

Issues: Group II Written Notice (failure to follow instructions) and Termination (due to accumulation); Hearing Date: 10/21/10; Decision Issued: 10/27/10; Agency: Radford University; AHO: Thomas F. Walk, Esq.; Case No. 9427; Outcome: No Relief – Agency Upheld.

IN THE DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION,
COMMONWEALTH OF VIRGINIA

IN RE: CASE NO.: 9427

DECISION OF HEARING OFFICER

HEARING HELD: October 21, 2010

DECISION RENDERED: October 27, 2010

PROCEDURAL BACKGROUND AND ISSUES

The grievant filed his Form A on August 2, 2010, grieving his termination from employment on July 30, 2010. The Department of Employment Dispute Resolution appointed me as hearing officer on September 22. I conducted a telephonic pre-hearing conference on September 27 with counsel for the parties. The parties and I agreed upon a hearing date of October 21. I conducted the hearing on that date at the school at which the grievant was employed. The hearing lasted approximately seven hours.

APPEARANCES

Agency representative

Agency counsel

Six witnesses for agency, including the agency representative and the grievant

Counsel for grievant

Grievant

Six witnesses for grievant, including the grievant

ISSUE

Whether the agency was justified in issuing to the grievant a Group II Written Notice for insubordination and failure to follow instructions and terminating him from employment for certain actions on July 23, 2010?

FINDINGS OF FACT

In this grievance, the agency is a state-supported university. The grievant, at all relevant times, worked for the agency. He held the position of housekeeping supervisor.

In the fall of 2009, the agency performed a reorganization of its housekeeping department. The changes caused the grievant to be placed under a female housekeeping manager. At some prior point in their employment with the agency, this manager had worked under the supervision of the grievant. The reorganization resulted in her becoming his manager. As a part of the crew assigned to the grievant and the manager was a female housekeeper senior. The manager was friendly with her but did not have a good relationship with the grievant. The

grievant and the housekeeper senior also did not have a good relationship.

The mother of the grievant was also employed by the agency as a housekeeping manager. She was aware of the relationships between the grievant and his new manager and the housekeeper senior. The grievant's mother requested the housekeeping director to reconsider his placement of the grievant and to place him under a different manager. The Director denied this request. Under agency policy, the grievant could not work under his mother. Another manager had previously expressed dissatisfaction with the work performance of the grievant. The Director viewed this placement of the grievant as being his best, if not only, option.

Within weeks after the reorganization, problems developed with the work performance of the grievant. On December 14, 2009, the agency issued him a counseling memorandum regarding issues between the grievant and various employees. On January 25, 2010, the housekeeping director issued the grievant a Notice of Improvement for failure to follow instructions and not being truthful with him. Approximately three weeks later the grievant had another incident with the manager regarding whose responsibility it was to file a workers' compensation accident report. The grievant relied on somewhat ambiguous wording in a memorandum issued approximately three months earlier in refusing

to follow the directions of the manager regarding the report. The director issued a Group II Written Notice on February 26 because of this incident. The grievant challenged that disciplinary action but did not follow it through to completion. That Notice remains active.

On July 14, a housekeeping employee failed to appear for work. The grievant was her supervisor but failed to notice or document that the employee was absent without leave. The housekeeping director issued a counseling memorandum to the grievant on July 15 for this incident.

Eight days later, on July 23, the housekeeping manager was working on her computer at the beginning of the workday. The grievant and the manager had separate computers for use but were required to share a jack. Only one of their computers could be used at a time because of this sharing arrangement. The desks and computers of the manager and grievant were in close proximity to each other. While the manager was working on her computer, the grievant requested that she hurry up as he had members of his crew wanting to use his computer to post their time to the agency system. She advised the grievant that she was busy checking emails and that he should advise them to come back later in the afternoon.

The grievant, shortly thereafter, gave his consent to a female housekeeper to use his computer to input her time. She

attempted to do so unsuccessfully, due to the manager continuing to use her computer. The housekeeper left the immediate area and found the grievant. She told him that she could not log on the computer. The grievant responded, "Sure you can." He then walked over to the jack, removed the plug of the manager's computer, and connected his computer. The manager was at her desk when this occurred. The manager said nothing to the grievant about this and the grievant left that area.

Shortly thereafter, the housekeeper senior was in the office area reviewing the call-in log. The manager told the grievant that another employee had called in sick and would be unavailable for duty. The grievant went over to the logbook and physically moved aside the housekeeper senior. He made no request for her to move and did not apologize to her. Again, the manager said nothing directly to the grievant, not wanting to confront him. After this second incident within approximately one hour, the manager called the director to complain about the actions of the grievant. The Director investigated the allegations and issued a Group II Written Notice to the grievant on July 30. The Director cited the prior problems with the grievant over the immediately preceding eight months as circumstances considered in his decision. Because of the active prior Group II, the Director terminated the grievant from employment.

ANALYSIS

This Commonwealth of Virginia has established a comprehensive set of laws and regulations for the protection of its employees. The Virginia Personnel Act is Chapter 29 of Title 2.2 of the Code of Virginia of 1950, as amended. As an adjunct to that Act, a grievance procedure exists for the benefit of non-exempt employees of the Commonwealth. The grievance procedure is set forth in Chapter 30 of Title 2.2 of the Code. The Virginia Department of Employment Dispute Resolution has promulgated a *Grievance Procedure Manual* (hereinafter "GPM". It has also developed comprehensive *Rules for Conducting Grievance Hearings* (hereinafter "the Rules").

