Issue: Group I Written Notice (unprofessional conduct, misuse of state time, disruption of the workplace, and moral turpitude); Hearing Date: 06/13/06; Decision Issued: 06/15/06; Agency: DMHMRSAS; AHO: David J. Latham, Esq.; Case No. 8356; Outcome: Employee granted partial relief.

COMMONWEALTH of VIRGINIA

Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 8356

Hearing Date:	June 13, 2006
Decision Issued:	June 15, 2006

PROCEDURAL ISSUES

Grievant requested as part of her relief that the agency be directed to retract a report it sent to the Department of Health Professions. A hearing officer does not have authority to direct the methods or means by which the agency conducts its activities.[1] Such decisions are internal management decisions made by each agency, pursuant to Va. Code § 2.2-3004.B, which states in pertinent part, "Management reserves the exclusive right to manage the affairs and operations of state government."

Grievant also requested reimbursement of her legal expenses incurred as a result of this hearing and in defending the complaint to the Department of Health Professions. A hearing officer does not have authority to require the agency to pay for attorney fees in grievance hearings not challenging discharge.[2] Similarly, a hearing officer does not have authority to direct payment of attorney fees for proceedings conducted by another state agency.[3]

[1] § 5.9(b)7. Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004.
[2] § 5.9(b)2. *Id.*
[3] § 5.9(b)8. *Id.*

APPEARANCES

Grievant
Attorney for Grievant
Two witnesses for Grievant
Representative for Agency
Two witnesses for Agency

ISSUES

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

FINDINGS OF FACT

The grievant filed a timely grievance from a Group I Written Notice for unprofessional conduct, misuse of state time, disruption of the workplace, and moral turpitude.[4] Following failure of the parties to resolve the grievance at the third resolution step, the agency head qualified the grievance for hearing.[5] The Department of Mental Health, Mental Retardation and Substance Abuse Services (hereinafter referred to as "agency") has employed grievant for five years as a psychologist.[6]

In late August or early September 2005, grievant was assigned to a different treatment team. According to witnesses and those interviewed during an investigation, the physician assigned to that team is compulsive, egotistical, autocratic, focused, persistent, direct, curt, demanding at times, has an authoritative tone, and does not like dissent. Beginning in October and November 2005, the physician began to contact grievant more frequently. He telephoned her often and came to her office frequently during the day to discuss work issues. Grievant initially assumed that the physician had decided to take her under his wing in a professional mentorship capacity. However, as time went on, grievant noticed that the visits and calls were more frequent than was necessary based on work needs, and that some issues were discussed repetitively. Grievant was annoyed by the frequency of the physician's contacts but assumed that this was just an aspect of the physician's personality. The

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[4] Agency Exhibit 1. Group I Written Notice, issued February 9, 2006.
[5] Agency Exhibit 2. *Grievance Form A*, filed March 9, 2006.
[6] Agency Exhibit 4. Grievant's Employee Work Profile Work Description, January 6, 2003.

physician also began to give grievant small gifts such as promotional items he received at meetings or conferences, and books.

The physician began to take a more personal interest in grievant in November. On November 18, 2005, he noticed that grievant had a bad cold with cough and congestion. During a break, he came to her office and inquired about her health, asking several questions about her symptoms. He then wanted to listen to her lungs (with his stethoscope) and raised the back of her shirt to do so. Grievant did not object because the physician is a medical doctor and appeared to be acting in a professional manner. The physician then prescribed an antibiotic medication for grievant. This brief visit took about 5-10 minutes. During her lunch period, grievant left the facility to go to a nearby pharmacy to have the prescription filled. In early December, when grievant had a recurrence of her symptoms, the physician gave her a prescription for a different antibiotic.[7]

The physician attempted to give grievant a video camera claiming that he was not using it. He encouraged grievant to call him by his first name. In mid-December, he wrote a long note to grievant offering to buy her a year's supply of multivitamin tablets.[8] The physician gave grievant a Christmas card with a cash gift of $300 on or about December 11, 2005.[9] Grievant attempted to return the cash but the physician insisted she keep it, asserting that he also gave cash to other employees. The week after Christmas, the physician gave grievant a big bag of cookies and candy, and an expensive pen. Grievant told him this was not necessary but he again insisted she keep the gifts. The physician ordered and paid for a box of pain patches that arrived in grievant's mail at home.

