

Issue: Group III Written Notice with suspension (falsifying records); Hearing Date: 04/26/12; Decision Issued: 05/17/12; Agency: VDOT; AHO: Thomas J. McCarthy, Jr., Esq.; Case No. 9786; Outcome: Full Relief; **Administrative Review**: EDR Ruling Request received 05/30/12; EDR Ruling No. 2012-3363 issued 08/02/12; Outcome: Remanded to AHO; Remand Decision issued 08/16/12; Outcome: Original decision affirmed; **Administrative Review**: EDR Ruling Request received on Remand Decision received 08/30/12; EDR Ruling No. 2013-3425 issued 09/18/12; Outcome: AHO's decision affirmed.

# DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION

## DECISION OF HEARING OFFICER

In re: Case Numbers 9786

Hearing Date: April 26, 2012

Decision Issued: May 17, 2012

### APPEARANCES

Grievant  
Grievant's Counsel  
Department Representative  
4 Witnesses for Department (1 by teleconference)  
1 Witnesses for Grievant

### ISSUE

"Was the Group III Written Notice with 5 day suspension for falsifying a state document and providing false information to management proper?"

### FINDINGS OF FACTS

1. Grievant was given a Group III Written Notice with 5 day suspension without pay for providing false information to management regarding her personal "relationship" which was inferred to be meretricious with an employee, which is the subject of this grievance.
2. Grievant, at the time in question, was an Administrative Program Manager II for civil regulations with the Agency and denied a "relationship" with an employee.
3. The agency recovered Grievant's "e-mails" to the employee in question pertaining to her divorce and references to her wedding vows, plus for a dinner meeting with the "employee", expressing the fact that she felt he was a "good person" and her feeling that she could only date one person at a time.
4. The Agency did not define "relationship", and anything between the Grievant and the employee of a sexual nature was not proved.
5. The emphasis on "relationship" from the Agency was sexual in nature, which was not proved.

6. The Agency witnesses appeared united to discredit the Grievant.
7. Grievant had been an exemplary employee for many years.
8. There are numerous "e-mails" between Grievant and the employee in question. None of which spoke of an improper or sexual relationship.

### **APPLICABLE LAW OR POLICY AND OPINION**

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 (4<sup>th</sup> Cir. 2001) (citing Munday v. Waste Mgmt. of North America, Inc., 126 F.3d 239, 243 (4<sup>th</sup> 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)].

Standards of Conduct, Policy 1.60 applies to all sections covered by the Virginia Personnel Act and sets the criteria for Employee Standards of Conduct.

### **DECISION**

Without a definition of "relationship" from the Agency, this matter developed into what appeared to be a witch hunt with a united group of Agency personnel and witnesses out to penalize and discredit the Grievant.

Any employer would have a "relationship" with an employee, as would a supervisor. The claim of bias from a grievant not part of this grievance is not substantiated. The undertones around the allegation of a "relationship" were that it was meretricious.

A relationship between employees does not warrant a Group III Written Notice when it was presented to be a meretricious or sexual relationship that the Grievant denied. Without a definition of "relationship", I believe the denial was accurate as to the unproved and unfounded allegation and does not warrant a Group III Written Notice and 5 day suspension.

Accordingly, the Group III Written Notice is not confirmed and it is suggested that it be withdrawn or drastically reduced to a Group I with back pay reinstated.

### **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 Department policy** is made to the Director of the Department of Human Resources Management. This request must cite to a particular mandate in state or Department 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. 14<sup>th</sup> Street, 12<sup>th</sup> 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 Department shall request and receive prior approval of the Director before filing a notice of appeal.

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**Thomas J. McCarthy, Jr.**  
**Hearing Officer**

**DEPARTMENT OF EMPLOYMENT DISPUTE RESOLUTION**  
**RECONSIDERATION OF DECISION OF HEARING OFFICER**

**In re: Case Number 9786**

<b>Hearing Date:</b>	<b>April 26, 2012</b>
<b>Decision Issued:</b>	<b>May 17, 2012</b>
<b>Reconsideration Date:</b>	<b>August 16, 2012</b>

After review of the hearing tapes, the original Findings of Fact appear to bear out. The tapes from the hearing show circumstantial evidence of what the Agency tried to prove. They were contradicted by direct testimony from the Grievant and her mother (about the Grievant's supper offsite meeting).

The tapes portray a caring section head trying to bolster another employee. The drafter of the Group III Written Notice supervised the Grievant from September, 2011 to June, 2012. Her evidence was circumstantial and contested by direct evidence from the Grievant, who explained her reasons for the offsite supper as not to put the other person under scrutiny at the Agency. She took her mother along for the supper meeting. It was highly proper. When asked if she had any (undefined) personal relationship with the other employee, she said no, because of the implication of impropriety. Every supervisor has or should have a personal relationship with his or her supervisee. Truthfulness on the job is indeed important under the Standards of Conduct, but questions and accusations need to be clearly defined. Such was not the case in this matter as the Grievant had the right to answer as she did, without being untruthful.

This grievance is about a matter of definition and motive. The person asking the question apparently implied improper conduct. I note the subject of the alleged improper "personal" relationship was not called as a witness. I cannot find from the testimony, evidence of an improper personal relationship, even noting the out of agency supper, to which the Grievant took her mother after taking her for a doctor's appointment. I do not find the Grievant to be untruthful to the agency.

From the credible evidence presented, and the demeanor of the witnesses, the decision was proper. I respectfully decline to change my decision.

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Thomas J. McCarthy, Jr., Esquire  
Hearing Officer