

Issues: Group II (failure to follow instructions), Group II (unauthorized use of State property), Group III (falsifying records), Group III (Fraternization), and Termination; Hearing Date: 04/29/15; Decision Issued: 05/08/15; Agency: DOC; AHO: Thomas P. Walk, Esq; Case No. 10559; Outcome: Partial Relief; **Administrative Review: EDR Ruling Request received 05/23/15; EDR Ruling No. 2015-4157 issued 06/12/15; Outcome: AHO's decision affirmed;** **Administrative Review: DHRM Ruling Request received 05/23/15; DHRM Ruling issued 06/23/15; Outcome: AHO's decision affirmed.**

**VIRGINIA: DEPARTMENT OF HUMAN RESOURCE MANAGEMENT,
OFFICE OF EMPLOYMENT DISPUTE RESOLUTION**

IN RE: CASE NO.: 10559

DECISION OF HEARING OFFICER

HEARING DATES: APRIL 13, 2015 and APRIL 29, 2015

DECISION DATE: MAY 8, 2015

I. PROCEDURAL BACKGROUND

The Department of Corrections terminated the grievant from employment on January 30, 2015. He filed a single grievance on February 10. I was appointed as hearing officer on February 24. I conducted a prehearing conference by telephone on March 3. The parties agreed to the scheduling of the hearing for April 13. On that day I commenced the hearing. The proceedings lasted approximately 7.5 hours. The parties agreed to recess the matter until another day. I reconvened the hearing on April 29. The second day of the hearing lasted approximately two hours.

II. APPEARANCES

The agency was represented by legal counsel. Three witnesses testified in person on behalf of the agency. The agency submitted an affidavit of a fourth witness. The grievant objected to consideration of the affidavit. I overruled the objection. In addition to the affidavit, the agency presented fifteen exhibits.

Legal counsel represented the grievant. The case of the grievant consisted of testimony

from the grievant, four additional witnesses, and exhibits labeled A through H.

III. ISSUES

A. Whether the agency properly issued the grievant a Group II Written Notice for failure to follow instructions?

B. Whether the agency properly issued the grievant a Group II Written Notice for the unauthorized use of state property?

C. Whether the agency properly issued the grievant a Group III Written Notice for falsifying a state record?

D. Whether the agency properly issued the grievant a Group III Written Notice for fraternization?

E. Whether the agency properly terminated the grievant from employment?

IV. FINDINGS OF FACT

The grievant served as a Senior Reentry Probation and Parole Officer for the agency in 2014. He had worked for the agency for approximately seventeen years. During the summer of 2014 he suffered from extreme clinical depression. On July 29 he began a period of leave for this condition.

On August 4 one of the offenders supervised by the grievant had a crisis situation arise. She contacted the grievant. He appropriately dealt with the issue despite his intention to be on

leave that day. The time spent dealing with the crisis of the offender was required to be counted as work by the grievant and caused a break in his leave status. This break caused a delay in his eligibility for short term disability through UNUM, the administrator for the Commonwealth's disability program for state employees.

After the grievant dealt with this crisis situation the Deputy Chief Probation Officer for the district in which the grievant was serving instructed the grievant that he was to perform no work-related duties whatsoever while on leave. The grievant filed a claim for short term disability as of August 6. He remained off work for the next several weeks. In October, 2014. He was detained on a temporary basis pursuant to an allegation that he constituted a danger to himself. This civil commitment proceeding was dismissed after it was determined the grievant did not meet the statutory criteria.

On November 4 the physician for the grievant authorized him to return to work. The agency advised him that he would be transitioned from short term disability status to being on administrative leave until an additional fitness for duty evaluation could be performed. A Human Resource Officer for the agency told the grievant that while he was on administrative leave his pay would come from the agency rather than UNUM and that it would be like he was working "only not in the office." That evaluation was not conducted until the following month.

