Issue: Group III Written Notice with Termination (failure to follow instructions/policy and falsifying records); Hearing Date: 02/16/11; Decision Issued: 03/01/11; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 9509; Outcome: No relief – Agency Upheld; **Administrative Review: AHO Reconsideration Request received 03/16/11; Reconsideration Decision issued 03/31/11; Outcome: Original decision affirmed; Administrative Review: EDR Ruling Request received 03/16/11; EDR Ruling No. 2011-2928 issued 06/07/11; Outcome: AHO's decision affirmed.**

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9509

Hearing Officer Appointment: January 25, 2011
Hearing Date: February 16, 2011
Decision Issued: March 1, 2011

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of her employment effective September 21, 2010, pursuant to a written notice, dated September 21, 2010 by Management of Department of Behavioral Health and Developmental Services (the "Department" or "Agency"), as described in the Grievance Form A dated September 28, 2010.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on February 1, 2011 at 2:00 p.m. The Grievant, the Agency's advocate and the hearing officer participated in the call. The Grievant confirmed she is seeking the relief requested in her Grievance Form A, namely, reinstatement and confirmed during the call that she is also seeking back-pay and restoration of all benefits.

Following the pre-hearing conference call, the hearing officer issued a Scheduling Order entered on February 1, 2011 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented herself and the Agency was represented by its advocate. Both parties were given the opportunity to make opening and closing statements, to call witnesses and to cross-examine witnesses called by the other party. The hearing officer also received various documentary exhibits of the parties into evidence at the hearing[1]. The hearing officer used the recording equipment and tapes supplied by the Agency.

No open issues concerning non-attendance of witnesses or non-production of documents remained by the conclusion of the hearing.

[1] References to the grievant's exhibits will be designated GE followed by the exhibit number. References to the agency's exhibits will be designated AE followed by the exhibit number.

In this proceeding, the Agency bears the burden of proof and must show by a preponderance of the evidence that the discipline was warranted and appropriate under the circumstances.

APPEARANCES

Representative for Agency
Grievant
Witnesses

FINDINGS OF FACT

1. The Grievant was formerly employed as a Direct Service Associate III by the Agency at a facility (the "Facility") which securely houses and treats civilly committed sex offenders. AE D-3. The residents of the Facility are all sexually violent predators and the Facility's mission is to rehabilitate them and return them to the least restrictive environment (the community or elsewhere).

2. The Grievant was employed by the Agency as a Residential Services Associate ("RSA") and was responsible for monitoring the day-to-day activities of the residents and for enforcing unit rules, policies and procedures, including performing room inspections and documenting behavior of residents. AE D-3.

3. The Grievant was hired in March 2009. In June 2010, the Grievant was counseled by her supervisor at the time, LB, in an Employee Counseling Report dated June 10, 2010 for unsatisfactory job performance concerning violation of facility policy or procedure as follows:

> Summary of Events:
>
> On June 8, 2010 between the hours of 11:35 a.m. to 12:10 p.m., [Grievant] relieved a staff member for lunch break on Unit 2D. [Grievant] was observed via video keying the 2D slider door and letting the staff member off the unit and walking directly outside to the patio to talk to a resident, these actions resulted in not following Post Order No. 7 which states "Staff maintain accountability of all residents assigned to the unit at all time. Conduct well being checks of residents at a minimum of every 30 minutes throughout your post." [Grievant] also failed to follow Post Order No. 22 which states "Improprieties of the appearance of

> improprieties, fraternization, or other non-professional association by and between employees and residents o is prohibited and may be treated as a Group III offense under the DHRM Standards of Conduct".
>
> Corrective Action to be Taken:
>
> [Grievant] needs to review V.C.B.R. policies and procedures. Also, review post order for Residential Living Area Supervisor. Review D.B.H.D.S. human rights policy.

AE D-1.

4. The Grievant was again warned on June 25, 2010 that she was spending too much time around Resident B in her performance evaluation and was warned that this behavior would continue to be monitored. AE D-8.

5. On September 9, 2010, the Grievant was assigned responsibility for the security and constant monitoring of approximately 23 residents in Unit 2-D. AE G-1.

6. However, from 1327 to 1347, the Grievant was on the Unit 2C/D patio talking to Resident B who was not authorized to be on such patio as he was housed in a different building. From her position on the patio it was not physically possible for the Grievant to maintain constant accountability of all residents within her assigned area of responsibility as the window to Unit 2D did not offer much of a view inside.

