

Issues: Group II Written Notice (failure to follow instructions), Group II (failure to follow instructions, insubordination, leaving work without permission), and Termination (due to accumulation); Hearing Date: 10/14/10; Decision Issued: 10/18/10; Agency: VCCS; AHO: Frank G. Aschmann, Esq.; Case No. 9422, 9423; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA**  
**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**

**DIVISION OF HEARINGS**  
**DECISION OF HEARING OFFICER**

In the matter of: Case Nos. 9422 & 9423

Hearing Date: October 14, 2010  
Decision Issued: October 18, 2010

**PROCEDURAL ISSUE**

No procedural issues raised.

**APPEARANCES**

Grievant  
One Grievant Witness  
Agency Presenter  
Agency Witness

**ISSUES**

1) Did the Grievant violate Agency policy by performing his duties unsatisfactorily and failing to follow a supervisor's instructions and/or policy from December 2009 to June 10, 2010 such as to warrant the issuance of a Group II Written Notice? 2) Did the Grievant violate Agency policy by performing his duties unsatisfactorily, failing to follow a supervisor's instructions and/or policy, acting insubordinate and abandoning his job on April, 26, 2010 such as to warrant the issuance of a Group II Written Notice? 3) Was termination of employment as disciplinary action by the Agency warranted?

**FINDINGS OF FACT**

The Community College employed the Grievant in a position as a Financial Services Manager I. The Community College is a local unit of a larger state agency, the Virginia Community College System (hereafter VCCS). The Community College maintains an accounting system which must be reconciled with the accounting system maintained by VCCS. The Grievant was responsible for reconciling the Community College system with the VCCS system and producing a monthly report which is sent to VCCS. The figures should be reconciled to a zero difference in balance between the two systems signifying that all funds are accounted for. Variances occur for many reasons including entries which are made by VCCS and thus can not be entered into the Community College system until VCCS notifies the Community College. The reconciliation report is due at the end of the month and information necessary to reconcile the accounts from VCCS is usually received in the middle of the month. VCCS also sends weekly reports to allow the Community College to update records. Variances may carry over for

one month depending on when information is received, however, these variances should be resolved by the end of the next month on the following month's report.

In 2009, the Grievant's supervisor retired. A temporary supervisor was put in place for several months until a permanent replacement was hired in September 2009. Several other positions in the Grievant's department were also vacant in 2009. The Grievant's department worked short-handed to complete annual reports and had to prioritize which duties would be performed. The Grievant's temporary supervisor praised the effort of the Grievant during this period. The Grievant has received "contributor" ratings on his annual evaluations. The Grievant worked overtime hours and received training in the system reconciliation process.

The Grievant's permanent supervisor was dissatisfied with the Grievant's work performance. Variances in the system reconciliation were carried over and unresolved for more than one month. The Grievant's supervisor admonished the Grievant to make a priority of the reconciliation process because she was receiving negative feedback from VCCS over the failure to balance the systems. In 2010, the Grievant's supervisor took job duties away from the Grievant to allow him more time to work on the reconciliation process. Variances continued to be carried over. The Grievant felt he should not contact VCCS for help on small variances because he perceived a change in the attitude of VCCS to his requests for help. The Grievant does not state why this happened, only that it occurred after his supervisor came back from a meeting with VCCS.

In April 2010, the Grievant requested three weeks leave so that he could travel abroad. The Grievant was scheduled to leave on April 26, 2010 and return May 17, 2010. The Grievant's supervisor agreed to the period of leave on the condition that the Grievant have the monthly reconciliation complete before his departure. The VCCS reports were available on April 12, 2010, allowing the Grievant nine work days to complete the reconciliation report. The report is typically completed in three to five days. Concerned about getting the report in to VCCS the Grievant's supervisor asked the Grievant about his progress several times. The Grievant had stated he was making progress and indicated it would be done on time. On April 21, 2010, the Grievant's supervisor had a formal meeting with the Grievant about the report and he told her it would not be finished and listed all the things that needed to be done. The Grievant's supervisor directed the Grievant to prepare the material for her to finish the job including putting the data in a format that was different than what he had used in the past. The two met the next day to go over the material. It was not in the format requested by the Grievant's supervisor and was not satisfactory to her for the purposes of completing the reconciliation report. At this meeting the Grievant told his supervisor that his travel plans had changed and he was leaving on the 24<sup>th</sup> of April and would not be coming in on Friday the 23<sup>rd</sup> because he needed to do some personal things to get ready to go on his trip. The Grievant's supervisor directed the Grievant to come to work to meet about the reconciliation and pointed out that he was not authorized leave for that day.

On April 23, 2010, the grievant came to work at approximately 8:30am and asked to meet with his supervisor immediately. The supervisor wanted the assistance of another staff member

to assist with the reconciliation who had not yet come in. When the other employee arrived the meeting began and the Grievant still did not have the information in the new format. He went to his office and returned in approximately 20 minutes with the information in the new format. The meeting resumed and at approximately 10am the Grievant's wife appeared at the facility. The Grievant met with his wife briefly and returned to the meeting for approximately five minutes and told his supervisor he had to go. The supervisor told the Grievant he did not have authorized leave, the work was not finished and he was not to leave the facility. The Grievant became angry, felt he was being mistreated and left. The Grievant had said he would try to return but did not return to work until May 17, 2010. The Grievant's work was completed by other employees.

