Issue: Group III Written Notice with termination (non-professional relationship with an offender under probation); Hearing Date: 10/14/05; Decision Issued: 10/17/05; Agency: DOC; AHO: David J. Latham, Esq.; Case No. 8181

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8181

Hearing Date: October 14, 2005
Decision Issued: October 17, 2005

PROCEDURAL ISSUE

In the attachment to her grievance, grievant raised the issues of retaliation and discrimination. However, at hearing, grievant failed to offer any testimony or evidence to support the allegations. Through her counsel, grievant stated that she would not pursue these two issues. Since grievant has effectively withdrawn these two issues from her grievance, they will not be addressed in this decision.

APPEARANCES

Grievant
Attorney for Grievant
One witness for Grievant
Chief Probation Officer
Advocate for Agency
One witness for Agency

ISSUES

Did grievant's conduct warrant disciplinary action under the Standards of Conduct? If so, what was the appropriate level of disciplinary action for the conduct at issue?

FINDINGS OF FACT

The grievant filed a timely grievance from a Group III Written Notice issued for a non-professional relationship with an offender under probation supervision by hiring him to perform work at her residence.[1] As part of the disciplinary action, grievant was removed from employment effective February 17, 2005. Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for a hearing.[2] The Department of Corrections (DOC) (Hereinafter referred to as "agency") had employed grievant as a probation officer for 15 years. Grievant had been suspended in 1998 for making disparaging statements to an offender, and in 2001 for improper disclosure of confidential criminal history information.[3]

Agency policy prohibits improprieties or the appearance of improprieties, fraternization, or other nonprofessional association between staff and inmates which may compromise security or which undermines the employee's effectiveness to carry out her responsibilities.[4] Such a violation may be treated as a Group III offense.

Grievant had known M since elementary school; M is the best friend of grievant's brother. He has been a participant in family gatherings (picnics, birthdays, and other celebrations) for 26 years and this relationship continues to the present day.[5] M was a frequent visitor at her parent's home and grievant saw

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[1] Agency Exhibit 1. Group III Written Notice, issued February 17, 2005.

[2] Agency Exhibit 2. Grievance Form A, filed March 17, 2005.

[3] Agency Exhibit 9. Letter from chief probation officer to grievant, September 28, 1998 and, letter from chief probation officer to grievant, January 31, 2001.

[4] Agency Exhibit 8. Section V.B, Agency Operating Procedure Number 130.1, *Rules of Conduct Governing Employees' Relationships with Inmates, Probationers, or Parolees*, February 15, 2004, states: Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and inmates, probationers, or parolees or families of inmates, probationers, or parolees is prohibited. Associations between staff and inmates, probationers, or parolees which may compromise security or which undermine the employee's effective to carry out his responsibilities may be treated as a Group III offense under DOC Procedure 5-10, *Standards of Conduct*.

[5] Agency Exhibit 2. Attachment to grievance. See also Agency Exhibit 6. Undated letter from M to his probation officer.

him there every "couple of weeks."[6] M was convicted of a criminal offense in 2002. His case was initially assigned to grievant for a pre-sentencing investigation. Grievant advised the chief probation officer that M was a friend of hers and her family and requested the case be assigned to a different probation officer. M was incarcerated for a period of time in a state correctional center and was released on probation in June 2004.

In August 2004, grievant's lawn was overgrown and in need of mowing. She asked her brother if he knew of someone who could take care of the yard mowing; he suggested that M was available. Grievant hired M to mow and clean the yard for $40. M mowed the yard and returned a second time to trim edges. Grievant did not see M during the second visit and left the money for M with her parents because M was a frequent visitor at their house. M was attempting to find employment and at his request, grievant wrote a brief "To Whom it may concern" note vouching that M had performed yard work at her residence and had done an excellent job.[7]

On February 2, 2005, M's attorney asked grievant to be a defense witness for M who was scheduled for a probation violation hearing on February 3, 2005. Another employee notified the chief probation officer that grievant was appearing on M's behalf in court. During the hearing, grievant privately advised M's attorney that she believed M's probation officer violated two required procedures.[8] The chief probation officer met with grievant that day and she told him what had occurred. It was during this discussion that the chief probation officer learned for the first time that grievant had employed M in August 2004. He suspended grievant on February 10, 2005 and gave her a due process notification letter.[9]

The chief probation officer stated that he removed grievant from employment because grievant had employed M to mow her lawn.[10] He further stated that the disciplinary action was not taken because of grievant's actions in court or because of grievant's relationship with M. However, grievant's entire employment history was a circumstance considered in deciding whether there were any factors that mitigated or supported the offense cited in the Written Notice.

