

Issues: Group III Written Notice (conduct unbecoming, fraternization) and Suspension; Hearing Date: 06/16/09; Decision Issued: 06/23/09; Agency: DOC; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9109; Outcome: No Relief – Agency Upheld in Full.

DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re: Case Number 9109

Hearing Date: June 16, 2009

Decision Issued: June 23, 2009

APPEARANCES

Grievant
Agency Representative
3 Witnesses for Agency
2 Witnesses for Grievant

ISSUE

“Was the Group III Written Notice with 3 day suspension issued to the Grievant on February 6, 2009, proper?”

FINDINGS OF FACTS

Grievant was issued a Group III Written Notice on February 6, 2009, for “conduct unbecoming of a Department of Corrections employee, specifically getting involved with someone you know had serious legal problems which later became a convicted felon and not being truthful with a Probation & Parole Officer when asked about being an employee of the DOC, proving that you knew you were wrong in dating this individual.”

At all times pertinent, Grievant was a registered nurse employed by the Department of Corrections.

Grievant admitted dating, having sex with and for a period of time living with a female he met while holding a second job as a nurse at a regional jail. When he first met the female, she was an inmate at the regional jail. The regional jail was not a Department of Corrections facility.

The female was later convicted of a felony. She appealed this conviction. The appeal was denied. The relationship went on while her appeal was pending.

At some point in this process, Grievant posted bond for the female.

She introduced Grievant to her probation officer who asked if Grievant was a corrections officer, which he denied. Testimony was heard that Grievant also denied being a Department of Corrections employee. Grievant denies ever making such a denial.

Grievant was classified to be a good, conscientious employee.

Grievant did not hide his relationship with the female whose case was on appeal and at the time of the relationship not a final conviction.

APPLICABLE LAW OR POLICY AND OPINION

For state employees subject to the Virginia Personnel act, appointment, promotion, transfer, layoff, removal, discipline and other incidents of state employment must be based on merit principles and objective methods and adhere to all applicable statutes and to the polices and procedures promulgated by DHRM. [DHRM Policy No. 1.60, "Standards of Conduct" (effective 9/16/93)]. Section VI of DHRM Policy No. 1.60 deals with corrective action.

An adverse employment action includes any action resulting in an adverse effect on the terms, conditions, or benefits of employment. [Von Gunten v. Maryland Department of the Environment, 243 F.3d 858, 866 (4th Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4th Cir. 1997))].

The grievance statutes and procedures reserve to management the exclusive right to manage the affairs and operations of state government. [See Virginia Code Section 2.2-3004(B)].

Department of Corrections Operating Procedure 130.1, Fraternalization states "The act of, or giving the appearance of, association with offenders, and/or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include excessive time and attention given to one offender over others, non-work related visits between offenders and employees, non-work related relationships with family members of offenders, spending time discussing staffs' personal matters (marriage, children, work, etc.) with offenders, and engaging in romantic or sexual relationships with offenders."

"Offender" is defined in the Standards of Conduct as "An individual sentenced by a court who is under the supervision of the Department of Corrections as an inmate, probationer or parolee."

Department of Corrections Procedure Manual, Section 5-4, Conduct unbecoming an employee of the Commonwealth of Virginia, states "Employees of the Department shall conduct themselves by the highest standards of ethics so that their actions will not be construed as a conflict of interest or conduct unbecoming an employee of the Commonwealth.

DECISION

Grievant clearly violated Department of Corrections Procedure 130.1 and Procedure Manual Section 5-4 by pursuing and having an intimate relationship with an "offender". His testimony that he did not hide his relationship confirms that he knew that his conduct could be construed as an unbecoming action of an employee of the Commonwealth.

Grievant was afforded full Due Process.

The Group III Written Notice with 24 hour suspension was proper and is sustained.

APPEAL RIGHTS

As the Grievance 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** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or agency policy. The Director's authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia, 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 East Main, Suite 301, Richmond, Virginia, 23219 or faxes 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**. (Note: the 15-day period, in which the appeal must occur, begins with the date of **issuance** of the decision, **not receipt** of the decision. However, the date the decision is rendered does not count as one of the 15 days; the day following the issuance of the decision is the first of the 15 days). 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 agency shall request and receive prior approval of the Director before filing a notice of appeal.

Thomas J. McCarthy, Jr.
Hearing Officer