

Issue: Group III Written Notice with termination (falsification of records, failure to comply with established written policy and inadequate work performance);
Hearing Date: 06/02/04; Decision Issued: 06/09/04; Agency: VCU; AHO:
David J. Latham, Esq.; Case No. 711



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 711

Hearing Date: June 2, 2004
Decision Issued: June 9, 2004

PROCEDURAL ISSUE

Grievant requested as part of her relief that she not be reinstated to her former position. A hearing officer does not have authority to transfer an employee.¹ When a grievant is reinstated, it may only be to her former position. During the hearing, grievant affirmed that she does not want to be reinstated if it means returning to the same position. Therefore, grievant clarified that her request for relief is either a rescission or reduction of the disciplinary action, *without* reinstatement to the agency.

APPEARANCES

Grievant
Attorney for Grievant
Five witnesses for Grievant
Associate Dean

¹ § 5.9(b)2, Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective July 1, 2001.

Advocate for Agency
Four witnesses for Agency
Observer for EDR

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue? Was the disciplinary action retaliatory?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for falsification of records, failure to comply with established written policy and inadequate work performance.² As part of the disciplinary action, grievant was removed from employment effective March 22, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.³

Virginia Commonwealth University (Hereinafter referred to as "agency") has employed grievant for six years as a financial services specialist.⁴ Grievant functioned as the business manager/accountant for the Department of Theater and, beginning in August 2003, as financial affairs manager for the Dean's office. The stated purpose for her position is to "Assure conformity to State, University, and School regulations by the persons responsible for initiating the transactions."⁵

In 2002, the agency's Audit and Management Services department conducted a special review of selected activities in the Department of Theater because it had become necessary to terminate the employment of the department's fiscal technician due to performance concerns. The audit concluded that the Theater department was out of compliance with state and University requirements and that its practices were not effective.⁶ As a result of this audit, it was decided to hire a financial services specialist (accountant). This position is a higher-level position than fiscal technician. When grievant was selected for the new position, she had already been employed by the agency for over four years. She knew about the problems in the Theater department and the audit report.

The Associate Dean who interviewed grievant for the position emphasized the need to operate the Theater Department by the book in order to avoid a recurrence of the problems uncovered by the audit. Grievant was specifically

² Agency Exhibit 1. Group III Written Notice, issued March 22, 2004.

³ Agency Exhibit 2. Grievance Form A, filed April 6, 2004.

⁴ Agency Exhibit 6. Grievant's Work Description, July 29, 2003.

⁵ *Ibid.*

⁶ Agency Exhibit 5. Special Review – School of the Arts, August 5, 2002.

charged with, *inter alia*, responsibility for assuring compliance with University policy concerning financial records, making deposits as cash/cash equivalents are received, and American Express (AMEX) transactions. Grievant understood what was expected of her as well as the importance of avoiding a repetition of the previous deficiencies. The Associate Dean reemphasized this point when grievant was selected for the position. Grievant was selected from among the other candidates because of her excellent knowledge of accounting practices and her good work record up to that time.

The Information Technology (IT) Director of the agency's Arts Center had received six checks over the course of three days in early February 2004. The checks, ranging in amounts from \$100.00 to \$835.00 and totaling \$2,835.00, were payments from students and employees for the leasing of laptop computers. Late in the afternoon of February 6, 2004, the IT Director gave the six checks to grievant. Standard procedure requires that grievant complete a Deposit/Receipt Form itemizing the checks and deposit the funds in a university bank account. State and agency policy require that all receipts must be deposited on the day received or not later than the next banking day.⁷ Grievant set the checks aside; several days later she asked a work/study student to fill out the form. On February 20, 2004, grievant noticed that the student had left the "date received" column blank; grievant entered "2/20" as the date received, signed the form, and deposited the checks.⁸

On February 6, 2004, the IT Director also gave grievant eight credit card charge slips (for laptop computer lease payments). Grievant set these charge slips aside and later deposited them on February 20, 2004. When questioned by the Associate Dean about the checks and credit card charges, grievant stated that she had delayed making deposits because it was "not convenient" to make deposits at that time. Grievant also acknowledged to the Associate Dean that she was aware of the policy requiring all funds to be deposited within 24 hours of receipt. The month of February 2004 was not a peak workload month. Grievant did not request Department of the Treasury to make an exception to the 24-hour deposit requirement.

