Issue: Group III Written Notice with termination (failure to submit leave slips while being paid by Foundation, and overcharging Foundation for her work); Hearing Date: 03/22/05; Decision Issued: 03/28/05; Agency: VSU; AHO: David J. Latham, Esq.; Case No. 8015; **Administrative Review: HO Reconsideration Request received 04/11/05; HO Reconsideration Decision issued 04/18/05; Outcome: No basis to change original decision; Administrative Review: EDR Ruling Request received 04/11/05; EDR Ruling Issued: pending**

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8015

Hearing Date: March 22, 2005
Decision Issued: March 28, 2005

APPEARANCES

Grievant
Attorney for Grievant
Eight witnesses for Grievant
Vice President for Development
Attorney for Agency
Four 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 from a Group III Written Notice for failure to submit leave slips while being paid by a foundation affiliated with the

agency and, because grievant overcharged the foundation for her work over at least a two-year period.[1] As part of the disciplinary action, grievant was removed from state employment effective January 7, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] Virginia State University (VSU) (Hereinafter referred to as "agency") has employed grievant for 24 years. She was a policy and planning specialist at the time of the disciplinary action.

Grievant has been employed in the agency's Development office as a full-time classified state employee. Approximately 15 years ago, grievant was also hired by the VSU Foundation (Hereinafter referred to as "Foundation") purportedly as an independent contractor to perform part-time bookkeeping work.[3] The Foundation chairman estimated that grievant would have to work about 25 percent of a full-time equivalency to perform the required Foundation work. Although the agency and the Foundation are two separate legal entities, the organizations have common interests and work closely together to raise funds. Grievant understood that any work for the Foundation would have to be performed either after her agency working hours or, if during agency hours, she would have to utilize leave time from the agency. Grievant had a flex-time arrangement with the agency, i.e., grievant could adjust her hours of work from one day to the next providing she worked at least eight hours for the agency. Grievant usually performed her Foundation work in the evening or on weekends.

In August 2004, the agency's Board of Visitors (trustees) requested its Internal Audit Department to conduct a general review of the relationships between the agency and the Foundation. As part of the review, the auditors examined the Foundation's financial statements and found that grievant had been paid more money by the foundation in 2003 ($45,000 per annum) than her full-time agency salary (approximately $39,000 p.a.), even though grievant was employed by the Foundation purportedly only on a part-time basis and was paid at the same hourly rate for both jobs.[4] When this finding was reported to the Board in November 2004, the Board requested the Audit Department to conduct a more in-depth audit of grievant's earnings from the Foundation.

A detailed audit revealed that grievant had been keeping track of her hours worked for both the agency and the Foundation on a calendar.[5] From the total hours worked each day, she subtracted nine hours (eight hours of agency work plus an hour for lunch) and charged the remainder to the Foundation on a monthly basis. In making its report, the Audit Department assumed that grievant

[1] Agency Exhibit 1. Group III Written Notice, issued January 7, 2005.
[2] Agency Exhibit 1. Grievance Form A, filed January 21, 2005.
[3] The audit also revealed that the Foundation had not been reporting grievant's pay to the Internal Revenue Service because it was not filing either W2 or 1099 forms.
[4] A subsequent review found that grievant was paid approximately $54,000 by the Foundation in 2004, while her agency salary remained at approximately $39,000.
[5] Agency Exhibits 4-6. Time records for 2002-2004. [NOTE: A few months are missing in each of the three years audited. Although grievant worked every month, the calendar pages for some months could not be located. Grievant did not proffer the records from the missing months.]

actually worked all of the hours she recorded, even though in certain instances the number of hours appears to be inflated.[6] The audit concluded that, in every month but one, grievant submitted to the Foundation for payment more hours than she had recorded on the calendar time record. During the 23 months audited during the period from June 2002 through July 2004, grievant overcharged the Foundation by over 502 hours at a cost of $14,133 to the Foundation. There were no months in which grievant *under*charged the Foundation; in each month where there was a variance between the audit calculation and grievant's calculation, grievant was paid significantly more than she was due.[7] As a full-time university employee, grievant is required to submit a leave activity reporting form for any agency time during which she performed work for the Foundation. The audit also reported that grievant failed to submit leave forms to the agency to cover at least 33 hours of time she was supposed to be working for the agency but was in fact performing work for the Foundation. The cost to the agency was approximately $615.

