Issues: Group II Written Notice (failure to follow instructions/policy), and Termination (due to accumulation); Hearing Date: 04/14/11; Decision Issued: 04/21/11; Agency: Va Tech; AHO: Thomas P. Walk, Esq.; Case No. 9553; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA, DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 9553

DECISION OF HEARING OFFICER

HEARING DATE: APRIL 14, 2011

DECISION DATE: APRIL 21, 2011

PROCEDURAL BACKGROUND

The grievant received a Group II Written Notice on January 19, 2011. The agency, a state university (hereinafter referred to as the agency or the school), terminated the grievant from employment on that date due to a prior active Group III Written Notice that it had issued to him in 2009. The grievant submitted his Form A on February 17, 2011. The Department of Employment Dispute Resolution appointed me as hearing officer for this matter on March 17, 2011. I conducted a pre-hearing conference by telephone on March 23. I scheduled the hearing for April 14 and conducted the hearing on that date.

APPEARANCES

Grievant

Three additional witnesses for grievant

Counsel for the school

School representative

One additional witness for the school (a total of two including the representative)

ISSUES

1. Whether the grievant failed to follow a supervisor's instructions and perform assigned work?

2. Whether the school acted properly in terminating the grievant from employment on January 19, 2011?

FINDINGS OF FACT

The school is a large state university. The grievant began his employment with the school in 2001, working in the Dining Services Department. The school promoted him to the status of unit manager in 2004. Until his termination from employment, he continued in that status for one of the dining facilities operated by the school.

In 2006, the school investigated a complaint made to the State Hotline regarding an employee under the supervision of the grievant. The Internal Audit Department of the school found that this employee had been violating departmental policy regarding meal breaks over a long duration of time. The subject policy requires employees of the department to take a meal break no later than 5.5 hours into his shift. This employee had been punching out on the time clock within the guidelines but continuing to work through the time showing as a break and then actually taking a break later. She was working "off the clock" and taking her break "on the clock." The auditors found no evidence that the employee had worked less than her scheduled time or had otherwise defrauded the school.

The discrepancies were revealed by a review of her time records and her meal ticket records. The time records were reviewed and approved by the grievant each pay period. The audit disclosed that other management individuals in the unit knew the practice of the one employee. Because of this investigation, the school issued the grievant a Written Counseling Memorandum. It included the warning that "further occurrences of those you manage and supervise with regards to failure to follow proper procedures on time cards, meal breaks, and regular breaks could result in disciplinary actions." The grievant conducted training for his unit

employees on the meal break policy approximately one month prior to the issuance of the memorandum.

Subsequent to the investigation in 2006, the Associate Director of Dining Services continued to raise with the grievant the issue of the meal breaks and time records. In December 2007, he again warned the grievant that in light of the prior issues "we will not tolerate failure to follow policy and procedures." The grievant and the associate director met in October 2009 with the topic of eating on the clock being discussed. The administrative assistant for the unit also brought discrepancies in time records and policy to the attention of the grievant.

In October 2010, the associate director reviewed the time records and discovered that the problem persisted. He directed the grievant to further investigate the problem. The grievant did so and met with the employees in his unit. He gave at least three employees oral warnings. Each sanctioned employee admitted violating the departmental policies. The time records for one of the employees showed that she had failed to punch out prior to the 5.5-hour limit on 35 out of 65 days. The failure of the employees to follow the break policy was obvious from the time records and meal plan records. The associate director, in his review of the records, discovered the discrepancies as early as the spring of 2010.

Because of his findings, the associate director issued to the grievant a Group II Written Notice. He had issued a Group III Written Notice to the grievant on June 19, 2009. That disciplinary action was not successfully challenged by the grievant and remained active through June 19, 2013. Because of the prior Group III Written Notice, the associate director terminated the grievant from employment with the agency on January 19, 2011.

APPLICABLE LAW AND OPINION

Chapter 30 of Title 2.2 of the Code of Virginia provides certain protections to employees

of the Commonwealth. Among those protections is the right to grieve termination from employment for disciplinary reasons. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence and the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate.

In a disciplinary grievance a hearing officer "reviews the facts de novo…to determine: (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; (iii) whether the agency's discipline was consistent with law and policy; and, (iv) whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and, if so, whether aggravating circumstances existed that would overcome the mitigating circumstances. See Rules for Conducting Grievance Hearings Section V (B). I will discuss these considerations in order.

The grievant does not dispute that from 2006 forward he was aware of the concerns of his supervisor regarding compliance with the departmental meal break policy. He does not dispute that his supervisor discussed the concerns with him on several occasions subsequent to 2006. Nevertheless, several employees at the unit under the supervision of the grievant continued to make violating the policy a regular occurrence. If the grievant had appropriately and carefully reviewed the time records of the employees and the meal plan records, he should have discovered these ongoing violations. This he failed to do. This violated the instructions that he had been given in 2006. It also was a breach of his duties as a unit manager to insure compliance with departmental polices.

The grievant testified that he had addressed these issues with certain employees in counseling sessions. One employee may have been issued a written counseling memorandum but it appears all other steps taken by the grievant were on a less formal basis. Whatever steps taken by the grievant were ineffectual. For example, the employee about whom the complaint was made in 2006 continued to violate the policy in January and such other months in 2010 prior to the investigation commencing in October of that year. These violations were apparent from payroll reports approved by the grievant.

Whether the grievant failed to protect the ongoing problems or failed to properly address them is no material. He clearly failed to follow the instructions of his supervisor and perform his work satisfactorily, as is charged in the written notice.

The Department of Human Resource Management for the Commonwealth of Virginia has issued Policy 1.60, labeled "Standards of Conduct." The grievant is challenging his Group II Written Notice. Group II offenses are those "that significantly impact business operations and/or constitute neglect of duty…violations of policies, procedures, or laws." The policy states that a second Group II offense normally should result in termination. Here, the grievant had a prior Group III Written Notice. Group III offenses are more serious than Group II offenses.

The actions and omissions by the grievant fall squarely within the definition of Group II offenses. I have no choice but to find that those actions and omissions constitute misconduct as contemplated by the GPM and Policy 1.60.

I also find that the discipline imposed by the school is consistent with applicable law and policy. The departmental policy being violated by the employees under the supervision of the grievant has a rational basis. Those policies are designed to promote the safety and efficiency

of the employees. The decision to terminate the grievant from employment for the Group II offense was consistent with law and policy, given the active Group III Written Notice.

The question of when a hearing officer may mitigate the punishment imposed by an agency is addressed by the Rules for Conducting Grievance Hearings established by the Department of Employment Dispute Resolution. Section VI (B) of those Rules requires a hearing officer to give deference to the right of management to exercise "its good faith business judgment in employee matters, and the agency's right to manage its operations." The hearing officer may mitigate the discipline only if it is unreasonable. This case involves no factors leading me to conclude that the discipline here was unreasonable.

The grievant had notice that the departmental policy was viewed as important by his supervisor. The grievant permitted, either by choosing not to confront the problem employees or by inattention to detail, the policy to be violated on an ongoing basis by multiple employees. The grievant only offered his good faith efforts to counsel certain of the employees as a mitigating factor. I cannot find those efforts to be sufficient to allow me to substitute my judgment for that of the agency.

DECISION

For the reasons stated above, I uphold the issuance of the Group II Written Notice to the grievant and his termination from employment on January 19, 2011.

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, 600 East Main Street, 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 DEDR 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.

SO DECIDED this April 21, 2011.

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