During the latter part of February and early March 2004, an Associate Professor of Theater traveled out of state for two weeks. The professor was the only designated person in the Theater department who possessed a university corporate purchasing credit card. He regularly utilized this card to make

⁷ Grievant Exhibit 1. Topic 20205, Virginia Office of the Comptroller *Cash Receipts Accounting* policy, January 2002. "All State receipts will be deposited on the day received or no later than the next banking day. Any exceptions to this policy should be justified by the small amount collected and availability of adequate safekeeping facilities. Processing during peak workload periods or extenuating circumstances may justify a short extension of the depositing requirements and will be considered by the Department of the Treasury on an exception basis. **Requests for exceptions should be addressed to the Manager, Cash and Banking, Department of the Treasury.**" (Emphasis added)

⁸ Agency Exhibit 3. Deposit/Receipt Form, February 20, 2004.

necessary purchases of supplies and materials for theater department productions. Because he anticipated that the department might have to purchase supplies or materials during his extended absence, he asked grievant for guidance on how purchases should be made while he was away. Even though the credit card policy prohibits anyone other than the designated cardholder from using the card, he asked grievant if there was any means by which someone else could use the card.⁹ Grievant advised him to prepare a note for signature by the Chairman of the Theater Department authorizing a specific person to make purchases during his absence. The professor prepared such a brief note and obtained the Chairman's signature.¹⁰ During his two-week absence, the designated person made purchases of over \$4,000.00 on the credit card. The purchases were all legitimate and necessary for theater productions. As a result of the policy violation, the card was suspended and revoked, and a new card had to be issued to the professor.¹¹

On March 4, 2004, grievant acknowledged that her failure to make deposits within 24 hours of receipt was irresponsible.¹² On March 15, 2004, prior to the issuance of discipline, the Associate Dean asked grievant whether there were any other instances of late deposits; grievant said there were not. However, the agency found other instances of deposits delayed beyond the 24-hour limit.¹³

The agency advised grievant in mid-March 2004 that it intended to issue her a Group II Written Notice for failure to comply with the check cashing policy. After the Associate Dean gave grievant a due process notification memorandum, she learned that grievant's offense was actually a falsification of records - a Group III offense. At about the same time, she learned that grievant had also been involved in a violation of the corporate purchasing card policy. Accordingly, in consultation with the Human Resources Department, it was decided that grievant should be given a Group III Written Notice and removed from employment. Grievant was given a second due process notification, and subsequently was issued the Group III Written Notice and discharged from employment.

⁹ Agency Exhibit 4. Section III.B. *AMEX Corporate Purchasing Card* policy provides that: "Authorized use of the AMEX Corporate Purchasing Card is limited to the person in whose name the card is issued. The **card shall not be loaned** to another person. If the cardholder will be away from the University for an extended period, a card may be issued to another person for the duration of the absence using the procedures above." (Emphasis added). Section III.G provides that: "An individual's card privileges may be suspended or revoked on the basis of the following infractions: 2. card sharing."

¹⁰ Agency Exhibit 4. Note signed by department chairman, February 19, 2004.

¹¹ The professor received counseling as a result of this incident.

¹² Agency Exhibit 2. Attachment to grievance form.

¹³ *Ibid.* During the pre-disciplinary hearing on March 18, 2004, grievant acknowledges that the Associate Dean showed her another example of a deposit made nearly two months after the check had been received.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 Va. 653, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.¹⁴

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60 effective September 16, 1993. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action. The Standards provide that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal;

¹⁴ § 5.8 Department of Employment Dispute Resolution (EDR), *Grievance Procedure Manual*, effective July 1, 2001.

falsification of any records is one example of a Group III offense.¹⁵ Group II offenses include acts and behavior that are more severe in nature than Group I offenses and are such that an accumulation of two Group II offenses normally should warrant removal from employment; one example of such an offense is failure to comply with established written policy. Group I offenses are the least severe and include inadequate work performance.

Falsification of Records

The agency has borne the burden of proof to show that grievant falsified the check deposit form. Grievant admitted that she wrote an incorrect date of receipt on the form, knowing that she had actually received the checks about two weeks earlier. Falsification of records is a Group III offense.

Failure to comply with established policy

Grievant has also admitted knowledge of both State and agency policy requirements that all receipts be deposited not later than the next business day. While the policy provides for the possibility of exceptions, none of the exceptions are applicable in this case. The amount collected (\$2,835.00) was not small and would therefore not justify an exception. While grievant averred that she was very busy in early February, the preponderance of evidence indicates that the department was no busier than during the balance of the school year. However, even if February could have been considered a peak workload period, that would only justify a short extension – not an extension of two weeks. Moreover, grievant never requested that Department of the Treasury grant such an extension. It appears more likely than not that grievant either forgot about the checks for a period of time or, as she said, “It just was not convenient.” Regardless of the reason, the agency has borne the burden of proof to show that grievant failed to comply with the established written policy – a Group II offense.

