Issues: 4 Group III Written Notices (theft, falsifying records, abuse of office, abuse of authority), 2 Group II Written Notices (failure to follow policy, misuse of State property), and termination; Hearing Date: 11/20/07; Decision Issued: 12/10/07; Agency: Va. Community College System; AHO: Anthony C. Vance, Esq.; Case No. 8749; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re: Case No. 8749 Hearing Date: November 20, 2007
Decision Issued: December 10, 2007

APPEARANCES

Grievant
Attorney for Grievant
Two Witnesses For Grievant
Attorney for Agency
Four Witnesses for Agency

ISSUES

Was the Grievant's conduct such as to warrant disciplinary action under the *Standards of Conduct*, Policy No. 1.60? If so, what is the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

Grievant was employed at the Community College (herein called "Agency") and filed a timely grievance from four Group III Written Notices and two Group II Written Notices. The Group III Written Notices were issued on August 27, 2007, for: (1) Theft - application for and acceptance of Metro Checks and cash while continuing to drive and park on the "A" campus and other campuses, offense date of November 21, 2006; (2) Falsifying records, which included applications for the Commuter Choice Metro Check Program,* among others, offense date May 1, 2007; (3) Abuse of office - allowing and facilitating an employee to abuse the Commuter Choice Program, actions that led to that employee's termination, offense date March 1, 20007; and (4) Abuse of authority - requiring supervised employees not to follow regulations and procedures required in the proper performance of their work, namely Grievant directing employees not to ticket his automobile and those of others illegally parked, offense date August 13, 2007. Grievant also received two Group II Written Notices issued on August 24, 2007, for: (1) Failure to follow and comply with applicable established written policy concerning ticketing of cars illegally parked on campus and not following the correct appeal procedure, offense date May 1, 2007; (2) Misuse of state property or records- Grievant misused the college's parking lots and State funds were misused in purchasing Metro Checks that were given to Grievant for the Commuter Choice Program when Grievant was using his own vehicle routinely to drive to work and park on campus, offense date May 1, 2007 (A. Ex. A-2). Grievant was terminated on September 4, 2007 and contends that all Written Notices should not have been issued, except that he admitted guilt to the Group II Written Notice of failure to follow and comply with established written policy concerning ticketing of cars illegally parked on campus. Grievant contended, however, that the latter Group II offense should be reduced to a Group I because of mitigating circumstances. See A. Ex. A-7, pages 7-8.

The instant grievance was executed by Grievant on September 20, 2007, and it was qualified for hearing on October 10, 2007 (See A. Ex. A-1). A telephonic prehearing conference was held on November 9, 2007, and a prehearing order issued on this same date. Hearing was held on November

* The purpose of this voluntary program is to reduce congestion on the regions' highways and to reduce the environmental impact of so many cars on area roads (Agency Exhibit ("A. Ex.") A-18, p.4).

20, 2007. Four witnesses and twenty-three exhibits were sponsored by the Agency. Grievant sponsored one witness beside himself and introduced nine exhibits. Memoranda of law on the theft charge were submitted by counsel for both parties before hearing commencement, and closing post-hearing Briefs were authorized if the parties chose to submit such. Counsel for both parties submitted post-hearing memoranda but Grievant's submittal was objected to by the Agency because untimely. Agency's objection is overruled.

I make the following additional findings of fact based upon a preponderance of the evidence introduced by the parties and accepted into evidence.

Grievant has been employed at the Agency since 1995. In November 2005, Grievant was promoted to Business Manager at the "A" Campus (A. Ex. A-7). One of Grievant's duties involved overseeing the parking and traffic management program at his place of employment (A. Ex. A-17, pp. 2, 5). On March 16, 2006, Grievant applied for and signed the Commonwealth Commuter Choice Employee Yearly Certificate form for 2006, which stated:

> I certify that during this period [March - December 2006] I used the benefits exclusively for my regular daily direct commute from house to work and return by public transportation - - - I further certify that during this period I did not receive - - - any other similar transportation fringe benefit from any other agency, department, or division - - - I understand and agree that false certification may result in disciplinary action - - - up to and including dismissal from employment - - (A. Ex. A-4; see also, Stipulation of Parties No. 5, Hearing Officer ("HO") Exhibit 1).