One of the duties of the grievant was to be a part of the Reentry Council for the area in which he was serving. This Council is tasked with the development of programs and opportunities to facilitate a successful transition by offenders released from incarceration into the community at large. The grievant had no involvement with the Council from August 6 until being cleared to return to work on November 4. After he was placed on administrative leave

status, the grievant resumed contact with the Council.

One of the activities arising from the Council was an exploration of the creation of a therapeutic residential facility in the area. The facility and programs was given a tentative name of the [] Academy. The academy was to be operated as a for-profit business. The exploratory group determined that it was necessary for a business plan to be written as part of the effort to obtain financing for the construction or acquisition of appropriate facilities. To help raise the funds for the writing of the business plan the grievant proposed that the group utilize the Internet "Go Fund Me" site. He wrote and posted a solicitation appeal, stating that he was the Director of the [] Academy. The business had not been formed at that point, no Board elected, and no officials, including the grievant, had been hired. The posting of the solicitation by the grievant did not result in any funds being donated.

One offender involved with the Re-entry Council (referred to hereafter as "Offender A") was someone who the grievant had met and worked with approximately thirteen years previously when he was employed in a correctional facility in which the offender was an inmate. Offender A at all relevant times remained under active supervision by the agency. Offender A posted on his Facebook page that he was employed by the [] Academy. He and the grievant had discussed possible employment by the facility when it was established. As was true with the grievant, no actual employment status had been created for Offender A.

During December 2014 Offender A moved. The grievant was asked to assist with the move. He went to the new home of the offender and provided limited physical assistance in moving furniture and belongings. The move was primarily assisted by members of a church attended by Offender A. The grievant had also attended this church on an irregular basis. One

member of the church group who assisted was a fellow employee of the agency, a female with whom the grievant was friends and had previously dated.

While an offender is under supervision, contact with that offender by a probation officer is required to be noted in the CORIS system maintained by the agency. At the end of the move by Offender A, the grievant asked him to tell his supervising parole officer that he had been present and to enter it into CORIS. The grievant took no steps to report the contact directly to the supervising officer or anyone in his chain of command.

One citizen member of the Re-entry Council was a well-known local businessman, (referred to hereafter as "Citizen A"). Citizen A belonged to an informal group of local figures who referred to themselves as the [] Club. These individuals would meet for a meal on a weekly basis, primarily for fellowship. The club decided in December, 2014 to take up a collection among its members and donate the funds to a worthy and needy individual as a Christmas gift. Citizen A, through his work with the Re-entry Council, was familiar with Offender A. He proposed that Offender A be the recipient of the anonymous gift. The club approved this idea. Citizen A told the grievant of this plan. The grievant suggested the donation be split between Offender A and another offender with whom he had been working as part of the re-entry program, (hereafter "Offender B"). Citizen A requested the grievant provide him with biographical information on Offender A and Offender B to share with the club for consideration. The grievant became aware of a great deal of information regarding these two offenders during his work with them. He and Employee A did additional research on the offenders using publicly available information. The biographies were submitted and the donations to the offenders were approved by the club.

Citizen A met with the grievant and delivered an envelope containing \$520.00, separated in equal stacks for delivery to each offender. The grievant wished to deliver the funds to the offenders at the same time. He arranged for a meeting with them at the home of Offender A. Offender B was delayed in arriving. The grievant left the funds with Offender A and directed him to share the amounts equally with Offender B. Offender A claimed to have received \$225.00 from the funds and to have delivered \$260.00 to Offender B. Offender B received \$260.00 from Offender A.

On January 12, 2015 a Master Special Agent for the agency interviewed the grievant. The investigation had been requested by the Chief of the District Office served by the grievant. The interview was not concluded on January 12 but was resumed the following day. In the course of the interview the grievant gave contradictory statements as to his involvement in the move of Offender A. He also gave contradictory statements on how the donated funds were handled.