7. The Grievant did not follow procedure and redirect Resident B back to his building and permissible areas but instead spent 20 minutes on the patio talking to him.

8. The Grievant maintains that she performed her safety checks for 1330 before she went on the patio but the hearing officer does not find her testimony credible. The video evidence captures her writing on the sheet on her clipboard (AE G-1) and the Grievant acknowledges in her Form A that "[i]n fact we were actually advised, also on more than one occasion, not to doodle or write anything extra on the sheets." AE A-4.

9. The Grievant falsified the Unit 2D safety checks for 1330 because she was not inside the unit to conduct those visual checks and make the rounds to verify the safety and location of her 20 or so assigned residents who were inside Unit 2D.

10. Similarly, the Grievant, in accordance with Agency policy and procedure, should have documented her 20 minute interaction with Resident B and she intentionally did not do this. AE F-3.

11. The Grievant violated post orders by not redirecting Resident B from the unauthorized area and disobeyed her supervisor's instructions by engaging in close conversation for 20 minutes with Resident B despite the recent warnings from her supervisor regarding the Grievant spending too much time around Resident B and that "[t]his behavior will continue to be monitored." AE D-8.

12. The Grievant put Facility residents and staff at risk by not enforcing Facility policies and procedures and by engaging for a prolonged period with Resident B in a non-therapeutic manner despite the warnings from her supervisors.

13. The Grievant's supervisor at the time, NM, issued a Group III Written Notice ending the Grievant's effective September 21, 2010, for falsifying records, failure to follow policy and procedure and failure to follow supervisor's instructions.

14. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright.

APPLICABLE LAW, ANALYSIS AND DECISION

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).

Va. Code § 2.2-3000(A) 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. *Grievance Procedure Manual*, § 5.8.

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department

of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The operative Agency Standards of Conduct (the "SOC") are contained in Agency Human Resources Policy No. 0701 (effective January 1, 2009). AE 6. The SOC provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The SOC 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.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

Pursuant to DHRM Policy No. 1.60, the Grievant's conduct could clearly constitute a terminable offense, as asserted by the Agency.

Policy 1.60 provides in part:

> c. **Group III Offense**:
>
> Offenses in this category include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. This level is appropriate for offenses that, for example, endanger others in the workplace, constitute illegal or unethical conduct; neglect of duty; disruption of the workplace; or other serious violations of policies, procedures, or laws.
>
> • See attachment A for examples of Group III Offenses.
>
> • One Group III Offense normally should result in termination unless there are mitigating circumstances.

b. **Group II Offense**:

> Offenses in this category include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action. This level is appropriate for offenses that significantly impact business operations and/or constitute neglect of duty, insubordination, the abuse of state resources, violations of policies, procedures, or laws.
>
> • See attachment A for examples of Group II Offenses.

Attachment A provides that falsification of records constitutes a Group III Offense. Attachment A provides that failure to follow supervisor's instructions or comply with written policy typically constitutes a Group II Offense. However, the SOC further provides:

> *Examples of offenses, by group, are presented in Attachment A. These examples are not all-inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted. Accordingly, any offense* ***not specifically enumerated****, that in the judgment of agency heads or their designees undermines the effectiveness of agencies' activity, may be considered unacceptable and treated in a manner consistent with the provisions of this section.*
>
> **Note**: Under certain circumstances an offense typically associated with one offense category may be elevated to a higher level offense. Agencies may consider any unique impact that a particular offense has on the agency and the fact that the potential consequences of the performance or misconduct substantially exceeded agency norms. Refer to Attachment A for specific guidance.

In this instance, the Agency appropriately determined that the Grievant's violations of post orders and supervisor's instructions (despite clear supervisor warnings that the Grievant would continue to be monitored for compliance) constituted a Group III Offense because it put residents and staff at risk in the context of a secure Facility for sexually violent predators where constant accountability of all residents by the RSA in her assigned area of responsibility was reasonably expected and specified in writing by the employer. AE F-3 and F-4.

"Falsifying" is not defined by the SOC, but for purposes of this proceeding, the hearing officer interprets this provision to require proof of an intent to falsify by the employee. This interpretation is consistent with the definition of "Falsify" found in Blacks Law Dictionary (6th Edition) which provides in part as follows: "**Falsify**. To counterfeit or forge; to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition;

to tamper with, as to falsify a record or document." At the hearing, both the Agency and the Grievant conceded that if the Grievant put down on any report information which she knew to be incorrect, that would constitute falsifying a report. Accordingly, the word "falsify" means being intentionally or knowingly untrue.