On March 16, 2006, Grievant was issued Commonwealth Commuter Choice Employee Benefit vouchers for the first time in the amount of $570 (HO Ex. 1, No. 8). On May 5, 2006, Grievant accepted $160 as a direct deposit reimbursement following an increase in the monthly benefit for participants of the Commuter Choice Program ("Program").* On June 22, 2006, Grievant was issued $630 worth of Commuter Choice vouchers, and on November 21, 2006, Grievant was issued another $630 worth of Commuter Choice vouchers (HO Ex. 1, Nos. 8-11; A. Ex. A-3). Grievant never refunded the $160 cash he received. Grievant was given at least a total of $1260 worth of Metro Checks which he did not return to any one in authority and which were found in his desk after he was terminated on September 4, 2006 (A. Ex. A-18, pp. 1, 12, 22, 23). Grievant stated that

* The Commuter Choice Program and parking restrictions are described in detail in A. Ex. 23.

there was no procedure through which he could return his unused Metro Checks and thus he simply kept them (A. Ex. A-18, p. 3). However, under the procedures adopted by the Agency for the Program, employees may switch out of the Program by giving one month's advance notice (A. Ex. A-18, p. 4). Under the Program, employees are not allowed to have both a parking sticker and participate in the Program. Employees are not permitted to park on campus regularly when a participant in the Program (HO Ex. 1, Nos. 6, 7). After becoming a participant in the Program, Grievant testified that his parking sticker remained on his car.

Grievant contended that he used Metro Checks exclusively to commute to and from work during the period March 2006 - January 2007 (A. Ex. A-7, p. 1). Grievant contended that the Metro Checks issued to him in March 2006 were used for commuting to and from work during this 2006 period and that the $160 cash he received was used for related bus transportation on his commutes. However, the evidence herein is compelling that Grievant's personal vehicle was seen parked in the Agency's facility lot at least twice per week until January 2007 and was seen so parked two to three times per week after January 2007*. Counsel for both parties stipulated at the hearing that Grievant never used Metro Checks issued to him in June and November 2006. Grievant never removed or turned in his parking permit (A. Ex. A-18, p. 3, 8). Grievant's use of an Agency parking facility during the period before Grievant terminated his participation in the Program, which Grievant did not attempt to do before July 5, 2007, represented receiving at least a "transportation fringe benefit" in violation of his 2006 "Commuter Choice Employee Yearly Certification", which could result in disciplinary action that included dismissal (A. Ex. A-4).

In January 2007, Grievant discovered that a large sum of money was missing from the ID credit card machine as well as collections pertaining to the student metered parking lot. Grievant's work situation then changed and involved his working longer hours, thereby making use of public transportation a less convenient mode of commuting. However, the Commuter Metro commences operations before 6 AM and departs the Agency as late into the evening as 10:30 PM (A. Ex. A-19). In early 2007, Grievant began to drive his car regularly to work, even though he did not then attempt to terminate his participation in the Program. Another employee Grievant managed, the head cashier, who was also a participant in the Commuter Choice Program, commenced working longer hours in the evening, usually on Tuesday evenings (A. Ex. A-12). Grievant told this employee she could drive to work and Grievant instructed the parking manager not to

* The acting Business Manager testified that she observed Grievant park at least four times per week in the facility parking lot from the Spring of 2006 until the end of 2006.

ticket his car and that of the named employee. When the latter employee received parking citations on three occasions, Grievant voided them (A. Exs. A-18, pp. 2-3; A-7, pp. 1-2, 4; A-12). Grievant also directed the "A" Campus parking manager to authorize hang-tags for parking for an employee (A. Ex. A-7, p. 4) and himself (A. Ex. A-18, p. 4). It was normal for Grievant to have a parking hang-tag in his car (*Id.* at p.5). Two hang tags were issued to Grievant for the period January 30, 2007 to expire February 28, 2007, another was issued May 1, 2007 to expire June 30, 2007, and a one day hang tag was issued on June 12, 2006 (A. Ex. A-3, p.1).*

There is a process for appealing parking tickets. The above employee managed by Grievant, *supra*, did not appeal tickets she received. Grievant used his discretion to dismiss them (A. Ex. 18, p. 7). Between August 1-15, Grievant and his employee were parked on campus every working day and photos were taken of their cars (A. Ex. 14; A. Ex. 18, pp. 8 and 14).

Grievant has been an exemplary employee since 1995, receiving many awards pertaining to his outstanding contributions. He earned his bachelors and a masters degree and the only disciplinary action he has ever been awarded is that which is the subject of this grievance (A. Ex. A-18, pp. 11-12).

Grievant appeared herein and testified under oath as did the head cashier employee he managed and referenced above. Grievant's requested relief was: eliminate his termination, reinstate his employment, provide back pay, and award reasonable counsel fees and costs.

