents that you must make immediate improvement in the performance of your duties. Continued poor performance as described below may result in an overall "Below Contributor"<sup>8</sup> rating on the annual performance evaluation conducted in this performance cycle.

**Description of specific performance deficiencies and improvements needed:**

On two occasions your sessions were not balanced [at] the close of the day. The first occasion (June 22, 2001) your admission deposits were not correctly coded. This caused the deposit to have an overage in cash (ADCS) and a shortage in charges (ADCH). The second occasion (July

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<sup>7</sup> Agency Exhibit 5. Attached to the memorandum were examples of the errors.

<sup>8</sup> A rating of "Below Contributor" means "Work that fails to meet the criteria of the job function."

9, 2001) in posting the CKOA (scholarship checks) you neglected to post the full face value of the check to the students account. This caused the deposit to have an overage in checks. On July 18, 2001 a Counseling memo was given to document the errors listed.

**Improvement plan:**

You will be required to code all admission deposits accurately and timely to avoid an overage in cash (ADCS) and a shortage in charges. All Scholarship checks (CKOA) are to be posted timely and for the full face value to avoid an overage in checks. Immediate, consistent, and sustained improvement is needed to correct your performance. Therefore, the improvement plan will consist of meeting with your supervisor once weekly to assess your improvement and to further convey issues and concerns that need to be discussed.

The Accounts Receivable Manager served as reviewer to the Notice and added, "I have asked for a list of items she needs training on. [Grievant] has not provided me with a list to help her be successful."<sup>9</sup>

On September 7, 2001, the University issued Grievant a Group I Written Notice for unsatisfactory work performance for offenses occurring on August 9, 2001 and August 27, 2001. The University President's office received a complaint from a student who claimed he was treated unprofessionally by Grievant on August 9, 2001. He asked to speak with Grievant's supervisor to resolve his complaint. On August 27, 2001, the Accounts Receivable Manager received a complaint from another customer who said Grievant was rude and unprofessional to him when he inquired as to the length of the waiting time. The customer also observed Grievant being rude to others.<sup>10</sup>

The University began evaluations for all of its employees in the Fall of 2001. Grievant's evaluation was initiated on September 20, 2001 and finalized on October 23, 2001. She received an overall rating of "Below Contributor." The evaluation identifies seven Core Responsibilities/Major Job Functions and specifies the percentage of time spent in each function. Grievant's functions and percent of time spent include – Cashier (50%); Return Checks (5%); Rotation (20%)<sup>11</sup>; Adjustments (16%); Customer Service (5%); and Procedures manual (3%).<sup>12</sup> Grievant received a "Below Contributor" rating for Cashier, Adjustments, and Customer Service.

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<sup>9</sup> Agency Exhibit 6.

<sup>10</sup> Agency Exhibit 7.

<sup>11</sup> Grievant did not perform any rotation functions because of staff shortages. The University did not consider this core responsibility/major job function when evaluating Grievant.

<sup>12</sup> The seventh core responsibility/major job function is not titled. It involves one percent of Grievant's time and requires Grievant to "maintain environment in professional, non-prejudiced and bias-free manner

On November 7, 2001, the University drafted a development plan for Grievant. The plan set forth the objectives for Grievant to meet for the following months.

On December 12, 2001, the University presented Grievant with a Notice of Improvement Needed/Substandard Performance. The Notice identified several examples of posting errors and poor customer service. Examples of the posting errors were attached to the Notice.

On December 18, 2001, the University issued Grievant's re-evaluation showing her performance as "Below Contributor."<sup>13</sup> Grievant received "Below Contributor" ratings for Core Responsibilities/Major Job Functions of Cashier, Adjustments/Refunds, and University Objective. Grievant's supervisor described Grievant's performance as:

[Grievant] has not sustained an overall improvement in meeting the core requirements for the position. Her inability to retain information and understand how to read, audit and analyze accounts has caused her to perform poorly. Adjustments, which she processed incorrectly, affects revenue levels creating inaccurate figures being reported. Adjustments processed without authorization creates negative audits comments by the APA. Poor customer service creates negative public relations of our customers.

Following Grievant's negative re-evaluation, University managers considered whether to demote, reassign, or terminate Grievant. Since only the termination option was available to the University, it sent Grievant a letter dated December 21, 2001 advising her that she would be removed from employment effective December 28, 2001.<sup>14</sup>

## CONCLUSIONS OF LAW

The Commonwealth of Virginia is entitled to have a competent and effective workforce. When an agency believes one of its employees is not performing adequately, the agency may remove that employee only after complying with all applicable policies.<sup>15</sup> Central to upholding an employee's removal is the question of

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with coworkers, supervisor, and customers. Grievant met these standards. A later evaluation on December 18, 2001 gives this provision the title "University Objective."

<sup>13</sup> Agency Exhibit 10.

<sup>14</sup> Agency Exhibit 11.

<sup>15</sup> It is important to remember that grievance hearings involve property rights protected by the United States Constitution and the Virginia Constitution. A nonprobationary classified employee has a valid property interest in continued employment as a State employee. *Leftwich v. Bevilacqua*, 635 F. Supp. 238, 240 (1986). Once that property interest is created, its removal is governed by the Due Process Clause of the Virginia and U.S. Constitutions, and not by Virginia statutes or regulations. *Id.* at 241.



whether the employee was given adequate notice of the performance problems and given an opportunity to correct those problems.

