

Issues: Group II Written Notice (fraternization), and Termination due to accumulation; Hearing Date: 01/24/17; Decision Issued: 01/25/17; Agency: DBHDS; AHO: Carl Wilson Schmidt, Esq.; Case No. 10919; Outcome: Full Relief; **Administrative Review Request received 02/08/17; Ruling No. 2017-4499 issued 03/14/17; Outcome: Remanded to AHO for clarification; Remand Decision issued 06/19/17; Outcome: Original decision reversed. Group II and termination will stand.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10919

Hearing Date: January 24, 2017
Decision Issued: January 25, 2017

PROCEDURAL HISTORY

On October 14, 2016, Grievant was issued a Group II Written Notice of disciplinary action for fraternizing with a former client. Grievant was removed from employment based on the accumulation of disciplinary action.

On November 1, 2016, Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On December 5, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On January 24, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Representatives
Agency's Representatives
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Department of Behavioral Health and Developmental Services employed Grievant as a Safety and Security Treatment Technician. She began working for the Agency in May 2011. Grievant had prior active disciplinary action. On September 13, 2016, Grievant received a Group II Written Notice for fraternizing with a former resident.

The Former Resident was a patient at the Facility until January 29, 2015. When he left the Facility, he was required to wear a GPS tracking device. At some point, the Former Resident learned that he could not contact an employee of the Facility for at least a year after a resident was released from the Facility.

On February 13, 2016, the Former Resident and Grievant spoke by telephone. He invited her to visit him at his home. She preferred to meet at her home for safety reasons. They agreed that the Former Resident would come to Grievant's house. On February 13, 2016, the Former Resident went to Grievant's house. They talked and walked around Grievant's property to see some of the animals Grievant kept at her property. They ate together and the Former Resident left. Grievant and the Former Resident had a "strictly plutonic" relationship.

Grievant believed that she was prohibited from contacting a resident for one year after his release date. When she met with the Former Resident on February 13, 2016, she did not believe she was acting contrary to Facility Policy because more than a year had passed since his release.

CONCLUSIONS OF POLICY

The Agency took disciplinary action against Grievant for violation of Facility Policy 503.¹ Facility Policy 503 addressed Staff and Resident Interactions and Boundaries. This policy provided:

Staff shall not enter into a personal or intimate relationship with a current or former resident of [the Facility].²

Facility Policy 503 stated:

Date Issued: 09/03/13
Effective Date: 03/01/16
Review Date: 02/10/17

The Agency could not explain why it issued a policy in September 2013 with an effective date of March 1, 2016. An Agency witness testified that there was no earlier version of Facility Policy 503.³

Grievant was disciplined for her behavior on February 13, 2016. Whether her behavior gives rise to disciplinary action depends on what policies were in effect on that date. Facility Policy 503 was not in effect on February 13, 2016. The Agency has not presented any policy in effect on February 13, 2016 prohibiting Grievant from meeting with the Former Resident. Accordingly, there is no basis for disciplinary action. Because the Group II Written Notice cannot be upheld, Grievant has not accumulated sufficient disciplinary action to support her removal.

The Agency also presented Facility Policy 504 and alleged Grievant violated that policy. Facility Policy 504 provides that “[a]n employee shall avoid forming personal relationships with residents and always maintain professional and ethical boundaries.” [Emphasis added]. Facility Policy 504 does not refer to former residents. Grievant did not violate Facility Policy 504.

DECISION

¹ The Written Notice referred to Facility Policy 504 but this policy did not refer to relationships with former residents. The Written Notice does not mention Facility Policy 503 but the Written Notice mentions behavior the Agency alleged was contrary to Facility Policy 503.

² Agency Exhibit C.

³ The Agency presented evidence that Grievant met with the Former Resident in March 2015 and that upon learning of that interaction, the Agency instructed Grievant to refrain from communication with a current or former resident. The Agency’s witness indicated that the Written Notice before the Hearing Officer was not issued for violation of that instruction.

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **rescinded**. The Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility. The Agency is directed to provide the Grievant with **back pay** less any interim earnings that the employee received during the period of removal and credit for leave and seniority that the employee did not otherwise accrue.

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 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. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

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 provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. 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.⁴

[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].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁴ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case No: 10919-R

Reconsideration Decision Issued: June 19, 2017

RECONSIDERATION DECISION

EDR Ruling 2017-4499 states:

After review, the hearing officer's conclusion regarding the applicability of Facility Instruction 503 to this case was understandable based on the evidence presented at hearing. However, the clarifying evidence presented by the agency on administrative review raises critical questions that cannot simply be ignored. For instance, if accurate, the clarifications provided in relation to Facility Instruction 503 would mean that the hearing officer's determination that this policy was not in effect is inaccurate. As such, the case is remanded to the hearing officer for further consideration to determine the operative policy language. To the extent needed to provide the parties with a full and fair hearing, as part of the remand the hearing officer may, in his discretion, reopen the hearing record to allow additional evidence and/or testimony.

Evidence discovered following a hearing is typically not to be considered unless it satisfies the newly discovered evidence standard. This rule was established by EDR. As part of the remand decision, EDR did not consider the application of the rule. It appears that EDR does not intend to apply the rule in this case. Accordingly, the Hearing Officer will not address the newly discovered evidence rule and will consider the additional documents submitted by the Agency.

The Agency submitted Facility Instruction 503 issued September 3, 2013 and effective October 1, 2013. That policy provided:

Staff shall not enter into a personal or intimate relationship with a current or former resident of [the Facility].

This policy appears to have been in effect on February 13, 2016.

Failure to follow policy is a Group II offense.⁵ Grievant developed a friendship with the Former Resident and then continued that friendship after the Former Resident left the Facility. She allowed the Former Resident to come to her home where they had dinner and discussed her animals. Grievant acted contrary to the Agency's policy thereby justifying the issuance of a Group II Written Notice.

Upon the accumulation of two Group II Written Notices, an employee may be removed from employment. Grievant has accumulated two Group II Written Notices thereby justifying the Agency's decision to remove her from employment.

APPEAL RIGHTS

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 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.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ See, Attachment A, DHRM Policy 1.60.