Upon the completion of the investigation the Chief of the District Office issued the grievant four written notices, namely:

- Failure to follow instructions (Exhibit 1A);
- Unauthorized use of state property (Exhibit 1B);
- Falsification of state records (Exhibit 1C);
- Fraternalization (Exhibit 1D).

The agency terminated the grievant from employment on January 30 based on these separate and collective disciplinary actions.

V. DISCUSSION AND ANALYSIS

A. General Principles

The Commonwealth of Virginia provides certain protections to employees in Chapter 30 of Title 2.2 of the Code of Virginia. Among these protections is the right to grieve formal disciplinary actions. The Department of Employment Dispute Resolution has developed a Grievance Procedural Manual (GPM). This manual sets forth the applicable standards for this type of proceeding. Section 5.8 of the GPM provides that in disciplinary grievances the agency has the burden of going forward with the evidence. It has the burden of proving, by a preponderance of the evidence, that its actions were warranted and appropriate. The GPM is supplemented by a separate set of standards promulgated by the Department of Employment Dispute Resolutions, Rules for Conducting Grievances. These Rules state that in a disciplinary grievance (such as this matter) a hearing officer shall review facts de novo and determine:

- I. Whether the employee engaged in the behavior described in the Written Notice;
- II. Whether the behavior constituted misconduct;
- III. Whether the discipline was consistent with law and policy; and
- IV. Whether there were mitigating circumstances justifying the reduction or removal of the disciplinary action, and, if so,

whether aggravating circumstances existed that would overcome the mitigating circumstances.

B. Failure to Follow Instructions (Exhibit 1A)

On or about August 6, 2014 the Deputy Chief instructed the grievant that he was not to perform work-related duties. The grievant followed these instructions through at least November 3. The problematic period of time occurs after he was placed on administrative leave through his termination of employment. The grievant readily admits his involvement with the Re-entry Council activities during this time frame. It is clear that this work was in direct violation of the instructions of the Chief, qualifying the acts for discipline as a Group II Offense under the Standards of Conduct.

The grievant appears to argue that the discipline is not consistent with policy in that the agency has no established written policies and procedures for “administrative leave.” If the grievant had not received the explicit directions from the Deputy Chief in August, this argument would be more convincing. The agency never modified those instructions. The grievant could have been confused by the statement by the Human Resource Officer that it would be “as if he was working, just not in the office.” He took no additional steps to seek clarification from the Deputy Chief or Chief as to whether this meant he was free to resume his work-related activities. I am not considering his work toward the creation of the [] Academy to be a violation of the orders as I believe that work to not necessarily be directly related to his employment. In fact, by holding himself out as the Director of the yet to be created facility, he was acting in conflict with his duties to the agency. I find that the issuance of the Group II

Written Notice for failure to follow instructions to be appropriate.

C. Unauthorized Use of State Property (Exhibit 1B)

The grievant denies that he used any agency file material in the creation of the biographical information provided to the [] Club. No direct evidence was presented to establish that he did so. The agency argues that certain of the details of the information must have come from confidential state files and that the files must have been accessed by the grievant or Employee A. I do not find this argument of the agency to be convincing. The grievant was very familiar with both offenders and could have obtained the vast majority of the information directly from the offenders while hearing them make presentations to various groups.

The agency also appears to argue that the information itself, because learned by the grievant as part of his job, constitutes state property. Neither party has cited any statute, regulation, or case decision as to what constitutes state property. I believe that for purposes of interpreting this section of the Standards of Conduct, a restrictive definition of property should be used. To take the argument of the agency to its logical end, any information learned by an employee during the course of employment could be viewed as state property. This would include information as basic as the names of fellow employees. I believe that the most appropriate way of looking at what constitutes property is to limit it to any item that employee would be required to return, or be denied access to, upon termination of employment.

The information contained in the biographies may qualify as confidential information under Agency Operating Procedure 130.1(4B) (4), the disclosure of which would be grounds for discipline of an employee. That is not the allegation against the grievant. Due process requires

that I not consider the existence of that policy in my determination.

