Issue: Group III Written Notice with Termination (leaving work without permission, failure to follow policy, falsification); Hearing Date: 11/21/13; Decision Issued: 12/02/13; Agency: VPI&SU; AHO: Thomas P. Walk, Esq.; Case No. 10199; Outcome: Partial Relief.

IN THE COMMONWEALTH OF VIRGINIA, DEPARTMENT OF HUMAN RESOURCE MANAGEMENT, OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

IN RE: CASE NO.: 10199

DECISION OF HEARING OFFICER

HEARING DATE: NOVEMBER 21, 2013

DECISION DATE: DECEMBER 2, 2013

I. PROCEDURAL BACKGROUND

The grievant instituted this matter on September 24, 2013 by filing his Grievance Form A. I was appointed as Hearing Officer on October 15. I conducted a prehearing conference by telephone on October 18. The hearing was held on November 21.

II. APPEARANCES

The school was represented by in-house counsel. A representative and observer also attended the hearing on behalf of the school. The school presented three witnesses, including the representative.

The grievant represented himself and called five additional witnesses.

III. ISSUE PRESENTED

Whether the school properly issued to the grievant a Group III Written Notice and terminated him from employment on September 12, 2013?

IV. FINDINGS OF FACT

The grievant worked as a food service worker at the agency at all relevant times. The agency in this matter is a public university in the Commonwealth of Virginia. The grievant had worked for the school for several years prior to 2013.

The grievant had a work schedule that required him to work until 3:30 p.m. each week day, with the exception of Fridays. He worked Saturday hours as well. The supervisor of the facility had agreed for the grievant to work greater than eight hours on weekdays if necessary for the grievant to accrue 40 hours during a week. The supervisor gave the grievant flexibility in his schedule to allow him to do this. It was not unusual for him to work until 5:00 p.m. on one or more days during the week as that allowed him to have a minimum of time between his shift at the school and his beginning work at an outside job.

On Wednesday, September 4, the grievant clocked in for his employment at the school at 7:15 a.m. He clocked out at 5:00 p.m. No co-worker or supervisor at the facility saw the defendant working on that date after approximately 3:30 p.m. The grievant testified that he took his last break at approximately 3:15 p.m. A witness called by the grievant testified that he took a break with her from approximately 4:00 p.m. until 4:15 or 4:20 p.m. This break was described as taking place within the building where the grievant was assigned. No other witness testified to seeing the grievant in the facility between 3:30 and 5:00. The supervisor of the facility saw the grievant clocking out at 5:00 p.m.

Saturday September 7 was a day on which the grievant was assigned to work at his normal facility and then to report to the school's football stadium to help out at a concession stand during the game scheduled for that date. The normal duties for the grievant on a Saturday

included arriving before the facility opened to set up the food preparation areas and to begin preparing food for the expected customers of the facility.

The grievant clocked in at 7:00 a.m. on September 7. A co-worker testified that he arrived at approximately 7:30 a.m., that the grievant was not present, and that the grievant had not started with the normal preparations. The grievant was not seen in the facility until approximately 10:00 a.m. He explained that he walked over to the football stadium in order to find where he needed to go for his duties there. He was not scheduled to work at the stadium until 10:30 a.m. No witness testified to seeing the grievant either at his normal worksite or the football stadium between 7:00 a.m. and 10:00 a.m.

After the grievant was unable to satisfactorily explain his absences from his work sites on September 4 and September 7, management issued to him a Group III Written Notice and terminated him from employment.

V. ANALYSIS

The Commonwealth of Virginia provides to its employees a grievance procedure. This procedure is part of the protections set out in Chapters 28 and 29 of Title 2.2 of the Virginia Code. The Department of Human Resource Management is responsible for implementing the grievance procedure. It has promulgated two documents in that regard, namely Rules for Conducting Grievance Hearings (“Rules”) and a Grievance Procedure Manual (“GPM”). Formal discipline issued to an employee (a written notice) automatically qualifies the employee for a grievance hearing under Section 4.1(A) of the GPM.

Section VI (B) of the Rules sets out the framework to be used by a hearing officer in a grievance hearing involving a disciplinary action. The hearing officer reviews the evidence *de*

novo. The hearing officer must determine the following:

I. Whether the employee engaged in the behavior described in the written notice;

II. Whether the behavior constitutes misconduct; and

III. Whether the disciplinary action was consistent with law and policy.

In a grievance involving a disciplinary action the state agency has the burden of proving the appropriateness of its actions. The standard of proof is a preponderance of the evidence.