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[6] Although grievant testified that she saw M every "couple of weeks," she told the chief probation officer that she saw M a couple of times per week. See Grievant Exhibit 2. Memorandum from chief probation officer to human resources representative, February 16, 2005.

[7] Agency Exhibit 6. Note, August 22, 2004.

[8] Grievant Exhibit 2. Memorandum from chief probation officer to human resource representative, February 16, 2005.

[9] Grievant Exhibit 1. Letter from chief probation officer to grievant, February 10, 2005.

[10] Agency Exhibit 3. First step response to grievance, April 1, 2005.

APPLICABLE LAW AND OPINION

The General Assembly enacted the Virginia Personnel Act, Va. Code § 2.2-2900 et seq., establishing the procedures and policies applicable to employment within 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, 656 (1989).

Code § 2.2-3000 sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

> It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints . . . To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for the resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances. In all other actions, such as claims of retaliation or discrimination, the employee must present her evidence first and must prove her claim by a preponderance of the evidence [11]

To establish procedures on Standards of Conduct and Performance for employees of the Commonwealth of Virginia and pursuant to Va. Code § 2.2-1201, the Department of Human Resource Management (DHRM) promulgated Standards of Conduct Policy No. 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 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.

Section V.B.3 of Policy No. 1.60 provides that Group III offenses include acts and behavior of such a serious nature that a first occurrence normally should warrant removal from employment.[12] The Department of Corrections

[11] § 5.8 Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[12] DHRM Policy No. 1.60, *Standards of Conduct*, effective September 16, 1993.

(DOC) has promulgated its own Standards of Conduct patterned on the state Standards, but tailored to the unique needs of the Department. Section 5-10.17 of the DOC Standards of Conduct addresses Group III offenses, which are defined identically to the DHRM Standards of Conduct.[13] Violation of DOC Procedure 5-22 (superseded by DOC Operating Procedure 130.1 on February 15, 2004) is one example of a Group III offense.

The underlying facts in this case are essentially undisputed. Grievant employed a probationer to mow and trim her lawn one time. The agency considers such employment to be a non-professional relationship that violates policy. Grievant acknowledged that she violated policy but claimed she was "operating under a misperception of policy."[14] She agrees that discipline is warranted but feels that she should not be removed from employment.

Grievant asserts that approximately 15 years ago, the then chief probation officer told her that it was permissible to hire a probationer for work such as mowing lawns providing you paid the same rate you would pay a non-probationer. Grievant did not provide any corroborative testimony or evidence to support this assertion.

Grievant has cited various examples to demonstrate her awareness of the need to avoid improprieties or the appearance of improprieties. In 2002, she requested that M's pre-sentencing investigation be conducted by a different probation officer. She notified her supervisor when M wrote grievant a letter while he was incarcerated, when she learned her fiancé invited a parolee to her wedding, when a probationer was living with grievant's ex-boyfriend, and when a Hurricane Isabel evacuee lived with her for a few days.[15] In view of her sensitivity to the issue of non-professional association with offenders, it is surprising that grievant did not see a need to report her semi-weekly (or bi-weekly depending on which version one believes) encounters with M at her parent's residence. It is even more surprising that grievant would not report that she had employed M to perform work for her. If grievant felt it necessary to report that one offender would be a wedding guest, it would appear far more necessary to report that she had actually employed an offender – particularly one with whom she already had a quasi-family relationship. An employment relationship is far more significant than having an offender attend a wedding as a guest.

Grievant argues that her suspensions in 1998 and 2001 should not be given consideration in determining the appropriate disciplinary action. These two disciplinary suspensions are sufficiently remote in time that they are not considered "active" disciplinary actions under the Standards of Conduct.

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[13] Agency Exhibit 10. Procedure Number 5-10*, Standards of Conduct,* June 15, 2002.

[14] Grievant Exhibit 3. Letter from grievant to chief probation officer, February 16, 2005. [NOTE: Although the letter is dated February 16, 200**4**, this appears to be a typographical error.]

[15] Grievant Exhibit 7. Attachment to grievance.