I hereby rescind the issuance of the Group II Written Notice for the unauthorized use of state property.

D. Falsification of State Records (Exhibit 1C)

The agency alleged that the grievant is subject to discipline under Operating Procedure 135.1(V)(D)(2)(B), for “falsifying any records, including, but not limited to all work and administrative related documents generated in the regular and ordinary course of business... or other official state documents. This charge is based on the contradictory statements given by the grievant to the investigator. The argument is that the recording of the interviews (Exhibit 15) is a state record. The Operating Procedure contains no definition of what constitutes a “record.” For purposes of this decision, I adopt the definition found in the Virginia Public Records Act, §42.1-77 of the Code of Virginia. That definition includes “recorded information that documents a transaction or activity.” The Supreme Court of the United States has stated that it “would not be strange to refer to falsifying data stored on a hard drive as falsifying a hard drive.” *Yates v. U.S.* (No. 13-7451, 2/25/2015). The use of both the word “records” and “documents” in the operating procedure supports a broad interpretation of the policy to include more than just written hard-copy materials.

The classification of this offense as a Group III is problematic. That level of offense is stated to be “of such a serious nature that a first occurrence normally should warrant removal.” I interpret the classification of this offense as a Group III as implicitly requiring a willful and material misstatement.

I conclude that the misstatements by the grievant with regard to the handling of the

Club donation and his participation in the move of Offender A were willful. I do not find them to be material. The assistance with the move was improper for the grievant because of his participation, regardless of whether he moved one box or a whole room of furniture, and his failing to report it so that it could be noted in the CORIS system. With regard to the Christmas donation, again, the problem arose from his participation in the transaction and not from any discrepancy in the amount received by each offender and whether the gifts were delivered to them together or separately. I am giving no weight to the hearsay statement made to the investigator by Offender 1 that he received less than Offender 2. No evidence was presented to support an inference that the grievant removed \$35.00 from the stack of currency kept by Offender 1. It would have been logical for the grievant to assume that the offenders would compare the amount of cash given to them and any discrepancy to be noted by them.

For these reasons, I rescind the Group III Written Notice for falsifying records.

E. Fraternalization (Exhibit! D)

The agency alleged that the grievant violated Operating Procedure 130.1 in his dealings with Offender 1. Subsection C(1) of this Operating Procedure prohibits non-professional relationships between employees and offenders and states that it may be treated as a Group III Offense under the Standards of Conduct. Certain contacts which maintain appropriate boundaries are exempted. Subsection C(3) prohibits employees extending to an offender “special privileges or favors not available to all persons similarly supervised.”

The grievant admits that he helped Offender A move into a new residence. He further admits providing Offender A and Offender B with the gifts provided by the Club. These contacts clearly violated Operating Procedure 130.1. Section V(D)(2)(y)

of Operating Procedure 135.1 establishes that the violation of Operating Procedure of 130.1 is a Group III Level Offense.

These contacts by the grievant with Offender A were not the most serious examples of fraternization available. I believe that the grievant had the best of intentions in helping both offenders. They are, however, examples of “special favors” that were not provided to offenders in general. My role is not that of “super-personnel manager” and I must give deference to the decision of agency management in classifying offenses. See *Rules*, Section VI(B). Deference need not be given if the decision of management is arbitrary. I cannot find arbitrariness here. Although neither contact viewed separately was particularly egregious, the agency chose to combine them into a single offense. I find that decision to be rational.

For the reasons, I affirm the issuance of a Group III Written Notice for violating Operating Procedure 130.1.

VI. DECISION

For the reasons stated above, I hereby uphold the issuance of the Written Notices marked as Exhibits 1A and 1D. I vacate or rescind those written notices marked as Exhibits 1B and 1C. The termination of the grievant is affirmed.

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 this final.

SO ORDERED this May 8, 2015.

/s/Thomas P. Walk
Thomas P. Walk, Hearing Officer