The written notice states "on September 4, 2013 and September 7, 2013 you were witnessed being absent from the building while still on the clock. You did not get supervisor approval for leaving the work site. Being absent from work site while still being on the clock is considered an abuse of state time." The notice goes on to describe in further detail the alleged violations of the grievant. The offense codes listed on the Written Notice charge the grievant with leaving work without permission, failing to follow instructions or policy, and falsifying records.

As stated above, I find the evidence to be sufficient to support a finding that the grievant was not working from 3:30 p.m. until 5:00 p.m. on September 4, although still on the clock. I do not believe that the difference between the evidence at the hearing regarding the location of the grievant during those 90 minutes and the allegation in the written notice to be a material variance. The evidence with regard to September 7 is sufficient to find that the grievant was away from his primary work site without permission or reasonable justification. By his own testimony, he was gone from the facility for approximately two hours without permission. Therefore, I conclude that the school has met its burden of proof with regard to its allegations of fact.

I further find that the actions of the grievant constitute misconduct under Department of Human Resource Management Policy 1.60. He left work without permission on both September 4 and September 7. By not performing his assigned duties on those dates, he was guilty of failing to follow instructions.

Policy 1.60 establishes a hierarchy of progressive discipline and categories of defenses based on the seriousness of the defense. One of the lowest levels of discipline is written counseling. This step can be taken by management to address relatively minor acts. The grievant received written counseling in 2009, 2010, and 2011 for failing to work assigned hours. The counseling in 2011 was for failing to work the scheduled shift a total of six times with 30 days.

After the facility supervisor investigated the absence of the grievant on September 4 he intended to merely issue to the grievant a written counseling memorandum. Only after an investigation of the September 7 events was made, including the opportunity for the grievant to produce witnesses with regard to each date, was the decision made to issue the Written Notice and terminate the grievant.

Those facts are relevant to my determination of whether the written notice and termination were consistent with policy. Generally, the right of an agency to manage its employees is subject to limited scrutiny. The rules provide that a hearing officer is to give "due consideration to management's right to exercise its good faith business judgment in employee matters, and the agencies right to manage its operations." Rules, Section VI (B)(1). That deference, however, does not restrict the right of a hearing officer to modify the discipline imposed only to those situations where the actions are arbitrary or capricious. Tatum v. Dept. of Agric. & Consumer Services, 41 Va. 110, 582 S.E.2d 452 (2003).

The question presented by the evidence is whether the absence of the grievant on September 7 for a number of hours was sufficient to justify the issuance of Group III Written Notice. The question is presented against the backdrop of the prior written counseling memorandums issued by the school to the grievant and the acknowledgment by the facility supervisor that he was going to issue only a Group I Written Notice for the September 4 offense. Policy 1.60 Section G(1)(V) provides that prior written notices, even though inactive under the time limitations set forth in the policy, may be considered in determining the appropriate disciplinary action if the conduct is repeated. At the time of these two events in 2013, the grievant had no prior formal Written Notices, merely the prior counseling memorandums. All of the disciplinary actions were for the same offense.

This provision in the policy is a general provision. Attachment A to the policy states (under the discussion of Group I offenses) that "an agency may issue a Group II Written Notice if the employee has an active Group I Written Notice for the same offense." Looking at the disciplinary record of the grievant reveals the following as of September 7, 2013:

A. Three written counseling memorandums, two of which would have been inactive had they been written as Group I Written Notices; and

B. The September 4 offense for which the grievant was going to receive a written memorandum of counseling.

Under the rule of giving due consideration to the agencies prerogative, I cannot find that the grievant would have had an active Group I offense on September 7 even if the grievance process for the September 4 offense would have allowed one to be issued and the process finalized by September 7. Attachment A describes a Group III offense as including "acts of misconduct of a most serious nature that severely impact agency operations." Group II offenses

are defined as those that significantly impact agency operations. Group I offenses are those having a relatively minor impact on agency business operations. The school has chosen to issue to the grievant this single written notice, accusing him of a Group III offense. I do not find that there was the serious type of misconduct to justify that level of offense. There was no showing of a severe impact on agency operations; similarly, there was no showing of a significant impact on agency operations as is required to sustain a Group II offense. I find that even in combination with each other, the actions of the grievant on September 4 and September 7 cannot be used to justify more than a Group I Written Notice.

VI. DECISION

For the reasons stated above, I hereby reduce Group III Written Notice to a Group I Written Notice. Pursuant to this modification, the grievant shall be reinstated to employment at the school and awarded full back pay, subject to an offset for interim earnings received during the period of separation. The grievant shall receive credit for annual and sick leave during the period of discharge as well as the payment or reimbursement of health insurance premiums as provided in Policy 1.60.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. 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. Please address your request to:

   Director

Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management 101
North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15- calendar day period has expired, or when requests for administrative 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 the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.

ORDERED this December 2, 2013.

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