

Issue: Group II Written Notice (failure to follow supervisor's instructions and follow established policy), and Group III Written Notice with termination (fraud/theft); Hearing Date: 12/10/04; Decision Issued: 12/16/04; Agency: UVA; AHO: David J. Latham, Esq.; Case No. 7937



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

**DIVISION OF HEARINGS**

**DECISION OF HEARING OFFICER**

In re:

Case No: 7937

Hearing Date: December 10, 2004  
Decision Issued: December 16, 2004

**APPEARANCES**

Grievant  
Program Support Technician Senior  
Attorney for Agency  
Three witnesses for Agency

**ISSUES**

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

**FINDINGS OF FACT**

The grievant filed a timely grievance of two disciplinary actions – a Group II Written Notice for failure to follow a supervisor's instructions and to comply with

established policy and, a Group III Written Notice for fraud/theft.<sup>1</sup> As part of the disciplinary actions, grievant was removed from employment effective September 29, 2004. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.<sup>2</sup> The University of Virginia (Hereinafter referred to as “agency”) has employed grievant for four years as a Program and Administrative Specialist.

On May 7, 2003, grievant wrote two personal checks payable to the agency, each in the amount of \$18. On May 8, 2003, grievant wrote a third personal check payable to the agency in the amount of \$18. The agency accumulated these and other checks and first attempted to negotiate them on May 30, 2003. Grievant’s bank returned the checks to the agency noting that grievant had insufficient funds (NSF) in her account to cover the checks.<sup>3</sup> The agency made a second attempt to negotiate the checks on June 5, 2003 but the bank again rejected the checks. The agency followed its customary practice for NSF checks by billing grievant for the amount of the checks plus a returned check service fee (\$20 per check) for each NSF check.<sup>4</sup> The first bill was mailed to grievant, at the post office box address on her checks, on July 16, 2003. Every two months thereafter, the agency sent another bill to grievant; the last bill was mailed on May 14, 2004. The post office did not return any of the bills as undeliverable. Grievant never paid the bills, and as of the time of this hearing, still has not paid for the NSF checks and services fees.

In March 2004, grievant was asked by the agency to attend a one-day training conference in Florida. When preparations were being made for the trip, grievant volunteered to drive to the conference if the agency paid for a rental automobile. Grievant left Charlottesville at about 5:00 p.m. on a Friday evening, drove through the night, and arrived at the conference site on Saturday morning. She attended the all-day training conference on Sunday and started back to Virginia early Monday morning. She stopped and slept for a time in a rest area and arrived home in the early morning hours of Tuesday.

Prior to leaving, the agency gave grievant a special cash advance of \$1,000 to cover expenses (rental car, lodging, and per diem for meals and incidentals) during the trip.<sup>5</sup> Grievant had previously received a copy of the state lodging and per diem dollar limits.<sup>6</sup> Prior to grievant’s trip, the department’s fiscal technician discussed with grievant the lodging and per diem limits. Grievant understood that upon completion of the trip and not later than April 19, 2004, she would have to submit appropriate receipts, timely complete a travel expense reimbursement voucher, and repay the advance regardless of reimbursement. Grievant failed to timely submit her receipts and excess money to the

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<sup>1</sup> Exhibit 1. Written Notices, issued September 29, 2004.

<sup>2</sup> Exhibit 1. Grievance Form A, filed October 15, 2004.

<sup>3</sup> Exhibit 34. Photocopies of three checks dated May 7 & 8, 2003.

<sup>4</sup> Exhibit 35. Bill to grievant for three checks of \$18 each plus three service fees, totaling \$114.

<sup>5</sup> Exhibit 5. Special Cash Advance Request, March 18, 2004.

<sup>6</sup> Exhibit 3. Email from fiscal technician to all staff, April 3, 2003.

department's fiscal technician.<sup>7</sup> Grievant eventually submitted her receipts on May 20, 2004 and the fiscal technician calculated allowable expenses at \$721.84. The fiscal technician requested grievant to reimburse the difference between the advance and allowable expenses - \$278.16.<sup>8</sup> Grievant repaid that amount. Grievant was upset that she had to repay any money and thought the agency should cover everything she had spent on the trip. On May 24, 2004, grievant called her doctor and obtained an excuse from work. She complained of stress, was placed on short-term disability (STD), and has not worked since that date.

In January 2004, the agency's Internal Audit department had begun a compliance audit of the department in which grievant was employed. In early June 2004, the fiscal technician (who was not totally familiar with state travel policy) requested that the auditor review grievant's travel voucher to assure that it was in compliance with policy. The auditor pointed out that certain expenses allowed to grievant are not covered separately when one receives a per diem allowance. The fiscal technician recalculated grievant's travel voucher and determined that grievant had been allowed \$103.64 above the allowable state guidelines, and therefore owed the agency another \$103.64.<sup>9</sup>

At about the same time, the department learned of the three NSF checks that grievant had not reimbursed. The auditor reviewed the checks and noted that student names were written in the lower left portion of the checks. Among grievant's responsibilities is receiving payment from students for software and course materials. Students are permitted to pay for such items in cash or by check. It appeared that grievant received cash from students and then replaced the cash with her personal checks. The agency does not permit employees to substitute a personal check for cash received from students.