The hearing officer finds that the Grievant intentionally or knowingly marked residents in her assigned area of responsibility, Unit 2D, to be in their bedrooms, etc., when she could not establish this because she knew she had not performed her necessary rounds and visual checks. AE G-1. The Grievant was preoccupied with Resident B for 20 minutes and the Grievant had no responsibility for Resident B who should have been promptly redirected to his Building in accordance with written policy and supervisor's instructions. The Grievant was also required to document any and all unusual resident behavior (namely Resident B) and she intentionally did not do this. AE F-3.

As previously stated, the Agency's burden is to show upon a preponderance of evidence that the discipline was warranted and appropriate under the circumstances. The hearing officer agrees with the Agency's advocate that the Grievant's disciplinary infractions justified the termination by Management. Accordingly, the Grievant's behavior constituted misconduct and the Agency's discipline is consistent with law and consistent with policy, being properly characterized as a terminable offense.

EDR's *Rules for Conducting Grievance Hearings* provide in part:

> The *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances" such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. *Rules* § VI(B) (alteration in original).

If the Department does not consider mitigating factors, the hearing officer should not show any deference to the Department in his mitigation analysis. In this proceeding the Department apparently did not consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in her Form A and while the Grievant might not have specified for the hearing officer's mitigation analysis all of the mitigating factors below, the hearing officer considered a number of factors including those specifically referenced herein and all of those listed below in his analysis:

1. the Grievant's service to the Agency; and

2. the often difficult and stressful circumstances of the Grievant's work environment.

EDR has previously ruled that it will be an extraordinary case in which an employee's length of service and/or past work experience could adequately support a finding by a hearing officer that a disciplinary action exceeded the limits of reasonableness. EDR Ruling No. 2008-1903; EDR Ruling No. 2007-1518; and EDR Ruling 2010-2368. The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. *Id.*

Here the offense was very serious. Clearly, the hearing officer would not be acting responsibly or appropriately if he were to reduce the discipline under the circumstances of this proceeding.

The task of managing the affairs and operations of state government, including supervising and managing the Commonwealth's employees, belongs to agency management which has been charged by the legislature with that critical task. *See, e.g., Rules for Conducting Grievance Hearings*, § VI; *DeJarnette v. Corning*, 133 F.3d 293, 299 (4th Cir. 1988).

Pursuant to DHRM Policy 1.60, Standards of Conduct, and the SOC, management is given the specific power to take corrective action ranging from informal action such as counseling to formal disciplinary action to address employment problems such as unacceptable behavior. Accordingly, as long as representatives of agency management act in accordance with law and policy, they deserve latitude in managing the affairs and operations of state government and have a right to apply their professional judgment without being easily second-guessed by a hearing officer. In short, a hearing officer is not a "super-personnel officer" and must be careful not to succumb to the temptation to substitute his judgment for that of an agency's management concerning personnel matters absent some statutory, policy or other infraction by management. *Id.*

In this proceeding, the Agency's actions were consistent with law and policy and, accordingly, the exercise of such professional judgment and expertise warrants appropriate deference from the hearing officer.

In EDR Case No. 8975 involving the University of Virginia ("UVA"), a grievant received a Group III Written Notice with removal for falsifying records on five (5) separate dates. Although the evidence supported only one of those instances, the hearing officer upheld the disciplinary action. The grievant appealed to EDR asserting that the disciplinary action was inappropriate in that the grievant did not engage in as much misconduct as alleged by UVA. The Director upheld the hearing officer's decision:

> The grievant's arguments essentially contest the hearing officer's determinations of fact as they relate to the proper sanction for the

> misconduct. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the disciplinary action was appropriate. In this case, while it appears that the hearing officer did find that the grievant did not engage in as much misconduct as alleged by the University, it was still determined that the grievant had falsified a state record with the requisite intent, generally a Group III offense under the Standards of Conduct. [footnote omitted] Upon review of the record, there is no indication that the hearing officer abused his discretion in making these findings or that the facts were not supported by the hearing record. Consequently, this Department has no basis to disturb the hearing decision.

EDR Ruling Number 2009-2192; February 6, 2009.

The hearing officer decides for each offense specified in the written notice (i) the Grievant engaged in the behavior described in the written notice; (ii) the behavior constituted serious misconduct; (iii) the Department's discipline was consistent with law and policy and that there are no mitigating circumstances justifying a further reduction or removal of the disciplinary action. Each of the offenses in the Written Notice could itself constitute a Level III Offense. Obviously, the Grievant was only charged and found liable for one Group III Offense.