The physician called grievant's home on January 4, 2006. Grievant told her niece to tell him that she was not home. The physician asked the niece several questions about grievant's health and when she would be home. Grievant became very uncomfortable because of the physician's continued unsolicited attention to her. When grievant went to work that afternoon she told the physician not to call her at home, that he should not communicate with her except for work-related issues, and that she would no longer meet one-on-one with him. The following day, the physician wrote a two-page letter to grievant apologizing for hurting her and stating that he only wanted to "protect" her.[10]

On January 10, 2006, grievant notified her supervisor that she planned to contact human resources to file a harassment complaint against the physician.

[7] The physician acknowledged that he has written prescriptions for other employees.
[8] Agency Exhibit 4. Note from physician to grievant, December 16, 2005.
[9] Agency Exhibit 4. Memorandum from human resource manager to file, January 11, 2006. Investigation revealed that the physician has given smaller amounts ($25 – 50) to at least two other employees at Christmas. In an interview with the human resources manager, the physician acknowledged that he has given monetary gifts to several employees at Christmas. See Agency Exhibit 10, Memorandum from human resource manager to file, January 18, 2006.
[10] Agency Exhibit 4. Letter from physician to grievant, January 5, 2006.

Grievant met with the human resource manager on January 11, 2006 and stated that the physician had sexually harassed her in the workplace.[11]

Grievant was aware that it was not uncommon for staff physicians at the facility to make solicitous inquiries about the health of staff members and, on occasion, to give them prescriptions for medication. The physician was disciplined with a Group I Written Notice for the identical offenses cited in grievant's written notice.

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 unfair application or misapplication of policy, and retaliation, grievant must present her evidence first and prove her claim by a preponderance of the evidence.[12]

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 effective September 16, 1993. The

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[11] Agency Exhibit 1. Grievance Form A, filed March 9, 2006.
[12] § 5.8, EDR *Grievance Procedure Manual*, effective August 30, 2004.

Standards 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 of Policy No. 1.60 provides that Group I offenses are the least serious.[13] Abuse of state time, and disruptive behavior are examples of a Group I offense. Unprofessional conduct, and moral turpitude can be considered Group I, II, or III offenses depending upon the nature of the violations.

The agency cited four offenses in the Written Notice; each allegation is addressed separately below:

<u>Unprofessional conduct</u>

The agency contends that grievant participated in forming what it characterizes as a "relationship" with the physician. The undisputed evidence establishes that grievant worked with the physician for a four-month period from early September through early January. The only relationship between them was a working relationship. The agency infers that there was some other type of personal consensual relationship between grievant and the physician. However, the evidence does not support such an inference. The preponderance of evidence was provided by grievant; the agency did not call the physician as a witness. Grievant's testimony establishes that she did not seek to have any relationship with the physician other than a collegial working relationship. It was the physician who constantly initiated contact with grievant, gave her gifts, offered her medical advice, mailed unsolicited items of value to her home, called her at home, gave her a large cash gift, and wrote complimentary letters to grievant. Thus, if any other type of relationship existed, it was unilateral and only in the physician's mind. Certainly there is no evidence to support the agency's contention that grievant participated in forming any such relationship.

However, it is correct that grievant could have acted sooner to tell the physician that his attentions had become unwelcome. Grievant admitted that his frequent telephone calls and meetings with her had become annoying several weeks prior to her January complaint. Grievant has explained that even though the physician is not her direct supervisor, she put up with a certain amount of his annoying behavior because of his general authority as a physician and his role as *de facto* leader of her treatment team. She felt that it might not have been politic to complain solely because of his annoying behavior. But, when his behavior became more personal, she filed a complaint and requested that she not have to work directly with him. Given the circumstances, grievant's decision to complain later rather than sooner is understandable.

[13] Agency Exhibit 3. Department of Human Resource Management (DHRM) Policy 1.60, *Standards of Conduct*, effective September 16, 1993.

