Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 07/09/09; Decision Issued: 07/15/09; Agency: Radford University; AHO: Thomas P. Walk, Esq.; Case No. 9120; Outcome: No Relief – Agency Upheld in Full.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 9120

DECISION OF HEARING OFFICER

HEARING DATE: July 9, 2009

DECISION ISSUED: July 15, 2009

PROCEDURAL BACKGROUND AND ISSUES

This case involves the grievance filed on April 23, 2009. The Department of Employment Dispute Resolution appointed me as hearing officer on June 9. I received formal notice of the appointment on June 11. A prehearing conference call was conducted on June 18. I scheduled the hearing for July 9.

Counsel for the grievant requested Orders for the appearance of several witnesses. I was contacted by one of those individuals on July 7. He left a message that he would be out of town and unavailable for the hearing. I relayed the message to counsel for the parties and suggested the witness be contacted to see if he would be in a position to testify by telephone. He declined to do so. At the hearing on July 9 counsel for the grievant requested that I draw an adverse inference based on the unavailability of this witness, an employee for the school. At the conclusion of the hearing I granted the Motion.

APPEARANCES

Counsel for school

Representative for school

Six witnesses for school

Grievant

Counsel for grievant

Three additional witnesses for grievant

ISSUE

Whether the school acted appropriately in the issuance of a Group II Written Notice to the grievant on March 25, 2009 and terminating her?

FINDING OF FACTS

The state agency involved in this grievance is a public university located in Western Virginia. The school hired the grievant in 2006 in the position of Events Coordinator for the president of the university. The school issued the grievant a Group I Written Notice on January 17, 2007 for failure to follow instructions and unsatisfactory work performance. This Notice became inactive on January 17 of this year. The action was based, in part, on problems created by the errors of the grievant in maintaining the appointment calendar of the president.

In August 2007 the grievant began working in the Athletic Department at the school on an interim basis, on loan from the office of the president. She served as an assistant to the athletic director. Later that year the school sought to hire a full-time executive assistant to the athletic director. The school advertised the position internally and the grievant applied for the position. The posted description of the position listed numerous duties, including setting up and maintaining personnel files and serving as a backup to the business manager for the department. The school hired the grievant for that position which she commenced on February 10, 2008. One of the duties of the grievant was to verify the completion by all new departmental employees of the United States Department of Homeland Security Employment Verification Form, Form I-9. The form contains appropriate identifying information for the employee. It

requires the employee to attest as to his citizenship, residency, or other immigration status. The employer is required to review and document at least one identifying document for the employee. The failure by an employer to properly complete and maintain this form for each employee subjects the employer to possible fines. The grievant attended a training session on the form on March 7, 2008.

In April of that same year the athletic director reorganized the department and assigned to the grievant the human resource responsibilities for it. In addition to those tasks, the grievant had the duty to maintain the calendar of the athletic director, verify that employment contracts were properly completed, and forward appropriate telephone and other messages for her supervisors. The athletic director was her direct supervisor, although she also worked under the executive associate athletics director.

On October 16, 2008 the athletic director issued to the grievant a Group II Written Notice for failure to accurately complete I-9 forms on three different employees. On that same date he also issued to her a Group I for failing to complete personnel paperwork correctly and in a timely manner, making errors in maintaining the calendar for her supervisor, and failing to "provide direction and instruction to ensure that the office was performing efficiently and effectively." She filed a grievance but did not pursue it to a successful completion. Both of those notices remain active.

The athletic director signed the Performance Plan and Evaluation for the grievant on October 16, 2008. She was given a Below Contributor rating in two areas. The supervisor cited her problems with employee files, calendaring, and the processing of employment contracts and the I-9 forms. Her overall rating was that of Contributor. He commented that this rating was "due to the fact that a performance plan was not provided at the beginning of the performance

cycle. If the employee had been provided a performance plan, a Below Contributor rating would have been given." An Employee Work Profile had been prepared for the grievant at some point; apparently it was never reviewed with her. It is undisputed that she never signed a copy of it. She signed the evaluation, without comment, on November 7, 2008.

Subsequent to October 16, 2008 the grievant continued to commit errors on the employment eligibility verification forms. One such form for a non-student employee was not prepared by the grievant but contained numerous errors. She submitted two additional forms with inaccurate or incomplete information. One of these forms failed to contain a certification as to the citizenship status of the employee.

The athletic director and his associate continued to experience other problems with the grievant. She failed to relay to the director a phone message in a timely manner, a result of her not checking her voicemail for nearly an entire workday. She persisted in forwarding messages to those individuals regarding job applicants, messages that were not solicited or appropriate. She failed to provide to the associate director requested budgetary information in a timely manner or explain to him why that information was not being provided. She also failed to properly see that basketball game day employees were paid in an appropriate manner. The supervisor and associate had concerns over the failure of the grievant to delegate to student or part-time workers certain of her tasks. This lack of delegation may have been the result of conflicting messages being sent as the grievant had been chastised were planning to over-delegate certain of those tasks.