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 goals reflect a valid governmental interest in and responsibility to its employees and workplace. *Murray v. Stokes*, 237 VA 653, 656 (1989).

* During the fall semester of 2006, long term hang-tags were issued to Grievant and one of his employees (A. Ex. A-18 pp. 4, 7) which was before changes were made in hang-tag procedures (A. Ex. A-9, A-16).

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 his evidence first and must prove his claim by a preponderance of the evidence.*

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.1 of the Commonwealth of Virginia's *Department of Personnel and Training Manual Standards of Conduct* Policy No. 1.60 (1993) provides that (1) Group II offenses include failure to follow and comply with established written policy and unauthorized use or misuse of state property or records; and (2) Group III offenses include theft, falsification of records or other official state documents, and other offenses which would include abuse of office and abuse of authority. For each Group III offense the "normal disciplinary action - - - is the issuance of a Written Notice and discharge (A. Ex. 15, pp. 4, 5, 8).

Violation Overcharging. Grievant contends that the six Written Notices here grew out of the same basic set of circumstances and therefore violation overcharging has in effect occurred here. The *Standards of Conduct* does not prohibit charging an employee with separate offenses that arise from related facts. No limit is placed on an Agency's decision to

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

cite unacceptable behavior. The *Standards of Conduct* expressly states that "any offense that, in the judgment of agency heads, undermines the effectiveness of agencies' activities, may be considered unacceptable and treated in a manner consistent with the provisions of this section." Thus, agencies may charge offenses in a manner consistent with their *severity* and do not limit which or how many offenses may be charged. This conclusion is consistent with Virginia Supreme Court Criminal Rule 3A:6 which states that "two or more offenses, any of which may be a felony or misdemeanor, may be charged in separate counts of an indictment or information if the offenses are based on the same act or transaction, or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan."

Grievant's instant misconduct is comprised of separate acts on different dates as the following discussion reveals.

Grievant falsified state records by signing for and accepting the Metro Checks and the payment of $160. Grievant accepted benefits for which he was not entitled - the $1,260 worth of Metro Checks and $160 cash. These are two separate acts. Grievant could have committed only the first offense - falsification of state records - without committing the other - theft, which offenses occurred on separate days.

The remaining two Group III Written Notices flow from separate acts also. Abuse of authority and abuse of office are not based on Grievant's signing for and accepting Metro Checks and the direct cash deposit payment. They are based on Grievant's use of his position and office to abuse the Program and to violate parking rules and regulations to benefit himself and a subordinate, who was terminated because of such behavior.

Also, Grievant was charged with separate Group II Written Notices, i.e., Grievant was charged with failing to get a hang tag when necessary and also with abusing state property because he parked his personal vehicle on campus when not permitted. These offenses are listed separately in the *Standards of Conduct* even though they may arise out of similar facts.

In summary, I find that overcharging did not occur here and that the offenses cited by the Agency were properly charged.*

Theft. The theft Written Notice here charges as follows:

> Theft - Application for and acceptance of Metro Checks

* "Abuse of Authority" and "abuse of office" may properly be charged as here where the offenses are substantively different and occurred on different dates. Also note that "abuse of authority" was charged in at least one other case. Hearing Officer Decision 2006-8298.

> while continuing to drive to and park on the "A" Campus and other campuses. We have grievant's signature indicating the receipt of Metro Checks. Grievant also received cash when the allowance for commuting was increased. Employee testimony and parking records demonstrate that Grievant continued to drive to work.
> (Written Notice III, issued 8/24/07)

Black's Law Dictionary (4th Ed.) p. 1647 states that theft is "a popular name for larceny". Larceny has often been defined as the wrongful or fraudulent taking of the personal goods of some intrinsic value, belonging to another, without his assent, and with the intention to deprive the owner thereof permanently. *Skeeter v. Com.*, 217 VA 722, 232 SE2d 756 (1977).

Grievant contends that he is not guilty of theft. The mere fact that Grievant began driving to work on a regular basis while he was a participant in the Program in and of itself does not constitute theft because there is no evidence of any unlawful conversion for personal use of the Metro Checks issued to Grievant. There is no wrongful or fraudulent taking shown here. All unused Metro Checks were returned to the issuer.

However, Grievant received $160 from the Agency on May 5, 2006, which was to reimburse Grievant for an increase in Metro Checks issued to Grievant for the March-June 2006 period. Grievant stated that this $160 was used for bus service in conjunction with Metro usage, and not for the purpose that the funds were paid to him. Moreover, there is compelling evidence of record proving that Grievant regularly used his personal vehicle and parked on campus during this very period that Grievant claimed he used these funds for bus service in 2006. I find that Grievant's extensive use of this claimed bus service is make weight and unproven.

