Issue: Group III Written Notice with Termination (fraternization); Hearing Date: 05/27/11; Decision Issued: 06/10/11; Agency: DBHDS; AHO: John V. Robinson, Esq.; Case No. 9577; Outcome: No Relief – Agency Upheld.

COMMONWEALTH OF VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

In the matter of: Case No. 9577

Hearing Officer Appointment: April 25, 2011
Hearing Date: May 27, 2011
Decision Issued: June 10, 2011

PROCEDURAL HISTORY, ISSUES AND PURPOSE OF HEARING

The Grievant requested an administrative due process hearing to challenge termination of his employment effective January 6, 2011, pursuant to a written notice, dated January 6, 2011 by Management of Department of Behavioral Health and Developmental Services (the "Department" or "Agency"), as described in the Grievance Form A dated January 31, 2011.

The parties duly participated in a first pre-hearing conference call scheduled by the hearing officer on Tuesday, May 3, 2011 at 10:00 a.m. The Grievant, the Agency's advocate and the hearing officer participated in the call. The Grievant confirmed he is seeking the relief requested in his Grievance Form A, namely, reinstatement and confirmed during the call that he 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 May 8, 2011 (the "Scheduling Order"), which is incorporated herein by this reference.

At the hearing, the Grievant represented himself 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, if any. 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 Unit Manager by the Agency at a facility (the "Facility") which securely houses and treats civilly committed sex offenders. AE C1. 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. As a Unit Manager, the Grievant should set an example and supervises up to 44 Residential Services Associates ("RSAs"), is directly assigned 9-15 RSAs for EWP purposes, etc., and can also serve as a shift supervisor.

3. On December 25, 2010, the Grievant was acting as a Unit Manager in Building 1 of the 4 buildings in the Facility. At approximately 8:59 p.m., the Grievant entered the galley area between Unit 1C and Unit 1D empty handed. At approximately 9:00 p.m., Resident H walked to the Unit 1C galley window with a container in his hands and handed it through the galley window to the Grievant.

4. At 9:02 p.m., the Grievant exited the Unit 1C/D galley with the container, which the Grievant understood to contain chicken, entered Unit 1D, and delivered the container to Resident J at his room door.

5. Unit 1D, where Resident J is housed, is a secure treatment unit where residents in the four-building Facility with the most severe behavioral problems are housed. Unit 1D residents are subject to the greatest restrictions concerning movement to for example the yard and the gym. Unit 1C is also a secure treatment unit, a little better in terms of restrictions than Unit 1D.

6. Residents H & J have been in an inappropriate relationship for at least three (3) years and were purposefully separated by the treatment team so that they not have contact for therapeutic treatment reasons.

7. Resident H has a history of cheeking medications and selling them or giving them to other residents. Medication or contraband could have been hidden in the food in the container. AE B6.

8. During the hearing, the Grievant admitted that he was well aware of the inappropriate relationship between Residents H & J.

9. While residents can and do share food within their unit while eating meals, personnel in program services are not supposed to be engaged in room service food delivery between residents and are certainly not to deliver food from secure Unit 1C to secure Unit 1D at the request of residents who their treatment team has determined should be separated and should not have contact.

10. The Grievant did not provide room service food delivery to all residents on December 25, 2010 and extended special favors or privileges to Residents H & J. The Grievant admitted during the hearing that he understood Resident H's motivation that night to be to give Resident J a surprise Christmas present.

11. Later that same night, Resident H asked for a nurse. When Resident H was called up, RSA J (who was assigned to Unit 1D) watched Resident H slide a sealed envelope through the Unit 1D slider into Unit 1D. RSA J confiscated the envelope and informed RSA S and Unit Manager T. Unit Manager T told RSA J to keep the envelope until the end of the shift.

12. Following Resident H's return from the nurse's station, Resident H realized that Resident J did not receive the envelope and a commotion ensued between the 2 units concerning the whereabouts of the envelope.