Grievant's Fall 2001 evaluation rated her overall performance as "Below Contributor." The University has presented sufficient evidence to support its manager's conclusions and judgments regarding Grievant's performance. For example, Grievant made numerous errors as part of her cashiering duties. Fifty percent of her time was devoted to cashiering duties. Grievant also showed difficulty auditing accounts. Sixteen percent of her time was devoted to adjustments. Although Grievant showed difficulty in customer service, she actually met the standard set by the University. Grievant was obligated to have no more than one justified complaint per month. Grievant had fewer than 12 justified complaints during the year, and, thus, she should have been rated as a "Contributor" for Customer Service. The University's mistake is harmless error. Since only five percent of Grievant's time was devoted to Customer Service, if the Hearing Officer corrects the evaluation to reflect "Contributor" for customer service, Grievant's overall rating would remain unchanged as "Below Contributor."<sup>16</sup>

An employee receiving a rating of "Below Contributor" must be re-evaluated and have a performance re-evaluation plan developed. The University provided Grievant with a development plan outlining her responsibilities and objectives for her performance. Grievant was given the opportunity to receiving additional on-the-job training. She did not actively pursue this training.

Grievant's re-evaluation showed her performance as "Below Contributor." Grievant's performance during this period supports her poor evaluation. For example, her posting error rate was 33% when only 4% is acceptable. Because of Grievant's errors, one student showed a balance of \$180 when the balance should have been zero. Another student showed a balance due of \$387 when the actual balance was zero. Collection proceedings were initiated against the student who became upset and complained to the University about the error.

"If the employee receives a re-evaluation rating of "Below Contributor," the supervisor shall demote, reassign, or terminate the employee by the end of the three (3) month re-evaluation period. \*\*\* If the agency determines that there are no alternative to demote, reassign, or reduce the employee's ... duties, termination based on the unsatisfactory re-evaluation is the proper action. The employee who receives an

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"Virginia law requires four basic elements in a post-termination grievance hearing. These requirements include: (1) written notice of the termination with reasons therefor; (2) a hearing before an impartial three-member panel [The General Assembly substituted hearing officers for panels]; (3) an opportunity to present, examine, and cross-examine witnesses; and (4) a panel decision that adheres to 'law and written policies.'" *Id.* at 242.

<sup>16</sup> Cashier and Adjustments total 66 percent of Grievant's time. (If Rotation is disregarded altogether, Cashier and Adjustments total 82 percent of Grievant's time.)

unsatisfactory re-evaluation will be terminated at the end of the three (3) month re-evaluation period.”

The University removed Grievant from employment after concluding that she could not be reassigned or demoted. Grievant was given ample notice of her performance problems and given ample opportunity to correct those problems. This removal must be upheld.

Grievant contends she was not properly trained to perform the work and, thus, her errors were inevitable. The evidence, however, showed that Grievant had receive extensive on-the-job training. She received training before beginning her duties as a cashier. As errors were noted, she was given copies of the errors and told how to correct the error. In addition, her supervisor and manager had an “open door” policy. If Grievant had a question, she could ask her supervisor. Grievant often chose to attempt to fix the problem without seeking assistance. During the re-evaluation period, the Account Receivable Manager scheduled weekly meetings with Grievant to provide her with any necessary training; yet Grievant came to the meetings unprepared or sometimes did not appear at all.

Grievant contends the University had already decided to remove her from employment before it re-evaluated her. According to Grievant, this is shown by the fact that the University began hiring for her position while she was in the position. The Hearing Officer concludes that the University did not decide to remove Grievant before finishing its re-evaluation of her. The positions for which the University was hiring were vacant positions.

Grievant contends the working environment was vindictive and hostile. If the Hearing Officer assumes for the sake of argument that Grievant’s allegation is true, the fact remains that the University has established that Grievant’s performance was poor and that she was given many opportunities to improve.

Grievant contends her accounts were more frequently audited that other cashiers. The evidence, however, showed that all cashiers were audited equally. Grievant had more errors than did the other cashiers.

## **DECISION**

For the reasons stated herein, the University’s removal of Grievant is **upheld**.

## **APPEAL RIGHTS**

As Sections 7.1 through 7.3 of the Grievance Procedure Manual set forth in more detail, this hearing decision is subject to administrative and judicial review. Once the

administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

Administrative Review – This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. **A request to reconsider a decision or reopen a hearing** is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. **A challenge that the hearing decision is inconsistent with state or agency policy** is made to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy.
3. **A challenge that the hearing decision does not comply with grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within **10 calendar** days of the **date of the original hearing decision**. (Note: the 10-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 10 days; the day following the issuance of the decision is the first of the 10 days). A copy of each appeal must be provided to the other party.

A hearing officer's original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

1. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

### Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer



**COMMONWEALTH of VIRGINIA**  
**Department of Employment Dispute Resolution**

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

**Grievance No: 5390-R**

Reconsideration Decision Issued: May 16, 2002

**RECONSIDERATION DECISION**

Grievance Procedure Manual § 7.2 authorizes the Hearing Officer to reconsider or reopen a hearing. “[G]enerally, newly discovered evidence or evidence of incorrect legal conclusions is the basis ...” to grant the request.

Grievant’s request for reconsideration does not identify any newly discovered evidence or any incorrect legal conclusions. Grievant merely asks to reopen the hearing to present new and additional evidence. Without any proffer regarding what that evidence may be, the Hearing Officer cannot reopen the hearing. For this reason, Grievant’s request for reconsideration is **denied**.

**APPEAL RIGHTS**

A hearing officer’s original decision becomes a **final hearing decision**, with no further possibility of an administrative review, when:

3. The 10 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or,
4. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.

Judicial Review of Final Hearing Decision

Within thirty days of a final decision, a party may appeal on the grounds that the determination is contradictory to law by filing a notice of appeal with the clerk of the

circuit court in the jurisdiction in which the grievance arose. The agency shall request and receive prior approval of the Director before filing a notice of appeal.

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Carl Wilson Schmidt, Esq.  
Hearing Officer