When grievant went on STD on May 24, 2004, she should not have been working. However, grievant was able to access her state email account from a home computer. As students contacted her via email, grievant responded via email to the students even though she was on disability leave.<sup>10</sup> Since grievant was absent, her supervisor had begun to handle student problems that grievant had been involved in. Because of the confusion inherent in grievant answering student emails while the supervisor was dealing with some of the same students, the supervisor directed grievant to forward all student email to her and the supervisor would resolve the inquiries.<sup>11</sup> Despite the supervisor's instructions, grievant continued to respond to students via email even though she was at home on disability.<sup>12</sup>

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<sup>7</sup> Exhibit 6. Reminder emails from fiscal technician to grievant, April 7, 2004 & May 7, 2004.

<sup>8</sup> Exhibit 7. Email from fiscal technician to grievant, May 21, 2004.

<sup>9</sup> Exhibit 9. Email from fiscal technician to grievant, June 4, 2004.

<sup>10</sup> Exhibit 11. Email from grievant to student, May 25, 2004.

<sup>11</sup> Exhibit 12. Email from supervisor to grievant, May 25, 2004.

<sup>12</sup> Exhibits 15-18. Emails from and to grievant.

To prevent further confusion, and to assure that grievant would not be working during a period of disability, her supervisor arranged with the Information Technology (IT) department to have grievant's agency email account disabled effective June 17, 2004 and notified grievant of this by email on June 16, 2004.<sup>13</sup> IT deleted grievant's agency email account on June 17, 2004.<sup>14</sup> However, when it did so, the account was in a dormant state and capable of being reactivated by the employee.<sup>15</sup> Grievant contacted the IT helpdesk and obtained information needed to allow her to reactivate her account. Then, without obtaining permission, grievant reactivated her agency email account on June 22, 2004.<sup>16</sup> When the agency learned several weeks later that grievant had reactivated her account without permission, her account was again deactivated on August 5, 2004.<sup>17</sup>

Subsequently, the agency advised grievant by certified mail and facsimile transmission (to a fax number provided by grievant) that she should reimburse the amount still outstanding from the travel voucher plus the three NSF checks.<sup>18</sup> Grievant did not respond to the letter and never made any reimbursement to the agency. Grievant was given a predetermination hearing on September 17, 2004 and discharged on September 29, 2004. The matter of grievant's check kiting has been referred to the Virginia State Police, University Police and agency management. The law enforcement agencies will decide whether to refer this matter to the Commonwealth's Attorney for prosecution.

### 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:

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<sup>13</sup> Exhibit 21. Email from supervisor to grievant, June 16, 2004.

<sup>14</sup> Exhibit 23. Email from IT to supervisor, June 17, 2004.

<sup>15</sup> IT could have flagged grievant's account in such a manner that would not have allowed her to reactivate it but, for unknown reasons, did not flag the account on June 17, 2004.

<sup>16</sup> Exhibit 39. IT activation log for grievant's email account. See also Exhibit 1 wherein grievant admits that she reactivated her email account.

<sup>17</sup> Exhibit 31. Email from IT to supervisor, August 5, 2004.

<sup>18</sup> Exhibit 32. Letter from supervisor to grievant, August 12, 2004.

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, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.<sup>19</sup>

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. 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. Section V.B.2 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group II offenses include acts and behavior that are more severe in nature and are such that an accumulation of two Group II offenses normally should warrant removal from employment. Failure to follow a supervisor's instructions is a Group II offense.<sup>20</sup> Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. Theft and falsifying records are examples of Group III offenses.

### Fraud/Theft

The agency has demonstrated by a preponderance of evidence that grievant wrote three personal checks to the agency for which she did not have sufficient funds in her bank account. Moreover, grievant acknowledged that she wrote the checks and admits that she owes the money to the agency. She explained at length why she wrote the three checks for \$18 each. In essence, she was attempting to assist students; however, the reasons grievant wrote each check are irrelevant. Regardless of *why* she wrote the checks, the fact remains that she wrote the checks, did not have sufficient funds in her bank account to cover the checks, and failed to repay the debt during the past 18 months.

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<sup>19</sup> § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

<sup>20</sup> Exhibit 2. Department of Human Resource Management (DHRM) Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

Grievant contends that she closed the bank account upon which the checks were drawn in June 2003. However, when the agency first attempted to negotiate the checks on May 30, 2003, grievant did not have sufficient funds to cover the checks. When the agency attempted to negotiate the checks six days later, the bank indicated they were still NSF checks – the bank did not state that grievant had closed her account. Grievant knew, or reasonably should have known, that she did not have sufficient funds to cover the checks. She also knew when she later closed her account that the checks had never been cashed. Further, she knew from her monthly bank reconciliation statements that the checks had not been cashed. Finally, she would have known from the bank's final statement that the bank had charged for NSF service fees. Despite clear knowledge that she owed the agency for the three kited checks, grievant never made any attempt to reimburse the agency in June 2003, after receiving six billing statements in 2003 and 2004, after being notified in August 2004, or after being disciplined in September 2004. Grievant's continued refusal to pay for the kited checks constitutes a continuing fraud upon the agency. Under these circumstances, grievant's actions constitute behavior of such a serious nature that removal from employment is warranted.