13. The Grievant went to Unit 1C where Resident H explained to him what had happened. The Grievant was told by RSA S that they had the envelope.

14. The Grievant went to Unit 1D and asked RSA J for the envelope, returned to Unit 1C and gave the sealed envelope to Resident H. The Grievant testified he was told by Resident H and he believed that the envelope contained a ring. The Grievant admitted that he "read the riot act" to Resident H. The envelope constituted contraband and should not have been returned unopened to Resident H immediately but instead should have been handled in accordance with Facility Instruction No. 203 (RTS) 10 Resident Property. GE.

15. The Grievant violated Facility Operational Procedures by fraternizing or giving the appearance of fraternization or impropriety or non-professional association with residents and by interacting with residents in a way that exceeded the Grievant's assigned job duties and by extending to a resident special privileges or favors.

16. The Grievant put Facility residents and staff at risk by not enforcing Facility policies and procedures.

17. The Grievant's supervisor at the time, NM, issued a Group III Written Notice ending the Grievant's employment effective January 6, 2011 for fraternization with residents.

18. The testimony of the Agency witnesses was credible. The demeanor of such witnesses was open, frank and forthright. The Grievant admits the Agency's version of events but contends he violated no policy and committed no fraternization.

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. In addition to the SOC, the Agency has adopted Operational Procedures and other rules pertaining to the offense asserted by the Agency. AE L.

> The Operational Procedures provide in part as follows:
>
> 2. Interactions With Residents:
>
> . . .
>
> D. Fraternization or non-professional relationships between employees and residents is prohibited.
>
> E. Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and residents or families of residents is prohibited.
>
> F. While performing their job duties, employees are encouraged to interact with residents on a professional level. Interactions shall be limited to the employee's assigned job duties.
>
> G. Employees shall not extend or promise to a resident special privileges or favors not available to all residents similarly supervised, except as provided through official channels . . .

AE L3.

> The Facility's Employee Handbook provides in part:
>
> Improprieties
>
> Improprieties, the appearance of impropriety, fraternization, or other non-professional association between employees and residents or their families shall be discouraged. Associations between employees and these individuals which may compromise security or undermine an employee's effectiveness to carry out his duty may be treated as a Group III offense under the Standards of Conduct (Refer to VCBR Policy Number 522, *Rules of Conduct Governing Employees Relationship with Residents*.
>
> Interactions
>
> Associations between employees and residents shall be limited to the employee performing their departmental duties.

Special Privileges

Employees shall not extend to or promise residents special privileges or favors not available to all persons similarly supervised, except as provided through official channels.

AE L5.

In turn, Facility Policy No. 522 provides, in part, as follows:

Rules of Conduct Governing
Employee Relationships
with Residents

I. POLICY:

It is the objective to create awareness of the ethics, role, and responsibilities of being employed with the [Facility].

II. DEFINITIONS:

. . .

B. Fraternization – The act of, or giving the appearance of, association with residents, and/or their family members, that extends to unacceptable, unprofessional and prohibited behavior. Examples include, but are not limited to:

- excessive time and attention given to one resident over others;

- non-work related visits between residents and employees;

- non-work related relationships with family members of residents;

- spending time discussing staffs' personal matters (marriage, children, work, etc.) with resident;

- engaging in romantic or sexual relationships with residents;

- exchanging property, gifts, non-work related correspondence or telephone calls with residents; and/or

- selectively enforcing facility rules or policies.

C. Hazing – Oppression, punishment or harassment by forcing or requiring performance of unnecessary work or disciplining by means of horseplay, practical jokes and tricks, often in the nature of humiliating or painful ordeals.

III. PROCEDURES:

A. Employees of [Facility] shall exercise a high level of professional conduct when dealing with residents to ensure the security and integrity of the facility. Violations of this policy are subject to disciplinary actions under the Commonwealth's Standards of Conduct Policy 1.60.