A Memorandum of Understanding between the agency and the Foundation provides that grievant's salary is to be charged to the University.[8] However, grievant did not follow this requirement; instead she submitted her hours to the Foundation chairman and then wrote a paycheck to herself for her wages. Grievant was the sole person employed by the Foundation and performed all of its administrative and clerical functions. Grievant was not given instructions on how to keep track of her time worked for the Foundation. She kept track of her own time worked, tabulated her own monthly total of hours and amount of pay, and submitted it to the private business office operated by the Foundation's chairman. The chairman is a certified public accountant. However, the chairman did not monitor grievant's hours of work, did not review grievant's time records, and did not verify the hours worked or amounts paid to grievant. From time to time, the chairman signed several blank Foundation checks; when grievant submitted her monthly tally of hours worked and the amount of pay due, she filled in the dollar amount on a pre-signed check payable to herself.

On January 4, 2005, grievant was given a pre-termination due process letter and a copy of the audit memorandum of January 3, 2005 detailing specific offenses.[9] The dates of offenses were from 2002 and 2003; the audit for months in 2004 had not been completed at that time but has since been completed and is included in the evidence submitted by the agency.

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[6] Agency Exhibit 12. Letter from Internal Audit Director to Auditor of Public Accounts, January 27, 2005.

[7] However, there were a few individual days on which grievant may have under-calculated hours worked for the Foundation. For example, on July 1, 2002, grievant recorded four hours worked for the Foundation while the correct amount was four and a half hours.

[8] Grievant Exhibit 1. Memorandum of Understanding, November 2003.

[9] Grievant Exhibit 3. Letter from Vice President for Development to grievant, January 4, 2005.

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, the employee must present her evidence first and must prove her claim by a preponderance of the evidence.[10]

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.3 of the Commonwealth of Virginia's *Department of Personnel and Training Manual* Standards of Conduct Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment. The offenses listed in the Standards of Conduct are intended to be illustrative, not all-inclusive. Accordingly, an offense that in the judgment of the agency head undermines the effectiveness of

[10] § 5.8, Department of Employment Dispute Resolution, *Grievance Procedure Manual*, Effective July 1, 2001.

the agency's activities or the employee's performance should be treated consistent with the provisions of the Standards of Conduct.[11]

Failure to submit leave forms

There is no evidence to show that grievant submitted leave reporting activity forms for time she was performing work for the Foundation on August 1, 2, 28, 29 & 30, 2002. On August 1 & 2, 2002, grievant reported for work at the agency at 1:00 p.m. and 1:15 p.m., respectively, but did not submit a leave time for the hours not worked prior to those times. Grievant asserts that her agency supervisor had allowed her to work at home on these two mornings. Grievant did not ask her supervisor to be a witness at the hearing, did not request an Order for her appearance, and did not obtain an affidavit from the supervisor to corroborate her assertion. However, if grievant had actually worked during the mornings at home, it would have been only logical for her to record that time as time worked, regardless of the physical location in which she had performed the work. It appears more likely than not that grievant recorded an afternoon start time because that is when she actually began to perform work for the agency.

Grievant claims that her supervisor told her not to submit a leave form for August 28, 29 & 30, 2002 when she performed work for the Foundation. The supervisor has stated in a sworn written statement that she always required employees to submit leave requests before the dates of proposed leave and, that she did not approve grievant to take leave without a leave activity reporting form in August 2002.[12] Grievant asserts that she had originally requested, in advance, sick leave for a period in mid-July for a surgical procedure. However, the surgical procedure was postponed and grievant worked on the days for which she had requested leave. Grievant did not submit her copy of the July 2002 leave request to corroborate her assertion. If, as is likely, the leave request form was destroyed because grievant did not take the leave, it is logical that the supervisor would have requested a leave form for the leave grievant took at the end of August. If the July leave request form was not destroyed, grievant and the agency should still have their copies of the form. Grievant could have resolved this issue by obtaining the testimony or statement of the supervisor, or by submitting the leave forms. As she did not, it must be concluded that the supervisor's sworn affidavit is more credible.