During the hearing, the Agency also tried to raise fraternization as an alleged offense but the hearing officer would not permit this because the offense of fraternization was not covered in the Written Notice.

DECISION

The Agency has sustained its burden of proof in this proceeding and the action of the Agency in issuing the written notice and in terminating the Grievant's employment and concerning all issues grieved in this proceeding is affirmed as warranted and appropriate under the circumstances. Accordingly, the Agency's action concerning the Grievant is hereby upheld, having been shown by the Agency, by a preponderance of the evidence, to be warranted by the facts and consistent with law and policy.

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 Street, Suite 301, Richmond, Virginia 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 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.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List (by U.S. Mail and e-mail transmission where possible and as appropriate, pursuant to *Grievance Procedure Manual*, § 5.9).

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9509

Hearing Officer Appointment: January 25, 2011
Hearing Date: February 16, 2011
Original Decision Issued: March 1, 2011
Reconsideration Decision Issued: March 31, 2011

ISSUES

The Virginia Department of Employment Dispute Resolution's ("EDR") Rules for Conducting Grievance Hearings (the "Rules") provide that the hearing officer's decision is subject to three types of administrative review, depending upon the nature of the alleged defect of the decision (Rules, Section VII):

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 ("DHRM"). 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 the grievance procedure** is made to the Director of EDR. This request must state the specific requirement of the grievance procedure with which the hearing 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, Virginia 23219 or faxed to (804) 786-0111.

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before any decisions are issued by the DHRM Director or the EDR Director. Rules, Section VII.

DECISION

In her request to reconsider the decision, the grievant has not offered any probative newly discovered evidence. Similarly, the grievant has not presented probative evidence of any incorrect legal conclusions by the hearing officer as the basis for such a request.

Hearing officers are authorized to make "findings of fact as to the material issues in the case" (*Va. Code § 2.2-3005.1(C))* and to determine the grievance based "on the material issues and grounds in the record for those findings." *Grievance Procedure Manual § 5.9.*

Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of the case, neither EDR nor DHRM can substitute its judgment for that of the hearing officer concerning those findings. Interpretation of policy is itself a policy matter and subject to the final say of DHRM. *Virginia State Police v. Barton*, 39 Va.App. 439, 573 S.E.2d 319 (2002). EDR makes final decisions on "procedure" and the hearing officer, provided he has acted in accordance with the grievance procedure, finds facts.

In making her arguments, the Grievant appears to contest the hearing officer's findings of fact, the weight and credibility that the hearing officer accorded to the testimony of the various witnesses, the resulting inferences that he drew, the characterizations that he made, and the facts he chose to include in his decision. Such determinations are within the hearing officer's authority as the hearing officer considers the facts *de novo* to determine whether the Agency has proved its case according to the applicable evidentiary standard.

Based upon a reconsideration of the hearing record, including numerous exhibits and the tapes of the hearing, the hearing officer is satisfied that sufficient evidence supports the hearing officer's decision. The Grievant makes four (4) main points in her request for reconsideration. First, the Grievant argues that an alleged earlier version of the actual written notice issued to the Grievant on September 21, 2010 (Agency Exhibit E-1) might have checked or raised both Group II and Group III boxes. The Grievant identified this issue only after speaking to someone on the EDR Hotline. However, after listening to the tape at the cross-examination of the Facility Manager who issued and served the Written Notice on the Grievant, the Grievant testified that she did not know if two (2) boxes (one for Group III and one for Group II) were checked initially and testified further that she never requested a copy of the alleged "Written Notice" on September 14, 2010.

The new Director asked the Facility Manager to hold off on serving the Written Notice until the new Director had an opportunity to speak to the Grievant, namely until September 21, 2010, when the Grievant was in fact given the actual Written Notice. Contrary to the Grievant's characterization in her request for reconsideration, the Facility Manager testified that while two (2) written notices could have been issued, Management determined and the Grievant was notified that it was a single Group III Written Notice which was being issued and served on the Grievant.

The Agency's advocate clarified and the Facility Manager testified that the September 14, 2010 meeting was part of the due process phase where the employee has an opportunity to respond. No written notice was served on the employee on September 14, 2010 because this was part of the due process phase and no "written notice" was intended to be served on such date.

The Grievant argues that the Written Notice does not identify any applicable policies and procedures which were violated and the Agency has failed to produce any policies and procedures which were violated.