B. Employees shall not use their official status as employees of [Facility] as a means to establish social interactions or business relationships not directly related to facility business.

C. Employees are expected to be alert to detect and prevent escapes from custody or supervision or violation of facility regulations. Observed incidents or suspicions of planned incidents shall be reported to the employee's supervisor or the appropriate administrator. Incidents should be documented on the Unusual Occurrence Form (401.2). . . .

I. Fraternization or non-professional relationships between employees and residents is prohibited.

J. Improprieties or the appearance of improprieties, fraternization, or other non-professional association by and between employees and residents or families of residents is prohibited.

K. While performing their job duties, employees are encouraged to interact with residents on a professional level. Interactions shall be limited to the employee's assigned job duties.

L. Employees shall not extend or promise to a resident special privileges or favors not available to all residents similarly supervised, except as provided through official channels. . . .

> Q. No one shall cause or permit any resident to perform personal services for staff or any individual. . . .

AE L6-8.

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.
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> • One Group III Offense normally should result in termination unless there are mitigating circumstances.

The SOC 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 clear Agency policies and procedures prohibiting fraternization constituted a Group III Offense because it put residents and staff at risk in the context of a secure Facility for sexually violent predators.

The hearing officer finds that the Grievant granted special favors and privileges to Resident H and/or J and otherwise violated Agency policies and procedures prohibiting fraternization.

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 consider mitigating factors in disciplining the Grievant.

While the Grievant did not specifically raise mitigation in the hearing or in his 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;

2. the Greivant's frankness concerning what he did;

3. the Grievant's most recent performance evaluation in which he received an overall rating of "Contributor;"

4. the blizzard on the night of December 25, 2010;

5. the shortness of staff on the night of December 25, 2010; and

6. 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 the 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.

The Grievant has raised his favorable decision in his case before the Virginia Employment Commission to challenge the Agency's discipline. In this regard, the hearing officer merely refers the Grievant to the Director's analysis in her Review of Case No. 9025:

> *VEC Statements*
>
> This grievant claims that the hearing officer erred by failing to consider statements about his eligibility for unemployment benefits made during a Virginia Employment Commission (VEC) proceeding. According to Virginia law, information provided to VEC and decisions rendered by VEC cannot be used in any other judicial or administrative proceeding.[14] Moreover, the standard used by hearing officers to determine whether a grievant is entitled to relief through the grievance process is different from the standard used by VEC to establish whether an employee is entitled to unemployment benefits.[15] As such, this Department concludes that the VEC determination has no bearing on whether the hearing officer abused his discretion or exceeded his authority in finding the grievant's removal appropriate under the grievance procedure. However, it should be noted that the issue of whether statements made during a VEC proceeding can be used in any other administrative proceeding appears to be an issue of law, more appropriately addressed by a circuit court, should review of the hearing decision reach that point.[16]

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[14] *See* Va. Code § 60.2-623(B) ("Information furnished the Commission under the provisions of this chapter shall not be published or be open to public inspection, other than to public employees in the performance of their public duties. Neither such information, nor any determination or decision rendered under the provisions of §§ 60.2-619, 60.2-620 or § 60.2-622, shall be used in any judicial or administrative proceeding other than one arising out of the provisions of this title.")

[15] The VEC can deny a claimant unemployment benefits if it finds the claimant was discharged for misconduct connected with work. Va. Code § 60.2-618(2). The Supreme Court of Virginia has defined "misconduct connected with his work" in the context of VEC unemployment benefits to mean deliberately violating a company rule designed to protect legitimate business interests or acting with *willful disregard* of those interests and the duties and obligations he owes his employer. *Branch v. Virginia Employment Commission*, 219 Va. 609, 611, 249 S.E.2d 180, 182 (1978) (emphasis added). This is not a definition or standard used in the context of state employee grievances administered by this Department.

[16] *See Grievance Procedure Manual* § 7.3.

EDR Ruling Number 2009-2303; June 18, 2009.

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).