It must be acknowledged that all of the instances of failure to submit leave forms occurred in just one month out of the 23 months audited. Thus, there does not appear to have been a consistent or long-term pervasive attempt to defraud the agency. Nonetheless, grievant's failure to submit leave forms for the days involved resulted in her receiving payment for time she did not work. Such conduct is subject to discipline pursuant to the Standards of Conduct.

[11] Section V.A., DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.
[12] Agency Exhibit 13. Sworn statement of supervisor, March 16, 2005.

Overcharging the Foundation

The detailed audit results demonstrate, by a preponderance of evidence, that grievant overcharged the Foundation for 22 of the 23 months audited. In some months, she overcharged more than $1,000.00; during 2003 and 2004, the overcharges averaged more than $758.00 per month. There were no months during which grievant undercharged the Foundation. If she had undercharged in some months and overcharged in other months, one might be able to conclude that the incorrect charges were attributable to calculation errors. If the amounts of the overcharging had been very small, one might also be able to conclude mathematical error was to blame. However, when every month resulted in very *substantial* overcharges, it must be concluded that grievant's overcharging was deliberate and intentional.

It should go without saying that the Foundation failed to have an appropriate system in place to prevent what occurred. Allowing an individual to write her own paycheck without having someone else verify whether the amount is proper is clearly a recipe for disaster. However, the Foundation's failure does not absolve the grievant of responsibility for her own actions. Grievant knew that she was paying herself for more hours than she actually worked. Accordingly, a preponderance of evidence demonstrates that grievant defrauded the Foundation.

While grievant's overcharging of the Foundation did not result in any loss of funds to the agency, her actions nonetheless have an adverse impact on the agency. Grievant was required by the MOU to submit her charges to the agency for payment. The agency would then obtain reimbursement from the Foundation. Had grievant followed the required procedure, the agency payroll department would have been able to detect the overbilling and assure that grievant was paid only what was actually due her. More significantly, grievant's actions reflect badly on the agency. Because grievant was both an agency employee and a Foundation employee, and because her work for both was so closely intertwined, misconduct by grievant at either entity reflects adversely on the other entity. For example, should knowledge of the grievant's large overpayments to herself become known to potential agency donors, they may be less inclined to make donations. This would have a negative impact on the agency's ability to raise funds from alumni and others.

DECISION

The disciplinary action of the agency is affirmed.

The Group III Written Notice and grievant's removal from employment effective January 7, 2005 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 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 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.[13] 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.[14]

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[13] 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).

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

[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

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8015

Hearing Date:	March 22, 2005
Decision Issued:	March 28, 2005
Reconsideration Request Received:	April 11, 2005
Response to Reconsideration:	April 18, 2005

APPLICABLE LAW

A hearing officer's original decision is subject to administrative review. A request for review must be made in writing, and *received* by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. A request to reconsider a decision is made to the hearing officer. A copy of all requests must be provided to the other party and to the EDR Director. 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.[15]

OPINION

Grievant first argues that the issue of her removal from state employment was not before the hearing officer and that the decision upholding her removal should be reversed. During the second step of the grievance resolution process, the agency decided to offer grievant the option of accepting a 30-day suspension and transfer to another department in lieu of removal. Grievant maintained innocence of the charges against her, disagreed with the agency's decision, and requested a hearing.[16] Based on grievant's rejection of the offer, the agency qualified the grievance for a hearing. In order to have an agreement between grievant and the agency, there must be offer and

[15] § 7.2 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.