The Written Notice provides, in part, as follows:

> . . . [Grievant] neglected her duties by staying on the patio talking to a resident for an extended period of time when she should have been monitoring activities and resident behavior taking place on Unit 2D.
>
> [Grievant] did not redirect the resident from the Unit 2C/D patio. Failure to redirect residents out of unauthorized areas is a violation of post orders and supervisor's instructions. Post Orders state the following: Enforce all rules and regulations established for the purpose of governing resident's behavior and do not extend or promise special privileges or favors not available to all residents. Day shift supervisors have announced several times during briefings that residents are not authorized to be on patios of units that they are not assigned to. [Grievant] was counseled for a similar incident on 10 June 2010 and was instructed to review VBCR Policy and Procedure and Residential Living Unit Supervisor Post Orders. [Grievant] did not improve her work performance and continued to put residents and staff at risk by not enforcing VCBR policy and procedures and by engaging in a non-therapeutic relationship with a resident.

Agency Exhibit E-1.

The Grievant admitted that she felt as if Resident B was attracted to her (Tapes, Exhibit A-3), that she had been counseled and cautioned about her interactions with Resident B previously (Tapes, Exhibit A-3), that the 20 minute videotaped interaction was not therapeutic, that the Grievant did not redirect Resident B from the area that was off-limits to him, that the 20 minutes spent on the patio was not typical and that typically 20 minutes in such an interaction is too long (Tapes), that Resident B knows the rules (Tapes), that it is better to be inside than outside on the patio to monitor those residents for whom the Grievant was assigned responsibility (Tapes) and that the Grievant had not completed proper documentation regarding her discussion with Resident B (Exhibit A-3).

Amongst other things, post orders provide:

> **Specific Duties**
>
> 4. Monitor all resident's behavior ensuring that [Facility] rules and regulations are followed. Report any unusual behavior to a supervisor. Submit Facility Incident Reports and Behavioral Notes prior to the end of the shift . . .
>
> 7. Maintain accountability of all residents assigned to the unit at all time. Conduct well-being checks of residents at a minimum of every 30 minutes throughout the shift . . .
>
> 10. All contact with the residents should be therapeutic and of a professional nature.
>
> **General Duties**
>
> 16. Observe all residents in your area. Security, custody, and control of residents are everyone's responsibility. Report any and all unusual activity, unusual resident behavior including trends or patters, sign's of tension, and contraband to the Unit Manager or higher authority immediately. Maintain constant accountability of all residents within your assigned area of responsibility . . .
>
> 20. Enforce all rules and regulations established for the purpose of governing resident's behavior.
>
> 21. Do not extend or promise special privileges or favors not available to all residents.

Agency Exhibits F3 and F4.

The record clearly establishes that the Grievant materially and flagrantly violated numerous policies and procedures, including by extending special privileges or favors to Resident B.

The Grievant was evasive on cross-examination when pressed on the topic that even assuming other residents also occasionally strayed on to unauthorized patios, was not the Grievant's situation materially different where she had been repeatedly counseled and cautioned that she should be especially circumspect about further interactions with this particular sex offender, Resident B. The Grievant was also previously cautioned that her behavior concerning Resident B would be monitored.

The Grievant's own witnesses, SS and DF, who were RSA's at the time of the incident, admitted on cross-examination that any 30-minute well-being check (while not performed exactly on the hour or half-hour) would be too early at 1:38 p.m. for the 2:00 p.m. hour.

The Grievant looked into the pod and wrote on to the chart on the clipboard around 1:38 p.m. on the video. As the hearing officer stated in his decision he does not find the Grievant's testimony credible that she performed her safety checks for 1330 before she went on the patio. See Decision at paragraph 8. While the scanning video camera only captures the Grievant on the patio at 1327, she obviously is already well ensconced and is already engrossed in conversation with Resident B at the time Camera 3 picks her up.

The safety issue raised by the Grievant is a red herring. The Agency explained that it had the safety of the residents for whom the Grievant was responsible under control at the time it was monitoring the Grievant and even if the Agency messed up, this does not excuse any disciplinary infractions by the Grievant.

For the reasons provided herein, the hearing officer hereby denies the Grievant's request for reconsideration directed to him and hereby affirms his decision that the Agency has sustained its burden of proving by a preponderance of the evidence that the Agency's discipline is warranted and appropriate under the circumstances.

APPEAL RIGHTS

The hearing officer incorporates herein Section VII of the Rules.

ENTER:

_____

John V. Robinson, Hearing Officer

cc: Each of the persons on the Attached Distribution List.