On June 10, 2010, the Grievant's supervisor issued two Group II Written Notices with a sanction of employment termination to the Grievant. The first notice cites failure to perform satisfactorily and follow instructions for the time period December 2009 to present. The second notice cites failure to perform satisfactorily, follow instructions, insubordination and job abandonment for the incident on April 23, 2010. The Agency decided that termination of employment was warranted because of the potential consequences to the Community College for repeatedly failing to meet the expectations of VCCS and possible public criticism. The Agency considered mitigation and found there were no factors which were sufficient to mitigate the sanction. This hearing is an appeal of the Agency's decision to terminate the Grievant's employment.

#### APPLICABLE LAW AND OPINION

The General assembly enacted the Virginia Personnel Act, Code of Virginia §2.2-2900 et seq., establishing the procedures and policies applicable to employment with 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 (1989).

Code of Virginia §2.2-3000 et seq. sets forth the Commonwealth's grievance procedure. State employees are covered by this procedure unless otherwise exempt. Code of Virginia §2.2-3001A. In disciplinary actions, the Agency must show by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. Department of Employment Dispute Resolution Grievance Procedure Manual, §5.8 (2).

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Code of Virginia §2.2-1201, the Department of Human Resource Management promulgated Standards of Conduct Policy number 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 of Conduct 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 Community College has adopted these standards and uses them to discipline employees.

The Grievant has argued that the variances which have been cited by the Agency occur within the regular course of business and are thus not issues of a failure to perform but rather technical system problems which simply needed to be corrected. While the variances do occur as regular system problems, the Grievant's failure to correct the variances in the system over extended periods of time, leaving the Community College open to rebuke, was a performance problem. The Grievant's supervisor directed the Grievant to resolve these variances yet they continued. Thus the Grievant failed to follow directions. The Grievant used his own judgment in deciding not to seek help to resolve some of the variances. This was a mistake in judgment. Resolution of these issues was clearly of importance to the supervisor and the Grievant chose to carry the variances rather than get the help needed to resolve them in a timely manner. The Grievant further imposed his own judgment inappropriately in this issue by deciding that small variances were not causing a significant impact on the Community College and thus could be carried over and rather than bother VCCS for help. During the time period December 2009 until the employment termination of the Grievant he failed to perform satisfactorily and follow his supervisor's instructions.

Failure to follow a supervisor's instructions is a Group II Written Notice offense. The Agency considered mitigation but determined that the circumstances still warranted the notice at the group two level.

The Grievant can not justify his actions on April 23, 2010. His only excuse is that he felt he was not being treated appropriately considering the dedicated service he had given to the Community College. He felt his personal needs should be given more consideration and he acted inappropriately when his supervisor placed work demands on him instead. The Grievant failed to complete the reconciliation before leaving for vacation as he had been directed to do by his supervisor. Thus he failed to perform his job satisfactorily and failed to follow a supervisor's instructions. The Grievant was specifically directed not to leave work but he became angry and did so anyway. Thus the Grievant was insubordinate and failed to follow a supervisor's instructions. The Grievant was not schedule for leave on April 23, 2010, and left the facility during his regular work hours and did not return until after his three week vacation. The Grievant left with his work unfinished and without the permission of his supervisor. Thus the Grievant left work improperly and failed to perform his duties satisfactorily on April 23, 2010.

Failure to follow a supervisor's instructions is a Group II Written Notice offense. Insubordination is a Group II Written Notice offense. Leaving work without permission is a Group II Written Notice offense. The Agency considered mitigation but determined that the circumstances still warranted the notice at the group two level.

Two active Group II Written Notices generally justifies employment termination. The

Grievant has received two Group II Written Notices at the same time. This might be seen as contrary to the principal of progressive discipline promoted in the Standards of Conduct, however, in this instance the notices are for different acts occurring over a long period of time thus justifying the issuance of two notices at the same time. The actions of the Grievant jeopardized the reputation of the Community College in its financial integrity. His acts of insubordination and refusal to comply with the demands of his job on April 23, 2010, were highly unprofessional and left others to perform his work. The Agency determined that these factors justified employment termination.

The Grievant argued that the sanction should be mitigated by the circumstance that his department was under staffed and he was called upon to perform more work than was reasonable. The Grievant points out that he worked many overtime hours and always took it upon himself to try and serve the interests of the students and the Community College. The Grievant's hard work for the Community College is noted, however, he was given the opportunity to resolve variance problems over an extended period of time without results. The Grievant had resources available to him to get help but decided on his own not to use them. The Grievant was relieved of some of his duties to give him more time to work on the reconciliation duty because it was a priority, however, he chose to put other things first. The Grievant's behavior on April 23, 2010, was completely unacceptable and not justified in any way by the stress the Grievant was under from his job. The Grievant had an obligation to his employer and to remain professional in his demeanor. He failed in both on April 23, 2010. Thus the circumstances present no factors which serve to mitigate the sanction of employment termination.

## DECISION

The disciplinary action of the Agency is affirmed.

## APPEAL RIGHTS

As the Grievance Procedure Manual sets forth in more detail, this hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

**ADMINISTRATIVE REVIEW:** This decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision:

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state or agency policy is

made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14<sup>th</sup> Street, 12<sup>th</sup> Floor, Richmond, VA 23219 or faxed to (804) 371-7401.

3. A challenge that the hearing decision does not comply with grievance procedure is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the decision is not in compliance. The Director's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. Requests should be sent to the EDR Director, Main Street Centre, 600 East Main Street, Suite 301, Richmond, VA 23219 or faxed to (804) 786-0100.

A party may make more than one type of request for review. All requests for review must be made in writing, and received by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. (Note: the 15-day period, in which the appeal must occur, begins with the date of issuance of the decision, not receipt of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). A copy of each appeal must be provided to the other party.

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

1. The 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 DHRM, the hearing officer has issued a revised decision.

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

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Frank G. Aschmann  
Hearing Officer