[16] Agency Exhibit 1. Grievance Form A, filed January 21, 2005.

acceptance. Grievant's decision to reject the offer on the terms made by the agency was not an acceptance. Grievant now suggests, in effect, that she would agree to return to work and grieve only the suspension. If grievant had advised the agency of this stipulation, it would have constituted a counteroffer – which the agency is free to reject.

Grievant raised this issue during the prehearing conference. The agency asserted that it had not accepted grievant's counteroffer. Once grievant rejected the proposed settlement, the agency decided to qualify the entire matter for hearing. Grievant has proffered no evidence to contradict the agency's position. On its face, grievant's written response to the agency's offer appears to be a rejection and a request for a hearing. If grievant had written to the agency and specifically agreed to accept the agency's offer *conditional* upon being allowed to proceed to hearing solely on the issue of the suspension, and if the agency had accepted such a counteroffer, grievant's position would have merit. However, in the absence of such a written exchange, the hearing officer must rely on the grievance form. That document, corroborated by the agency's avowal that there was no acceptance of grievant's counteroffer, is probative. Moreover, if there had been acceptance of the counteroffer, grievant would have returned to work on February 10, 2005. The fact that she did *not* return to work is further evidence that the parties were not in agreement and that the entire matter should go to hearing.

Grievant argues that hearing the entire grievance constitutes taking an adverse action against grievant.[17] The grievance of the disciplinary action taken on January 7, 2005 included grievant's removal from employment. The hearing officer's decision upheld the disciplinary action challenged by the grievance and therefore does not violate the grievance procedure. Accordingly, grievant's request to modify the decision to address only the issue of suspension is denied.

In her second argument, grievant disagrees with the hearing officer's conclusion that the agency sustained the burden of proof to support its disciplinary action. Grievant references, in particular, the calendars upon which grievant recorded time worked for four of the 23 months between June 2002 and May 2004. The agency did not include the four calendars because they could not be located. However, it was grievant who raised these missing calendars as an issue, claiming that they might have proven beneficial to her position. The hearing officer did not draw an adverse inference from grievant's failure to proffer a copy of these four calendars; the hearing officer only observes that if grievant believes the missing months would have helped her case, she has the burden to produce such evidence. Moreover, even if the four missing months contained no improprieties, the evidence from the other 19 months constituted a preponderance of evidence of misconduct.

Grievant objects to drawing an adverse inference from the fact that grievant completed her own paychecks for dollar amounts that she knew, or reasonably should have known, were excessive and incorrect. Given the very high degree of trust which the Foundation's chairman placed in grievant by allowing her to write her own paychecks, one cannot help but draw an adverse inference against grievant under the circumstances revealed by the evidence in this case.

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[17] § 5.9(b) EDR *Grievance Procedure Manual* prohibits a hearing officer from taking adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance).

Grievant also objects to the drawing of an adverse inference based on the sworn written statement of grievant's former supervisor. Since the former supervisor is a retired employee, she is no longer especially beholden to the agency and, therefore, her statement is not likely to be self-serving. Given the totality of the evidence in the case, the hearing officer found grievant's testimony on this issue to be less credible than the supervisor's statement.

Finally, although the decision did not specifically address the issue of mitigation, the hearing officer considered grievant's long service and satisfactory work performance with the agency. Grievant suggests that her many hours of part-time employment with the Foundation should also be considered a mitigating circumstance. The Foundation, while affiliated with the agency, is not part of the agency. Accordingly, grievant's work for the Foundation cannot be considered a mitigating circumstance. Moreover, the fact that grievant took from the Foundation over $14,000 to which she was not entitled outweighs any possible mitigation. While consideration may be given to mitigating circumstances, the nature of grievant's offense is sufficient to outweigh grievant's past service and performance.

DECISION

Grievant has not proffered either any newly discovered evidence or any evidence of incorrect legal conclusions. The hearing officer has carefully considered grievant's arguments and concludes that there is no basis to change the Decision issued on March 28, 2005.

APPEAL RIGHTS

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

1. The 15 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 HRM, 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.[18]

[18] 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).

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David J. Latham, Esq.
Hearing Officer