Grievant cites Section VII.B.2.e of DHRM Policy 1.60, which states that inactive Written Notices shall not be considered in the accumulation of disciplinary actions or in determining the appropriate disciplinary action for a new offense. Grievant's reliance on Policy 1.60 is technically misplaced because the applicable policy under which this case must be adjudicated is agency Procedure 5-10.[16] Procedure 5-10 provides that written notices that are no longer active shall not be taken into consideration in the accumulation of notices or "the *degree* of discipline for a new offense." (Italics added). This wording makes clear that an agency may not increase the degree or level of a new offense based on inactive disciplinary actions.[17] However, when determining whether mitigating or aggravating circumstances exist, the agency may consider the entire employment history including inactive disciplinary actions and counseling, providing such history is relevant to the current offense.

In this case, the agency concluded that, in committing the current offense, grievant exercised extremely poor judgment and decision-making. The suspensions in 1998 and 2001 resulted from similar exercises of poor judgment and decision making (disparaging comments to an offender and, disclosure of confidential information about an offender). Grievant argues that virtually all offenses can be considered poor judgment and that the use of this criterion is too overbroad to warrant inclusion of the 1998 and 2001 offenses. However, all three offenses were interactions with or involving offenders; to that extent, there is sufficient similarity in the nature of the earlier offenses to warrant giving them consideration as aggravating circumstances. Nonetheless, due to the amount of time that has passed since those earlier disciplinary actions, this decision assigns less evidentiary weight to them than it would if the disciplinary actions had been active.

The agency did not charge grievant with fraternization *per se*. In any case, grievant's hiring of M to mow her lawn on one occasion does not constitute fraternization as that term is defined in Procedure 130.1. Rather, the agency cited grievant for a "non-professional relationship," which the policy classifies under the heading of fraternization and, more generally, as an "impropriety: non-professional association." Regardless of the semantics, and regardless of whether one characterizes the offense as a relationship, impropriety, or association, grievant agreed that she violated the policy. The only real issue requiring resolution is what should be the appropriate disciplinary action.

Procedure 5-10 specifies that violation of Operating Procedure 130.1 is a Group III offense. Mitigating circumstances may result in demotion, transfer, and/or suspension as an alternative to removal from employment. However, a

[16] Section X of Policy 1.60 permits agencies of the Commonwealth to promulgate disciplinary policies provided the agency policy is consistent with DHRM Policy 1.60, and providing the DHRM Director has approved in writing the agency policy.

[17] While the wording of Procedure 5-10.19.D varies slightly from Section VII.B.2.e of Policy 1.60, both policies have been consistently and regularly interpreted as stated above.

hearing officer "must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances."[18] A hearing officer may mitigate the agency's discipline only if the agency's discipline exceeds the limit of reasonableness. In this case, the agency gave due consideration to grievant's length of service and satisfactory or better performance evaluations as mitigating circumstances. However, the agency found that aggravating factors counterbalanced or outweighed the mitigating circumstances. First, the agency concluded that grievant had maintained a continuing non-professional relationship with the offender by seeing him frequently at her parent's residence. Second, the agency concluded that grievant's past behavior reflected a similar pattern of poor judgment and decision-making. Third, the agency concluded that grievant's assistance to W's attorney during the February 2005 court hearing undermined agency effectiveness and further reflected additional poor judgment on her part. After carefully evaluating all the evidence, it appears that the agency gave fair consideration to both mitigating and aggravating circumstances. There is no basis to conclude that the agency's decision to remove grievant exceeded the limit of reasonableness.

DECISION

The decision of the agency is affirmed.

The Group III Written Notice issued on February 17, 2005 for non-professional relationship with an offender under probation and the removal of grievant from state employment is hereby AFFIRMED.

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 have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.

2. 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. Address your request to:

[18] Section VI.B.1, EDR *Rules for Conducting Grievance Hearings*, August 30, 2004.

Director
Department of Human Resource Management
101 N 14th St, 12th floor
Richmond, VA 23219

3. If you believe the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Address your request to:

Director
Department of Employment Dispute Resolution
830 E Main St, Suite 400
Richmond, VA 23219

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 give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law.[19] 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.[20]

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant]

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David J. Latham, Esq.
Hearing Officer

[19] An appeal to circuit court may be made only on the basis that the decision was contradictory to law, and must identify the specific constitutional provision, statute, regulation or judicial decision that the hearing decision purportedly contradicts. *Virginia Department of State Police v. Barton*, 39 Va. App. 439, 573 S.E.2d 319 (2002).

[20] Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.