The grievant was a non-exempt employee. All cases of formal discipline against such an employee qualify for a grievance hearing. GPM Section 4.1 (A). Under Section 5.8 of the GPM, an administrative agency has the burden of going forward and the burden of proof in disciplinary actions. It must show by a preponderance of evidence that its action was warranted and appropriate under the circumstances.

Section VI (B) of the Rules requires me to determine:

1. Whether the employee engaged in the alleged behavior;
2. Whether the behavior constituted misconduct;

3. Whether the discipline by the agency was consistent with law and policy; and

4. Whether any mitigating circumstances justified a reduction or removal of the disciplinary action and, if so, whether any aggravating circumstances outweighed the mitigating circumstances.

As set forth in detail above, the agency has met its burden of proving that the charged misconduct occurred. The misconduct with which I am concerned is that alleged to have occurred on July 23, 2010. The Defendant has denied that the two incidents occurred as described by the agency witnesses. Taken as a whole, I find the agency evidence to be more credible. This credibility determination is based largely on the testimony of the housekeeper who attempted to use the computer of the grievant on that morning while it was unplugged. She was clear in her testimony that the manager was present when this incident occurred. The grievant denied that. I observed her demeanor while testifying and considered her possible interest in the outcome of this grievance. The grievant approached this housekeeper at some point after the incident and prior to the hearing and attempted to tell her that the manager was not present at that time. This statement by the grievant did not change her recollection as to the events. This same housekeeper has accused by another employee of cursing. This incident was

reported to the manager but the manager has taken no disciplinary action. She apparently chose to believe the housekeeper is not credible with regard to the cursing incident. I considered whether the housekeeper could be part of a concerted plan between the manager and the housekeeper senior to have the grievant fired. No evidence was presented to support that theory and the apparent disbelieving of the housekeeper by the manager indicates the lack of a conspiratorial connection between the two of them.

I have also found that the grievant engaged in the unwelcome physical contact with the housekeeper senior on July 23. Although the evidence amply supports the existence of a poor relationship between the grievant and the housekeeper senior, I view that relationship as merely serving as a backdrop to the incident on July 23. I have strong doubts, however, that the incident occurred exactly as described by the manager and the housekeeper senior. Nevertheless, I am convinced that the incident occurred based, in part, on the prompt reporting of it to the housekeeping director. I have also considered that prompt reporting in assessing the computer jack incident. The computer jack incident clearly constituted insubordination on the part of the grievant rather than following the instructions of the manager to check back later in the afternoon, he preceded to take a step to do things on his own schedule. The fact that

he did this in the presence of a subordinate worker and the manager is particularly troubling.

The behavior of the grievant in moving aside the housekeeper senior from the logbook also constitutes this conduct under the Standards of Conduct developed by the Department of Human Resource Management. The Written Notice of July 30, 2010 is specific in stating that the grievant was being disciplined for insubordination and failure to follow instructions. The physical contact between the grievant and the housekeeper senior does not fall into either of those categories. Therefore, I find that the agency cannot rely on that incident directly to support its issuance of the discipline.

The Standards of Conduct developed by the Department of Human Resource Management are written to give an agency a range of options for discipline. Group I offenses include behavior of the least severe nature but which still requires correction to maintain a productive and well-managed workforce. Group II offenses are more severe in nature. Under the Rules, a hearing officer is required to give deference to the right of the agency to exercise good faith judgment in personnel matters and its right to manage its operations so long as the discipline imposed does not exceed the boundaries of reasonableness. A hearing

officer must also defer to the consideration by the agency of any mitigating and aggravating circumstances.

The evidence in the record establishes many things. It clearly shows that the housekeeping department at the agency was a veritable gossip-mill where adults acted more like teenagers allowing petty jealousies and personality conflicts to fester and thrive. It established that the manager and the housekeeper senior felt ill will toward the grievant and that his job responsibilities were impacted by this vendetta. The grievant used the term "hostile environment" to describe the work setting. I agree with that description.

On the other hand, the evidence also establishes that the grievant did not respond appropriately by faithfully following instructions and attempting to resolve disputes in a more civil and professional manner. I cannot find the agency exceeded the bounds of reasonableness in giving the grievant the second Group II Written Notice. The housekeeping director had attempted to work with the grievant by imposing progressive discipline on him over a number of months. Whether the prior Group II discipline was appropriate is beyond my purview as it was not challenged by the grievant and remains active. The agency acted within its authority in issuing the second Group II discipline and terminating the grievant. This is not an instance where the grievant was set up to fail or unreasonably provoked. It is a

situation that was allowed to spiral out of control. I do not find, however, the agency acted unreasonably in its consideration of any mitigating circumstances. I find that the physical contact that occurred on July 23 was an aggravating circumstance for proper consideration by the agency. It could have been used by the agency as an additional ground for the discipline. As stated above, I do not believe it qualifies under the two categories relied upon by the agency in the formal Notice.

DECISION

For the reasons stated above, the agency's issuance of the Group II Written Notice on July 30, 2010 and termination of the grievant from employment is upheld.

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, Main Street Centre, 600 E. Main St., Suite 301, 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 October 27, 2010.

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