In sum, Grievant here lawfully obtained possession of the sum of $160, provided to him in good faith for the above stated purpose. However, Grievant appears to have fraudulently appropriated this $160 to his own use for purposes other than those intended by the Agency.* This constitutes embezzlement. See *Miller On Criminal Law*, p. 375. Embezzlement is deemed larceny under §18.2-111, VA Code. Accordingly, I find that Grievant committed the theft of $160, which is the "cash" sum reference in the instant theft Written Notice III.

The evidence also clearly proves that Grievant applied for participation in the Program and accepted Metro Checks and cash for his supposed participation. He did not commute using public

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* See *Stegall v. Com.*, 208 VA 719, 160 SE2d 566 (1968).

transportation to the exclusion of private transportation as he certified he would in his application for the Program. He, in fact, routinely drove his personal vehicle to work and parked on campus, which is forbidden under the Program. Grievant accepted Metro Checks in June and November 2006 when he did not intend to use them for commuting. These facts indeed prove record falsification as correctly found in the Step 2 Grievance Meeting.

Furthermore, the evidence plainly proves that Grievant abused his office by permitting one of his employee subordinates to violate rules, regulations and policies that he, as Business Manager, was charged with enforcing, and resulted in that employee's termination. The preponderance of the evidence also shows that Grievant abused his authority by directing employees not to ticket his personal vehicle and a subordinate's vehicle when parked illegally without lawful permits in campus parking lots. The voiding of tickets issued to his subordinate also represents an abuse of authority.

Grievant routinely drove his car to work and parked such on Agency property when he earlier represented that he would use the Program which forbade such action. State funds were misused in purchasing Metro Checks given to Grievant who did not use such after representing that he would use such. Thus Grievant is guilty of misusing state property as charged.

Lastly, Grievant admitted that he failed to follow and comply with established written policy. The preponderance of the evidence proves that he is guilty of this charge also, i.e., failing to park legally, voiding or dismissing parking tickets given when established policy required appealing such. Grievant contends, however, that this Group II violation should be reduced to a Group I for reasons of mitigation,* which will next be discussed.

As stated above, Grievant testified that his unblemished record, and long and successful employment without previous disciplinary action, represent mitigating circumstances to warrant the relief he requested and cited on page 5, *supra*.

In EDR Ruling No. 2007-1518, the Director explained that while an agency can elect to mitigate discipline on the basis of length of service and otherwise satisfactory work performance, those factors will not generally constitute a basis for mitigation by a hearing officer:

Both length of service and otherwise satisfactory

* Counsel for the Agency correctly states (Memorandum, served 12/3/07, p. 6) that I may not "mitigate" this Group II offense to Group I without finding that the Agency misclassified Grievant's misconduct as Group II.

> work performance are grounds for mitigation by agency management under the Standards of Conduct. However, a hearing officer's authority to mitigate under the *Rules for Conducting Grievance Hearings* is not identical to the agency's authority to mitigate under the Standards of Conduct. Under the *Rules for Conducting Grievance Hearings*, the hearing officer can only mitigate if the agency's discipline exceeded the limits of reasonableness. Therefore, while it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. (Emphasis added)

Grievant's misconduct set a bad example for his subordinates. Grievant used his high ranking position to direct or permit subordinates to violate rules and policies that he was charged with enforcing. One of Grievant's subordinates was terminated for abusing the Program. Evidence proved that Grievant knowingly facilitated and condoned this employee's abuse of the Program. In these circumstances, I find that this is not "an extraordinary case" to conclude that length of service and satisfactory past work performance warrant mitigation. Also, I find that the Agency's disciplinary action here did not exceed the limits of reasonableness but in fact was warranted.

In summary, I find that the Agency has, by a preponderance of the evidence, carried its burden of proving all of the violations charged and that the discipline awarded was measured and reasonable.

DECISION

The disciplinary action of the agency is affirmed.

The four Group III Written Notices issued on August 27, 2007, and the Group II Written Notices issued on August 24, 2007, are hereby affirmed.

APPEAL RIGHTS

You may file an administrative review request within 15 calendar days from the date this 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 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 this 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.* You must file a notice of appeal with

* 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).

the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 days of the date when this decision becomes final.**

Decision Issued: December 10, 2007

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Anthony C. Vance, Esq.
Hearing Officer

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