The agency infers that there may have been a sexual, consensual overtone to the alleged relationship because grievant did not rebuff the physician when he lifted her shirt to listen to her lungs. However, there is no evidence to support such an inference. Grievant was surprised by the physician's action but did not rebuff him at that time because he was acting in his role as a professional physician. Although one may harbor suspicions about the physician's motives, there is no evidence or testimony to show that his physical examination of grievant was anything other than professional.

The agency argues that grievant established a "multiple relationship" with the physician. It cites the American Psychological Association's (APA) Ethical Principles of Psychologists and Code of Conduct.[14] That document defines a multiple relationship as occurring when the psychologist is in a professional role with a person, and at the same time is in another role with the same person. The agency's argument is not persuasive. A reading of the entire Ethical Principles document suggests that the intent of the "multiple relationships" section is to avoid such relationships between psychologists and their *patients*.[15] Further language suggests that psychologists should refrain from a multiple relationship if the relationship could reasonably be expected to impair the psychologist's objectivity, competence or effectiveness, or otherwise risks harm to the person with whom the relationship exists. One may speculate that if a psychologist were to become romantically involved with a physician, both of whom treated the same patients, there would be a possibility that objectivity could become impaired with regard to a patient over whom they disagreed about treatment. However, the fact is that grievant was not, to her knowledge and intent, in any role with the physician other than a working relationship. She had no romantic interest in him, and the agency has not proven that he had any such interest in grievant.[16]

In summary, the agency has not borne the burden of proof to demonstrate, by a preponderance of evidence, that grievant's conduct was unprofessional because it has not shown that the relationship between grievant and the physician was anything other than a working relationship.[17]

<u>Misuse of state time</u>

The agency alleges that grievant solicited the physician's physical examination. However, the agency failed to present any witness or document to substantiate that allegation. The only available evidence is grievant's testimony

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[14] Agency Exhibit 1. First step response to grievance, March 13, 2006.

[15] *See* http://www.apa.org/ethics/code2002.html#intro, Introduction and Applicability, *APA Ethical Principles of Psychologists and Code of Conduct*, 2002.

[16] While the indicia of his attentions to grievant suggest that the physician may have had more than a purely business interest in her, the evidence is essentially speculative.

[17] The hearing officer does not conclude whether the physician intended to develop a multiple relationship with grievant. If the physician had such an intent, grievant certainly did not harbor any reciprocal feelings.

that the physician came to her office, asked questions about her symptoms and, without any prompting from her, took it upon himself to listen to her lungs.

The agency also asserts that participating in the examination was a misuse of state time. Again, the agency failed to present any evidence – other than speculation about the length of the examination – to support its assertion. Grievant testified that the questioning and examination took no more than five to ten minutes, and that it was conducted during her break. When facility work requirements permit, employees are entitled to breaks. The agency has offered no evidence to contradict grievant's testimony that she was on a break during the examination. While employees may not leave the facility during a break, they are permitted to rest or talk with coworkers during breaks. Accordingly, the agency has not carried the burden of proof to show that grievant misused state time.

Disruption of the Workplace

The agency argues that grievant's request to not work with the physician caused a disruption in the workplace. The agency notes that when grievant was transferred to a different unit, a significant number of patients had to be swapped with another psychologist. This required both psychologists to familiarize themselves with a new group of patients and read their charts to become current with their treatment modalities. The agency's argument that this constituted a disruption is not persuasive. First, from time to time, as new employees are hired, and as transfers are made for various administrative reasons, such transfers occur. It is a routine part of doing business to incur such movement and the concomitant need to learn a new group of patients. Second, the agency was not obligated to transfer grievant merely because she requested such a transfer. The agency elected to grant her request because it concluded that such a transfer would be beneficial for both grievant and the agency. The situation that prompted grievant to request her transfer arose because of another employee's inappropriate behavior. That behavior made grievant fearful and uncomfortable. Under these circumstances, it was entirely reasonable for grievant to request transfer, and it was equally reasonable for the agency to grant the request. It is inappropriate to lay the blame for any alleged disruption at grievant's doorstep.