The supervisor issued a second Group II Written Notice on March 25, 2009. He gave as his basis the continued failure to accurately complete I-9 employment eligibility forms as well as continued unsatisfactory performance more specifically failing to complete personnel paperwork

correctly and to complete assigned tasks in a timely manner. The employer terminated the grievant from employment effective March 27, 2009 based on this Notice while the prior Group II Written Notice was still active.

ANALYSIS OF LAW AND OPINION

This Virginia Personnel Act, Virginia Code § 2.2-2900, *et seq*. sets forth, among numerous other matters, the procedures for the discharging of state employees. A grievance procedure for state employees is provided for in Chapter 30 of Title 2.2. of the Code of Virginia. This matter has been conducted pursuant to that set of statutes. The school issued the disciplinary action and terminated the grievant pursuant to the Standards of Conduct set forth in Policy 1.60 of the Virginia Department of Human Resource Management. That policy divides offenses into three levels according to the severity of the behavior. The subject disciplinary action was given as a Group II offense. Those offenses are stated to be conduct that is of such severity or of a repeated nature that formal disciplinary action is required. The policy states that the level "is appropriate for offenses that significantly impact business operation and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures or laws." The policy further states that a second active notice of this level should result in termination.

Section VI (B) of the Rules for Conducting Grievance Hearings promulgated by the Department of Employment Dispute Resolution requires a hearing officer to "determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances." To make this determination, a hearing officer shall decide:

- Whether the employee engaged in the behavior described in the written notice;

- Whether the behavior constituted misconduct;
- Whether the discipline was consistent with law and policy; and
- Whether the action was appropriate in light of any mitigating circumstances not offset by aggravating circumstances.

As set forth above, I believe that the grievant committed the errors alleged. She failed to present evidence to substantially challenge the majority of, and more serious of, the allegations. Notable exceptions would be with regard to the one non-student worker's Form I-9 and the collection of the wage information requested by the associate athletic director. The evidence clearly showed a pattern of continuing performance errors of the same or a similar nature.

I also find that her defective performance constituted misconduct within the meaning of the Standards of Conduct. Inadequate work performance clearly can justify formal disciplinary action.

The closer question is whether the issuance of the Group II in 2009 and termination of the grievant is consistent with the policies of the Commonwealth of Virginia. Viewed in isolation, none of the errors or omissions by the grievant would be sufficient to support and offense of this level. Taken in combination and as part of a continuing pattern, however, I do find that the acts of the grievant are such as to make the discipline issued to her consistent with policy. This is true whether one looks only at events occurring after October 16, 2008 or views her entire work history as a whole.

I am concerned over the continuing problems with the Form I-9. Those problems could have resulted in substantial penalties to the school if discovered by the Federal agency. Also, the evidence clearly shows that the supervisor and the associate athletic director were required to spend a significant amount of time

in dealing with the performance issues of the grievant. There was time, which could have been better used, and the disruptions interfered with the efficient operations of the department.

The grievant presented evidence that she felt harassed by her supervisor and the associate athletic director. I cannot deny that communication issues existed and that the performance problems of the grievant could have been addressed in a different, possibly more effective, manner. This does not mean that the grievant suffered from discrimination or harassment to the extent that her treatment was violative of any Federal or State law.

As a hearing officer I am required to "give due consideration to managements right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations." This directive is in Section VI (B) of the Rules for Conducting Grievance Hearings. I cannot find that the school has acted in bad faith. Under this standard, in light of the other findings I have made, whether I would have imposed the same level of discipline is of no consequence in the absence of mitigating circumstances. I am further required to give deference to any assessment by the agency of mitigating circumstances. I can mitigate the level of discipline only if the evidence establishes that the discipline exceeds the limits of reasonableness. I cannot make that finding in this case.

The grievant presented two arguments, which I view as to going toward mitigation. First, she asserts that after the October 2008 disciplinary actions she did not have sufficient time to correct her performance problems. Over the five-month period between October 2008 and March 2009, the performance of the grievant continued to be deficient without any noticeable improvement. Although she performed in a generally satisfactory manner, the specific problems cannot be glossed over.

The second argument is that lack of awareness of the contents of her employee work profile excuses her omissions. The grievant admitted under cross-examination that her performance was not affected by such lack of knowledge. This admission is consistent with the balance of the evidence in the case.

DECISION

For the reasons stated above, I uphold the issuance of the Group II Written Notice on March 25, 2009 and the termination of the grievant effective March 27, 2009.

APPEAL RIGHTS

As the Grievant 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** to the Director of the Department of Human Resource Management. This request must cite to a particular mandate in the state or agency policy. The Director=s authority is limited to ordering the hearing officer to review the decision to conform it to written policy. Requests should be sent to the Director of Human Resources Management, 101 N. 14th St., 12th 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, One Capitol Square, 830 E. Main St., Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111.

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**. 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 contradictory to law by filing a notice of appeal with the clerk of the circuit court

in the jurisdiction in which the grievance arose. The court shall award reasonable attorneys= fees and costs to the employee if the employee substantially prevails on the merits of the appeal. Either party may appeal the final decision of the Circuit Court to the Court of Appeals pursuant to Virginia Code ' 17.1-405.

ISSUED this July 15, 2009.

/s/ Thomas P. Walk
Thomas P. Walk, Hearing Officer