Inadequate work performance

The agency has demonstrated that grievant was the acknowledged financial/accounting expert in the Theater department. She had more financial and accounting knowledge than anyone else in the department and others relied on her to give correct advice. When grievant suggested to a professor that the prohibition against credit card sharing could be circumvented by obtaining the Chairman’s authorization, he relied on grievant’s suggestion. The Chairman was a bit surprised by the suggestion but assumed that grievant would not make such a recommendation unless it comported with policy. In fact, grievant knew, or reasonably should have known from the written policy, that the correct procedure was to obtain a temporary credit card in the name of a different user for the duration of the professor’s absence from the University. Grievant’s failure to give

¹⁵ Agency Exhibit 7. DHRM Policy 1.60 Section V.B., *Standards of Conduct*, September 16, 1993.

this advice, and her suggestion of an unauthorized method of circumvention was inadequate work performance – a Group I offense.

Grievant's attitude

Grievant acknowledged that she “had truly become unhappy in my role as Accountant.”¹⁶ She attributes her change in attitude to the hiring in June 2003 of a new Administrative Director of the Theater. Grievant contends that the Administrative Director is obsessively controlling, demanding, repressive and autocratic. Grievant offered two other witnesses who tended to corroborate grievant's negative assessment of the Administrative Director, although one of the witnesses worked for the Director for only two weeks. As the agency did not rebut testimony on this issue, it appears that the Administrative Director is an equal-opportunity autocrat and treated grievant no differently from other employees.

Both the Department Chairman and the Administrative Director testified that grievant often became angry, slammed things on desks, or would be abusive by yelling at them about problems. The Chairman stated that grievant seemed resentful toward him and the Director when they gave grievant directions. On February 26, 2004, grievant wrote a letter that she intended as a resignation.¹⁷ Before disseminating it, she showed it to a human resources representative. The human resources representative recommended to grievant that she hold the letter until after grievant had taken her scheduled vacation from March 4-15, 2004. Grievant agreed and never gave the letter to anyone else before the agency decided to terminate her employment.

Retaliation

In her written grievance, grievant alleged retaliation *solely* because the department chairman became upset about a travel authorization form.¹⁸ Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.¹⁹ To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Generally, protected activities include use of or participation in the grievance procedure, complying with or reporting a violation of law to authorities, seeking to change a law before the General Assembly or Congress, reporting a violation of fraud, waste or abuse to the state hotline, or exercising any other right protected by law. Grievant has not shown that she engaged in any protected activity prior to the issuance of the

¹⁶ Agency Exhibit 2. Attachment to grievance form.

¹⁷ Grievant Exhibit 3. Letter to multiple addressees from grievant, February 26, 2004.

¹⁸ *Ibid.*

¹⁹ EDR *Grievance Procedure Manual*, p.24

disciplinary action. Since grievant has failed to prove the first and third prongs of the test, she has not met the burden to prove retaliation.

Disparate treatment

Grievant suggests that she received disparate treatment because the department chairman was not disciplined for agreeing to permit credit card sharing. It is correct that the chairman had oversight responsibility for the department's financial affairs. However, as the business manager/accountant for the department, grievant had primary responsibility for day-to-day detailed financial transactions. Grievant's past experience and training in Virginia financial and accounting matters is superior to that of others in the department, including the chairman. Because grievant came to the position after a careful selection process, others relied on her expertise. Consequently, when grievant recommended to the professor that he obtain written authorization to share his credit card, both he and the chairman relied on grievant to provide advice that would not violate policy. Therefore, as the department's financial/accounting expert, it is logical that grievant should have more responsibility for the violation, and be disciplined more severely, than the chairman.

Level of discipline

The agency has shown that grievant committed three offenses. The primary offense of falsification is a Group III offense that normally results in removal from employment. If this were the sole offense, mitigation of removal from employment to a lesser form of discipline (demotion, transfer, or suspension) might be considered. However, the agency has shown that grievant committed two additional offenses, both of which reflect a similar and serious neglect of her duties and responsibilities. Grievant had, by her own admission, developed a very unhappy attitude about her job during the past several months. Her negative attitude manifested itself to others and especially to department management in the form of resentment and abusive communication. Grievant had already decided to resign before the agency removed her from employment. Accordingly, mitigating the discipline would serve no useful purpose, since grievant does not want to return to the agency. More importantly, however, the totality of grievant's three offenses amply justify the issuance of a Group III Written Notice.

DECISION

The agency's disciplinary action is affirmed.

The Group III Written Notice issued on March 22, 2004 for falsification of records, failure to comply with written policy, and inadequate work performance is hereby UPHeld.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar days** from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Address your request to:

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.²⁰ You must file a notice of appeal with the clerk of the circuit court in the

²⁰ An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision

jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.²¹

[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]

David J. Latham, Esq.
Hearing Officer

that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

²¹ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.