Moral turpitude

The agency asserts that grievant's alleged unprofessional conduct, misuse of state time, and disruption of the workplace can, in combination, be construed as questionable moral turpitude.[18] At the hearing, however, the Director of Psychology acknowledged that misuse of state time does not constitute moral turpitude.

[18] Agency Exhibit 3. Attachment to Written Notice.

While the agency offered a definition of "moral turpitude,"[19] the law provides definitions that are more relevant and appropriate to this quasi-legal proceeding. The Restatement of Torts defines moral turpitude as "inherent baseness or vileness of principle in the human heart. It means, in general, shameful wickedness so extreme a departure from ordinary standards of honesty, good morals, justice or ethics as to be shocking to the moral sense of the community."[20] Crimes involving moral turpitude include: treason, espionage, murder, burglary, larceny, arson, rape, criminal assault, perjury, kidnapping, wife beating, malicious mischief, indecent exposure, bootlegging, and operating a bawdy house.[21] The United States Fourth Circuit endorsed the following definition of moral turpitude: "a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988).[22]

In the instant case, even if the agency had been able to prove all its allegations, they would not rise to the level of conduct defined as moral turpitude. However, it is unnecessary to consider whether any of the allegations reach that level because the agency has not borne the burden of proof for any of the three allegations above. Therefore, it has not shown that the allegations, singly or in combination, amounted to moral turpitude. Moreover, it has not shown that grievant's actions would in any way shock the public conscience.

Summary

The evidence in this case reflects that the physician was the initiator of behavior which grievant neither solicited nor welcomed. While grievant initially tolerated the annoying behavior and accepted his gifts during November and December, she did so because the physician is in a position of authority and she did not anticipate that his behavior would escalate as it did. It is possible that because grievant did not complain sooner, the physician may have been indirectly encouraged to persist in his efforts. However, the facts remain that grievant did complain, and that she was the primary victim in this case. It is totally inequitable to discipline grievant at the same level as the perpetrator of the inappropriate behavior. Based on the evidence in this case, the most appropriate corrective action for grievant in this case is counseling to point out the importance of reporting the unwanted attentions of a coworker sooner rather than later.

Retaliation

[19] Agency Exhibit 6.
[20] § 571, *Restatement 2d of Torts.*
[21] *Id.*
[22] *Medina v. United States*, 259 F. 3d 220 (4th Cir. 2001).

Retaliation is defined as actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority.[23] To prove a claim of retaliation, grievant must prove that: (i) she engaged in a protected activity; (ii) she suffered an adverse employment action; and (iii) a nexus or causal link exists between the protected activity and the adverse employment action. Grievant's complaint of alleged sexual harassment is a protected activity. The disciplinary action constitutes an adverse employment action. In order to establish retaliation, grievant must show a nexus between her reporting of the complaint and issuance of the disciplinary action; however, she has not established any such connection between the two events. She argues that the timing of discipline being issued less than one month after her complaint is evidence of retaliation. While timing of discipline is a factor to be considered in such cases, timing alone without more evidence is insufficient to support a conclusion of retaliatory motive. However, even if such a nexus could be found, the agency has established nonretaliatory reasons for issuance of discipline. Grievant has not shown that the agency's reasons for issuing discipline were pretextual in nature.

While the evidence does not support issuance of a disciplinary action in this case, the agency's stated reasons for issuance were not based on a retaliatory motive but rather on its conclusion that the offenses rose to a level that required discipline.

DECISION

The disciplinary action of the agency is reversed.

The Group I Written Notice issued February 9, 2006 is RESCINDED.

Grievant has not borne the burden of proof to show that the agency's action was retaliatory.

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.

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[23] EDR *Grievance Procedure Manual*, p.24

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:

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 one copy of any appeal to the other party and one copy to the Director of the Department of Employment Dispute Resolution. 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.[24] 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.[25] You must give a copy of your notice of appeal to the Director of the Department of Employment Dispute Resolution.

[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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[24] 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).

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

S/David J. Latham

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David J. Latham, Esq.
Hearing Officer