#### Failure to follow a supervisor's instructions

The agency has shown by a preponderance of evidence that grievant knew not later than June 22, 2004 (and more likely earlier) that her supervisor had ordered deactivation of grievant's agency email account. Despite that knowledge, grievant surreptitiously reactivated her email account without notifying her supervisor.

Grievant claims that she did not read her supervisor's email of June 16, 2004 notifying her that her email account was being deactivated. If grievant had not read the email prior to account deactivation on June 17, 2004, that might explain why she reactivated the account without permission. However, once grievant reactivated her account on June 22, 2004, she would have received the June 16<sup>th</sup> email and would have known that her supervisor had deactivated her account. Despite this knowledge, grievant did not deactivate her account, did not contact the agency, and did not ask her supervisor for permission to reactivate. Rather, she continued to keep her agency email account activated without permission.

Grievant averred repeatedly during the hearing that she did not reactivate her account, contending that she had no knowledge of how it was reactivated. However, in her grievance form, grievant stated, "The lady from the help desk gave me instructions [on how] to go in and reset my account, which I did."<sup>21</sup> Grievant's repeated denial that she had reactivated her account directly contradicts her own written statement in which she admitted reactivating the account. The inconsistency between these two statements significantly taints grievant's credibility.

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<sup>21</sup> Exhibit 1. Grievance Form A, filed October 15, 2004.

Grievant claimed throughout her testimony that she didn't receive key emails, any of the six bills mailed to her post office box, letters mailed to her home address, or communications faxed to the number she had provided. While it is possible that grievant might not have received a communication or two, her assertion that she didn't receive any of these key communications is not credible. All of the communications were sent to addresses or phone numbers provided by grievant. Moreover, all of the addresses and numbers were correct. Given her already tainted credibility, grievant's assertion that she never received any of the communications is disingenuous. Accordingly, it is concluded that grievant's actions constitute a failure to follow her supervisor's instructions.

#### Failure to comply with established policy

The agency has demonstrated that grievant failed to repay the cash advance overage determined by the agency after audit by the internal audit department. While grievant repaid the overage determined by the fiscal technician, subsequent audit revealed errors in the allowances made on the first travel voucher. This required a recalculation of the correct allowable travel expense and resulted in a determination that grievant owed an additional \$103.64 in reimbursement. Grievant has adamantly refused to reimburse the agency and, during the hearing, continued to assert that she has no intention of repaying the money.

Grievant's refusal to reimburse the agency is based on her conviction that the agency should pay for her entire trip. However, while grievant may feel that way, the fact is that state employees are subject to a very rigorous set of State Travel Regulations. The regulations detail what expenses are covered, what expenses are not covered, and provide dollar limitations for certain types of expenditures such as lodging, meals and incidentals.<sup>22</sup> Moreover, grievant was given a booklet entitled *Travel Basics* which covers most of the information found in the regulations.<sup>23</sup> The amounts that grievant actually spent for meals and for unusually large tips to a valet, concierge, and bellman suggest a disregard for the per diem limits. Grievant's assertion that she was unaware of per diem limits is contradicted by the fiscal technician's testimony and email to grievant as well as the *Travel Basics* booklet she received.

Grievant also argued that the agency did not reimburse her salary for the travel days of Saturday and Monday. She asserts that she received compensatory time only for one day – the Sunday on which she attended the conference. While this issue was not grieved, grievant apparently feels this justifies her refusal to reimburse the travel advance overage. There may be some merit to grievant's argument because her supervisor advised her on August 12, 2004 that grievant was only entitled to eight hours of compensation

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<sup>22</sup> Exhibit 37. Agency Policy VI.G.1, *Travel Expenses*, April 21, 2000. See also General Accounting Topic 20335, *State Travel Regulations*, October 1, 2002.

<sup>23</sup> Exhibit 38. *Travel Basics*.



for the hours of the conference on Sunday. However, because grievant was traveling to the conference on Saturday, it would appear that she should have received compensatory leave on another day for this time. Further, because she traveled on Monday to return from the conference, she should have received her regular salary for that day. Grievant avers that she did not receive compensatory leave for Saturday and was not paid salary for Monday. This was not an issue to be adjudicated during this hearing and there were no leave records available to resolve this question. Nonetheless, the agency should investigate this question to assure that grievant was properly compensated for her travel time.

### DECISION

The disciplinary action of the agency is affirmed.

The Group II Written Notice, the Group III Written Notice, and grievant's removal from employment effective September 29, 2004 are hereby UPHELD.

### APPEAL RIGHTS

You may file an administrative review request within **15 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 14<sup>th</sup> St, 12<sup>th</sup> 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 15 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 15-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.<sup>24</sup> 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.<sup>25</sup>

[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]

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David J. Latham, Esq.  
Hearing Officer

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<sup>24</sup> 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 that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

<sup>25</sup> Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.